made since the act of bankruptcy is affected by the previous assignment of the commissioners; and, vesting in the assignees, is liable to be seized by them: even in the hands of third persons.

From the case of Hesse *v.* Stevenson,(*m*) we dis-

head before he obtains his certificate, or the fruits which he may make of such schemes, do not pass; nor could the assignees require him to assign them, provided he does not carry them into effect until after he has obtained his certificate. But if he avail himself of his knowledge and skill, and thereby acquire a beneficial interest, which may be the subject of assignment, I cannot frame to myself an argument why that interest should not pass as any other property acquired by his personal industry. We are therefore clearly of opinion that the interest in the letters patent was an interest of such a nature as to be the subject of assignment by the commissioners.

(*m*) Hesse *v.* Stevenson, 3 Bos. & Pull. 565. This was an action of covenant. It appeared by a case reserved, that in June 1790, one Koops was duly declared a bankrupt. That on the 17th and 18th of May 1801, the said Koops obtained patents. That Koops had assigned a certain share of the patent to the defendant, who had assigned a part of that share to the plaintiff. That an act had passed by which Koops was enabled to assign the use of the said patent to any number of persons, not exceeding sixty; which act was declared to be a public act. On 9th September, 1801, the creditors of Koops executed a deed of composition with him; to which several of his creditors were not parties. The assignees, and most of the creditors, by that deed, did remise, release, and quit claim unto the said Koops, his heirs, executors and administrators, all actions, rents, claims, and demands whatsoever. Koops failed in the performance of the consideration of the said deed; whereupon the assignees entered up judgment upon the warrant of attorney, on 31st March 1802, and on the 14th October following issued a

cover in what manner patents for inventions are viewed by the bankrupt laws. After deciding generally that a composition entered into by the

fieri facias; and, after taking the goods, &c. of Koops, entered upor the premises where the manufactory under the patents and act of parliament was carried on, and took possession of the same. In the deed-poll between the defendant of one part, and the plaintiff of the other, was the usual covenant for good title, that the said defendant had good right, full power, and absolute and lawful authority, to assign and convey the said shares, &c.; and that he had not by any means, directly or indirectly, forfeited any right or authority he ever had or might have had in the said shares. Breach that he had not good title.

Alvanley, C. J. We shall consider the case as though the whole deed were before us. From all the cases upon this subject it appears to be determined, that however general the words of a covenant may be if standing alone, yet if, from other covenants in the same deed, it is plainly and irresistibly to be inferred that the party could not have intended to use the words in the general sense which they import, the court will limit the operation of the general words. The question therefore always has been, whether such an irresistible inference does arise. The warranty in this deed, in the usual and almost daily words, where parties intend to be bound by their own acts only, *viz.* "for and notwithstanding any act by him done to the contrary," omits them altogether; besides which, the defendant covenants that the assignee shall enjoy the property assigned in as ample a manner as the assignor. The omission of the words is almost of itself decisive. We are therefore of opinion, that the covenant for absolute right to convey is not restrained by the other parts of the deed.

It is said, secondly, that the assignees have reconveyed the whole of their interest: but I am of opinion that deed was not intended to convey, nor did it operate in law as a conveyance.

bankrupt, his assignees, and most of his creditors, by which, upon certain terms, the bankrupt had all his goods and chattels attempted to be reconveyed to him, was not a conveyance in law: it was held that the general covenant for good title of a patent-right was not restrained by the covenant in which Stevenson, assignee of Koops the patentee and bankrupt, says that he has not done any act to impeach his title. This decision arose principally from the words "for and notwithstanding any act by him done to the contrary," being omitted.

It may be well to observe that an uncertificated bankrupt, before he attempts to carry his schemes into execution, should obtain from his assignees a renunciation of all benefit of the patent.

A Trust of patent.

It was doubted by Lord Thurlow (*n*), whether a patent, meaning letters patent generally, could be the subject of a *trust*: but it is humbly conceived that one for an invention might become so, in the same manner as other personal property.

Indeed it is expressly granted (*o*) that it shall not be *assigned in trust* to more than five persons; thus allowing it to be made a trust for the benefit of that number.

There was a trust declared in Cartwright's patent; and no objection was raised to it *on that account.* (*p*)

Proper for a devise.

It may be bequeathed in any manner the pa-

(*n*) 1 Ves. Jun. 129. Ex parte O'Reily.

(*o*) Form of Patent, Appendix. (*p*) 2 Bos. & Pul. 44.

tentee pleases. If he make not a will, it is assets in the hands of his administrator. (*q*)

Licence to use it.

If the patentee does not wish to part wholly with his patent, he may grant *licences* to persons to *use* it. And it would appear, in the event of an infringement of the patent-right, that all who have licences may maintain actions for damages. (*r*)

3. Enlargement of the patent right by parliament.

The transcendent power of parliament has, however, often been called forth to give a better effect to the right of patentees for inventions, by *extending the term* of its duration, or *increasing the number* of persons that may, at any one time, become interested in a patent.

The extension of the term is made, when it appears that the application, labour, and expense, of the patentee have been so great, that he has not been able to receive, within the time allowed by his patent, an adequate reward from his great undertaking. Other causes have had their due effect upon parliament:—as when the patentee has discovered some improvements which have been attended with great expense, and by which the machine is become much more profitable to him, and beneficial to the community; or where, dying, he has left his family unable to proceed with the manufacture without that indulgence.

And the legislature will also lend its assistance when the undertaking is of such a magnitude

(*q*) 1 Ves. Jun. 118. and see 3 B. & P. 573.

(*r*) Ante 49. See George v. B. Wackerback and another, Repertory of Arts, N.S. Vol. XXVII, 252.

that five persons are unable by themselves to reap any benefit from the grant, by making an act of parliament, giving power to the patentee to assign the patent-right to any number of persons. The interest in Koops's patent was, by an act of parliament made capable of being divided into *sixty* shares. (*s*)

In almost every instance in which the legislature has interfered, a proviso is introduced, that every objection in law competent against the patent shall be of the same force against the act to all intents and purposes. (*t*) But even if that clause is not introduced, yet the patentee, as to the *validity* of the patent, or his *title* to it, is in the same situation as though the act had never been passed. (*u*)

II. Property in Discoveries not protected by a Patent.

Some persons, alarmed at the frauds frequently practised upon inventors, and strongly impressed with the difficulty of making a sufficient specification, and perhaps suspicious of the manner in which the patent may be construed, have preferred to keep their discoveries secret, and to use or vend their manufacture without the protection of a patent. No one, however, can have a property—an exclusive right—in

(*s*) 3 Bos. and Pull. 565.
(*t*) Ante 152. n.
(*u*) 3 Bos. and Pull. 578.

such a subject. (*v*) Injury and remedy are inseparable in law: but as there is not any rule of law, even in equity, to punish or to prevent any one from making use of such manufactures, we may conclude that such discoverers do not sustain an *injury* to any legal property.

Of course, the case is altered, when any *fraud* is practised in getting at the secret. One

(*v*) Canham *v.* Jones, 2 Ves. & Beam. 221; (and see Williams *v.* Williams, 3 Meriv. 157.) The bill stated that Isaac Swainson was, for upwards of thirty years before his death, the sole proprietor of the secret or recipe for preparing the medicine called Velno's vegetable syrup, which he had purchased for 600*l.*, and by his will bequeathed to the plaintiff; who, since his decease, continued to make the same preparation as specified by the recipe; and made great profit; and would have made much greater, if the defendant had not imposed on the public a spurious composition under the same name. Demurrer.

Sir Thomas Plumer, V. C. This bill proceeds upon an erroneous notion of exclusive property now subsisting in this medicine; which Swainson having purchased, had a right to dispose of by his will; and, as it is contended, to give the plaintiff the exclusive right of sale. If this claim of monopoly can be maintained without any limitation of time, it is a much better right than that of a patentee. But the violation with which the defendant is charged does not fall within the cases in which the court has restrained a fraudulent attempt by one man to invade another's property; to appropriate the benefit of a valuable interest in the nature of good will, consisting in the character of his trade or production, established by individual merit; the other representing himself to be the same person, and his trade or production the same, as in Hogg *v.* Kirby, 8 Ves. 215. combining imposition on the public with injury to the individual. Demurrer allowed.

person must not use the name of another, nor represent his article to be the same as the one thus secretly made; or he will be liable to answer for damages in an action at law; or be restrained from using it by an injunction. (x)

Nor will the court prevent a person from imparting the secret of an invention which had been the subject of a patent long since expired; the specification of which was so incorrect, that the discovery still remained undisclosed. (y)

But a man has such a property in his invention before a patent is procured, that if he agree to inform another person of the secret, who binds himself in a penalty not to avail himself, or take any undue advantage of the communication; he may maintain an action for the breach of that contract. (z)

(x) Yovatt *v.* Arnyard, 1 Jac. & Walk. 394. And the Case of Day & Martin, E. T. June 1821, before Abbott, C. J.

(y) Newberry *v.* James, 2 Mer. 446.

(z) Smith *v.* Dickenson, 3 Bos. & Pul. 630. post.

CHAP. VIII.

Of the Infringement of a Patent, and the Remedies for that Injury.

THE patentee having ascertained the nature of the property he has acquired by the grant, the next topic for investigation will be the conduct of persons, when it is considered as an *infringement* of that right, and the necessary *remedies* which the law has prescribed for the injury.

I. What amounts to an Infringement.

Whether the act of the defendant is really an infringement of the grant is a question for the jury. (*a*)

The law cannot be evaded by fraud or deceit of any kind. It has been decided that the making or using of any the *least part* of a manufacture (*b*) is an infringement. If the article manufactured by the defendant be of a different *form*, (*c*) or made with slight and immaterial

(*a*) 2 Hen. Bla. 480.

(*b*) In Manton *v.* Manton, Dav. Pat. Cas. 348. the alleged infringement consisted in making a perforation in the hammer of a gun, in a direction a little different to that in the patent article.

(*c*) 2 Hen. Bla. 477. and see Bovill *v.* Moore, Dav. Pat. Cas. 405. *Gibbs*, C. J. I remember that that was the ex-

additions, or by the substitution of things somewhat different from those used by the patentee; yet, if the manufactures are really and substantially the same, the patentee is entitled to a remedy at law. (*d*)

pedient used by a man in Cornwall, who endeavoured to pirate the steam engine. He produced an engine, which, on the first view of it, had not the least resemblance to Boulton and Watt's. Where you looked for the head, you found the feet; and where you looked for the feet you found the head. But it turned out that he had taken the principle of Boulton and Watt:—it acted as well one way as the other; but if you set it upright, it was exactly Boulton and Watts' engine.

(*d*) See the elaborate opinion of the court in Hill *v.* Thomson, 2 B. Moore, 447. *Dallas*, J. Whether the patent be valid or not signifies nothing in this particular case, if the defendants have not worked according to the specification. To prove the infringement of the patent one witness only was called; this part of the case therefore depends entirely upon his testimony; and, before adverting to the evidence in question, it will be necessary to look at the patent, as far as it relates to this part of the subject. It has not been contended that it is a patent introducing into use any one of the articles mentioned therein, as singly and separately taken; nor could it be so contended, for the patent itself shews the contrary; and if it had been a patent of such a description, it would have been impossible to support it; for slags, as well as mine rubbish, and lime, had undoubtedly been made use of before it was passed. But it is said, it is a patent for combinations and proportions, producing an effect altogether new, by a mode and process, or series of processes, unknown before; or, to adopt the language made use of at the bar, it is a patent for a combination of processes altogether new, leading to one end;—and this being the nature of the alleged discovery, any use made of any of the ingredients singly, or used in partial combination, omitting some, and making use of all or some, in proportions essen-

If there are some articles well specified, and others that are only mentioned in the specification, without any intention of their being considered as perfect instruments, but merely as speculative matter, as was done by Mr. Watt in his patent, (*e*) although the latter cannot be protected, and may consequently be infringed with impunity; yet an infringement of the former parts or articles cannot be excused.

Even if the improvement of a manufacture be so great and important that the *substratum* is insignificant in comparison with it, still no claim can be laid to the whole. The addition may be made and vended by itself. (*f*)

II. Remedy at Common Law.

It is a wise maxim in our law that there is not an injury without its concomitant remedy. Formerly, patent-rights were investigated in the Star Chamber: (*g*) but, by the statute of Mono-

tially different, and yet producing a result equally, if not more beneficial, will constitute an infringemeut of the patent. It is scarcely necessary here to observe, that a slight departure from the specification for the purpose of invasion only would of course be a fraud upon the patent; and therefore the question will be, whether the mode of working by the defendants has or has not been *essentially or substantially different.*

(*e*) Ante 116. It has been doubted whether the insertion of imperfect articles ought not to invalidale the grant. See ante.

(*f*) 1 Ves. & Beam, 67. and see ante 72 and 126.

(*g*) 3 Inst. 183.

polies,(*h*) it was enacted "that monopolies, letters patent, &c., and their force and validity, ought to be, and shall be, examined, heard, tried, and determined, by and according to the *common laws* of this realm, and not otherwise." Hence the remedies for this injury are

An *action at law* for damages; or

Proceedings in Equity for an injunction and account.

When the king has granted a patent for the sole use of any invention, the common law gives a right of action against every person who infringes it. (*i*) It is in form an action on the case. (*j*)

Although the patentee has been defeated in one action, still he may maintain fresh suits against other persons: as was done by Mr. Arkwright (*k*) and by Mr. Watt. For actions

(*h*) 21 Jac. I. c. 3. s. 2.

(*i*) Buller, N. P. 76. (*j*) 1 Chit. Pl. 142.

(*k*) Arkwright *v.* Nightingale, Dav. Pat. Cas. 55. *Lord Loughborough.* It has been said that many persons have acted upon an idea that Mr. Arkwright had no right, he having failed to establish it when this cause underwent an examination in another place, in which the event was unfavourable to him. If the question at present were what damages Mr. Arkwright should have received for the invading that right, I would have allowed the parties to have gone into evidence to shew to what extent persons had acted upon the faith of the former verdict: but the question now is upon the mere right; and if the result of this case is in favour of the plaintiff, the verdict will be with one shilling damages. A future invasion of this right would entitle Mr. Arkwright to an action for damages: but in the present case they are not asked.

on the case will lie, notwithstanding the patent is really void, until it has been cancelled. (*l*)

1. The pleadings. The parties.

If the patent has been assigned, the assignee may sue alone, or he and the patentee may join in the action. (*m*)

The declaration.

When a grant by letters patent is pleaded, it ought to be shewn under *what* seal it is made;(*n*) and therefore, in the declaration for an infringement, the patent must be stated to be under the *great seal.* (*o*)

A profert is made of the letters patent, which are recited: but oyer of them is never allowed, (*p*) because they are matters of record.

Venue.

The venue in this action must always be laid in the county of Middlesex. In *Cameron* v. *Gray*, (*q*) a motion was made to change the venue from Middlesex to Northampton. The rule was refused, because the patent, which is the substratum of the action, is tested at Westminster.

Plea, &c.

The usual plea is *not guilty*; which, putting in issue the whole of the declaration, forces the plaintiff to support the grant in all its parts, and gives to the defendant the greatest latitude for evidence. (*r*)

(*l*) 2 Ventr. 344. Dav. Pat. Cas. 55.

(*m*) 2 Wils. 423. 2 Saund. 115, 6. a.

(*n*) 2 Inst. 555, 1 Vent. 222. 9 Co. Rep. 18.

(*o*) For precedents of declarations see the record at full length in King *v.* Arkwright, printed case. And see Boulton *v.* Bull, 2 Hen. Bla. 463. Dav. Pat. Cas. 162. 2 Chit. Pl. 355. 8 Went. Pl. 431.

(*p*) Rex *v.* Amery, 1 T. R. 149. 1 Saund. 96. a. 1.

(*q*) 6 T. R. 363. and see Rex *v.* Haine, 2 Cox 235.

(*r*) If the patent be void in itself, *it is said* that *non con-*

Demurrer. The defendant, for any thing on the face of the declaration, by which it clearly appears that the patent is void, may *demur generally*; as if the grant be of a thing for which a patent ought not to have been obtained.

2. Evidence. By plaintiff to support the patent.

By the common law (*t*) a *constat* or *inspeximus* of the king's letters patent could not be shewn forth in court, but the letters patent themselves must have been produced: but by statute 3 and 4 Ed. VI. c. 4., explained by stat. 13 Eliz. c. 6., "patentees, and persons claiming under them, may make title in pleading, by shewing forth an exemplification of the letters patent, as if the letters patent themselves were pleaded and shewn forth;" and now they are to be given in evidence in the same manner as if they were pleaded.

It is necessary in this, as in every other case, that the plaintiff should be prepared to prove the material allegations in his declaration;—that the invention in all the parts to which the patent applies is *new* and *useful*; (*u*)—that he is the *inventor*, and that the *specification* is sufficient in law. "I do not agree," said Mr. Justice *Buller*, (x) "with the counsel who have

cessit may be pleaded to it without a *scire facias* to repeal it. 2 Roll. Abr. 191, (s.) pl. 2. 2 W. Saunders, 72. q.

(*t*) Olive *v.* Gwyn, Hardr. 119. Phil. on Evid. 498. and see 5 Co. 53. Bro. Surrender 51. Co. Lit. 225, b. Dyer 167-179. Att. Gen. *v.* Taylor, Prec. Ch. 59.

(*u*) Boville *v.* Moore, Dav. Pat. Cas. 399. Manton *v.* Manton, *id.* 348, 9.

(*x*) Turner *v.* Winter, 1 T. R. 606, 7. and see 2 B. Moore, 250.

argued against the rule, in saying that it was not necessary for the plaintiff to give any evidence to shew what the invention was, and that the proof, that the specification, was improper, lay on the defendant; for I hold that a plaintiff must give some evidence to shew what his invention was, unless the other side admit that it has been tried and succeeds. But wherever the patentee brings an action on his patent, if the novelty or effect of the invention be disputed, he must shew in what his invention consists, and that he produced the effect proposed by the patent in the manner specified. Slight evidence of this on his part is sufficient, and it is then incumbent on the defendant to falsify the specification."

It is good *prima facie* evidence that experienced and intelligent men, versed in the art or mystery in which the invention has been made, have never before heard of it; (*y*) yet the novelty of the invention cannot be thus proved if one witness is produced who states that he has used it. (*z*)

Evidence of the infringement.

After the plaintiff has thus supported his patent, he is required to prove that the defendant has infringed it, to whom it will be open to shew that he has not worked according to the specification. (*a*)

What amounts to an infringement has been

(*y*) Manton *v.* Manton, Dav. Pat. Cas. 350.

(*z*) Ante, p. 62.; and see King *v.* Arkwright, Printed Case, 183. Dav. Pat. Cas. 135.

(*a*) Hill *v.* Thompson, 2 B. Moore, 447, and ante, 174. n.

considered, (*b*) from which it is easy to determine what evidence is necessary in each particular case.

Proof by inspection of manufactures.

In several instances it has been very difficult to prove the infringement, especially where it is to be ascertained by the examination of the manufactures. It is possible that two persons might make articles equally good and cheap by machines constructed upon different principles; but it is hardly probable that the manufactures would agree in all their parts.

It was observed to the jury by Lord Ellenborough, in Huddart *v.* Grimshaw, (*c*) after it was proved that the defendant would not allow his manufactory to be inspected to furnish evidence for the cause,—"When one sees the rope of the defendant agree in all its qualities with a rope actually made upon the plaintiff's plan, it is *prima facie* evidence, till the contrary is shewn, that it was made upon his method; and therefore, as against him it should seem, supposing the patent in full force and a valid one, it is reasonable fair evidence, in the absence of contrary evidence, to presume that it was made in that way. There is certainly great weight in the observation of the counsel,—Am I to come forward and divulge my mode of making rope, and from which I reap a great advantage? Whether it was necessary to have gone that length in proof does not appear. Persons might have been called upon

(*b*) Ante, 173.

(*c*) Dav. Pat. Cas. 288, 289.

who might not be privy to the making of strands in the small room: however, whether it puts him to inconvenience or not, the question is, whether it is *prima facie* probable presumptive evidence, in the absence of evidence on the other side; and it is a competent ground for you, if you think the facts bear you out, to form that conclusion upon."

Evidence by the defendant.

When the plaintiff has closed his case, the defendant may give any evidence which will shew that the grant is invalid, as that the patentee was not the inventor, or that the subject is not a proper object for a patent, or that the specificatiou is incorrect. Or he may otherwise shew that the plaintiff has no right to sue.

Intention of patentee to conceal invention.

The question generally arises on the specification. It is often attempted to be shewn that it was the intention of the patentee, at the time he made the specification, to conceal the invention.

It was proved that Mr. Arkwright said, that his description would operate as a specification, but that he had made it as obscure as the nature of the subject would allow; (*d*) and also that he had, in a petition to the House of Commons, admitted that he had not properly specified how the machine was to be made, on purpose that foreigners might not use it. (*e*)

A witness may be asked whether the invention might not with ease have been clearly described,

(*d*) King *v.* Arkwright, Printed Case, 173. Dav. Pat. Cas. 108.

(*e*) *Id.* Printed Case, 176. Dav. Pat. Cas. 115, 116.

and whether he does not think that the description is *very* obscure. (*f*)

To prevent the miscarriage, which will almost always take place, in the endeavour to prove an infringement by comparison of the manufactures, it is prudent first to apply to a court of equity to appoint persons to inspect the manufactories, as was done in several cases. (*g*)

Trial by comparing specification with patent.

The validity of the patent may, however, be questioned upon the putting in and reading of the specification. If they do not support each other: if the description in the latter be palpably at variance with the title of the thing claimed by the former instrument, the plaintiff must fail. In the King *v.* Wheeler (*h*) Abbott, C. J., did not leave any point to the jury, because he conceived that on the face of the record it was clear that the patent was void, whatever evidence might be produced.

New trial in law.

The patentee must be very careful in collecting his evidence; for, after a verdict has once been given, the Court is very anxious not to put the parties to further expense by sending them back to a new trial.

A rule *nisi* for a new trial was refused to Mr. Arkwright, (*i*) although he stated in his affidavits that he did not expect the *originality* of his invention to be attacked; that he was taken by surprise; and that on a future occasion he

(*f*) *Id.* Printed Case, 96.
(*g*) Remedies in Equity, p. 187.
(*h*) 2 Barn. and Ald. 345.
(*i*) Page 188 of the Printed Case. Dav. Pat. Cas. 142.

would adduce evidence to contradict or explain the evidence given against him. That he did not conceive that the point, that some of the articles were immaterial, and inserted only for the purpose of causing misconceptions, would have been litigated.

If judgment be given for the patentee, he may of course bring other actions against every person who has infringed his right. If it be against him, still he may proceed in fresh suits, for no one is at liberty to use and vend the manufacture without subjecting himself to be sued, until the letters patent have been *cancelled.* (*j*) Judgment.

III. Remedy in Equity.

The jurisdiction exercised by the Court of Chancery over patents for inventions is merely in aid of the common law; from which, by the delay sometimes arising in its proceedings, some injury might be felt by the patentee. This interference is made between the parties in order to give full effect to the provisions of the statute of James; and is never allowed to be called for, but upon the supposition, that the property in the patent, generally inferred from his possession of it, belongs to the applicant, and that he has been fraudulently dealt with by the defendant. (*k*) 1. The jurisdiction of a Court of Chancery.

The great advantage gained by commencing

(*j*) 2 Ventr. 344. See Arkwright *v.* Nightingale, Dav. Pat. Cas. 55.

(*k*) Boulton *v.* Bull, 3 Ves. 140; and see 14 Ves. 132. 6 Ves. 607. 1 Maddox. Chan. p. 113. and post. Book III. c. 8.

proceedings in equity (*l*) for an infringement, before recourse is had to the common law courts, arises from the power of that court immediately to restrain the party from any further use of the patent-right, and to order him to give an account of his profits.

The grounds on which injunctions are granted.

"The principle," said Lord Eldon, (*m*) "upon which the Court acts in cases of this description, is the following:—where a patent has been granted, and an exclusive possession of some duration under it, the Court will interpose its *injunction* without putting the party previously to establish the validity of his patent by an action at law. But where the patent is but of yesterday, and upon an application being made for an injunction it is endeavoured to be shewn, in opposition to it, that there is no good specification, or otherwise that the patent ought not to have been granted, the Court will not, from its own notions respecting the matter in dispute, act upon the presumed validity or invalidity of the patent, without the right having been ascertained by a previous trial; but will send the patentee to law, and oblige him to establish the validity of his patent in a court of law. It will, however, in the mean time, grant him the benefit of an injunction."

Although possession has been distinctly proved; yet, if there be a strong doubt whether the speci-

(*l*) Mitford's Chanc. Plead. 124.

(*m*) Hill *v.* Thompson, 3 Meriv. 624. and see Prodgers *v.* Phrazier, 1 Vern. 137. 2 Atk. 286. 391. 485. 1 Vern. 120. *id.* 275. Amb. 406.

fication is not bad in law, the court will *brevi manu* interfere, and put an end to the injunction (*n*).

2. The practice. Filing a bill.

Of the manner of filing the bill for relief, which in general prays for an injunction and an account, with the method of issuing the subpœna, its service, &c. reference must be made generally to the books of practice (*o*), observing that for each distinct invasion of the patent there must be separate bills filed (*p*).

An injunction.

The remedy sought in equity is for INSTANT RELIEF (*q*). It is usual to move for the injunction upon filing the bill before the answer is put in. It is generally granted upon the *ex parte* affidavits. The defendant is commanded *either* to refrain in future from using or vending the manufacture, or to keep an account of the proceeds, until it can be determined whether the patent is valid, and whether it has been infringed by the defendant.

The affidavits.

In Hill *v.* Thompson (*r*), Lord Eldon said, "he doubted whether the injunction ought to have been granted in the first instance, unless the *affidavits* had stated more particularly in what the alleged infringement of the patent consisted; and that it should have been shewn to be, by working in the *precise proportions* men-

(*n*) Harmer *v.* Playne, 14 Ves. 132. Grierson *v.* Eyre, 9 Ves. 341.

(*o*) 2 Maddox. Chan. ch. 7. and Eden on Injunctions, ch. 15.

(*p*) Dilly *v.* Doig, 2 Ves. jun. 486.

(*q*) See *ex parte* O'Reilly, 1 Ves. jun. 112., and see 1 Ves. jun. 430. 2 Ves. jun. 486. 3 Ves. 141. 6 Ves. 689. 14 Ves. 130. 1 Ves. and Beam. 67.

(*r*) 3 Meriv. 624. And see Hill *v.* Wilkinson, Rep. of Arts, Vol. XXX. p. 382.

tioned in the specification, as *being* of the essence of the invention. That when, in future, an injunction is applied for *ex parte*, on the ground of a violation of a right to an invention, secured by patent, it must be understood, that it is incumbent on the party making the application to swear, at the time of making it, as to his belief that he is the original inventor; for although, when he obtained his patent, he might very honestly have sworn as to his belief of such being the fact, yet circumstances may have subsequently intervened, or information been communicated, sufficient to convince *him* that it was not his own original invention, and that he was under a mistake when he made his previous declaration to that effect."

The answer.

In the usual time the defendant must bring in his answer to the bill, which generally contains a statement of facts, verified by affidavit, that shew, either that the patent is not a good one, or that the defendant has not infringed it.

Plea.

The defendant may plead any matters, as in other cases in equity, or he may demur. A demurrer, alleging that the right to the patent had not been previously established at law, was immediately overruled (s).

The hearing.

When the answer is read, the plaintiff may move to make the *injunction perpetual*, if one has previously been obtained; or, on the other hand, the defendant may move to have it dissolved. (t) But if, when the bill was filed, an in-

(s) Hicks *v.* Raincock, 2 Dick. 647.

(t) See Gibbs *v.* Cole, 3 P. W. 355.

junction was denied, it may now be moved for (*u*). The court will exercise its own discretion, and, in continuing it, will perhaps direct *an issue at law* to try the validity of the patent; or, in dissolving it, will leave the party to bring an action for the supposed infringement. In the latter instance the court will, in general, order that the party against whom the application is made shall still keep an account pending the litigation (*v*): but sometimes, when the affidavits are very contradictory, it will dismiss the suit altogether.

5. Feigned issue at law.

It is unnecessary to go into the manner of making the record of a *feigned issue* directed by the Court of Chancery (*w*).

Evidence.

The evidence to be given at the trial is nearly the same as if the suit had been originally commenced at the common law court (*x*).

The Lord Chancellor will place the parties under such conditions as will meet the equity of the case. He will order admissions to be made of facts, which, though true, could not easily be proved. If the infringement is done secretly, he will order the *manufactory to be inspected* (*y*).

New trial.

When a verdict has been given, and the plaintiff moves to revive or to make an injunction per-

(*u*) 1 Ves. jun. 430.

(*v*) 3 Meriv. 628. And see 1 Stark. N. P. C. 205. Wood *v.* Cockerell, Aug. 1819. Rep. of Arts, N. S. Vol. XXXV. p. 254.

(*w*) See Tidd's Practice, p. 750.

(*x*) Ante, 178—182.

(*y*) See Huddart *v.* Grimshaw, Dav. Pat. Cas. 265. and Boville *v.* Moore, *id.* 361. and see ante, 182.

petual; or the defendant having been successful moves to dissolve it, either motion may be opposed on the ground that the verdict is bad, and that it is his intention to move for a new trial.

If the Lord Chancellor thinks that, in point of law, he is not so well satisfied with the patent as to take it for granted that no argument can prevail upon a court of law to let the question be reconsidered in a new trial, then he will not revive the injunction, but direct the account to be kept until that motion has been made. But if he is convinced that a court of law must and will consider the verdict of the jury as final and conclusive, then he will revive the injunction, and make it perpetual. (*a*)

In one instance (*b*) in which the judges of the court of common law were equally divided in opinion as to the validity of the grant, the Court of Chancery directed a new trial to be had, but would not impose any terms on the patentee, nor dissolve the injunction in the mean time.

Costs. At the same time the party that is successful may move for the costs and expenses which he has sustained by an allegation of right which could not be supported. (*c*)

General observations. Thus it appears that, before a suit is commenced at law, it is often preferable to take proceedings in equity. If the patent is really good, the injunction prevents any further in-

(*a*) 3 Meriv. 631.
(*b*) Boulton *v.* Bull, 3 Ves. 141.
(*c*) 3 Meriv. 629. and see Tidd's Prac. 1001.

fringement; and, if it be a doubtful one, the defendant will be restrained from using it until its validity has been examined. The order for an account puts the patentee in a better situation than if he had to depend upon a jury for damages; and, if he wants any indulgence, any alleviation from the strict rules of law as to evidence, &c. it becomes absolutely necessary to sue first in chancery.

CHAP. IX.

Of Letters Patent when void, and the manner of having them Cancelled.

Although the infringement of an invalid grant may, by shewing its defects, be justified in an action at law, or in an answer to a bill in equity; and the Courts may declare, that, in their opinion, the patent is voidable; yet, until it is actually cancelled, the patentee may go on against different parties, maintaining proceedings upon it in law and equity, (*a*) although the jury, under such circumstances, would of course give their verdict for the defendant. And the reason assigned is, that the patent must for the honour of the grantor,—the King,—be protected; until it is found by inquisition at law, that the grant either ought

(*a*) Ante, 177. 2 Ventr. 344. and see Attorney-General v. Vernon, 1 Vern. 277. 370. 2 Chan. Rep. 353.

not to have been made, or cannot with propriety be enforced. It is, therefore, necessary that the public should be provided with means of destroying a bad patent. This object is effected by a *writ of scire facias.*

All the instances in which patents are considered as void will first be enumerated, and then those things will be stated which do *not* vitiate patents; and afterwards the *proceedings* by *scire facias* will be investigated. (*b*)

I. What renders a Patent Void.

1. What makes all kinds of patents void.

The construction, which in law is put upon royal grants in general, was considered in a former Chapter. And it was there pointed out, as far as the law of patents in general was necessary to elucidate that of patents for inventions, how all kinds of grants were rendered void for uncertainty, misrecitals, and false suggestions. (*c*)

2. Patent for invention void generally under the statute.

A patent may be void, although the invention be new, either altogether, or for something in particular.

It is expressly provided by the statute of Monopolies, (*d*) that letters patent shall be void altogether, or generally, if they are—

1. Contrary to law; or
2. Mischievous to the state.

(*b*) See George *v.* B. Wackerback and Another, Repertory of Arts, N. S. Vol. XXVII. p. 252.

(*c*) Ante, Chap. VI. and see Chit. jun. Prerog. of Crown, 391—399.

(*d*) 21 Jac. I. c. 3. s. 6.

The mischief contemplated may, it appears, be done,

1. By their raising the price of commodities at home.
2. Or being hurtful of trade.
3. Or being generally inconvenient.

Contrary to law.

If an inventor obtain a patent for a proper object, and give a correct specification, and it be otherwise valid; yet, if it produce the baneful effects by which Lord Coke distinguishes monopolies, as described in Book I. of this Treatise, it will be contrary to law. (*e*) It will then be void for being a monopoly. It is almost impossible, that, at the present day, a patent, professing to be for a new invention, (which would be invalid on the grounds that grants were formerly declared to be monopolies,) could be *obtained*; and therefore it is unnecessary to add more on that subject.

Mischievous to the state, &c.

It has been shewn that by the common law, and the statute of James, all monopolies are illegal. (*f*) According to the letter of the statute, the exception of patents for inventions, from the consequences attendant on monopolies, goes only to the *sole working* and *making*; the sole buying, selling, and using, continue under the general prohibition: and with apparent good reason, for the exclusive privilege of *buying*, selling, and using, could hardly be brought

(*e*) 3 Inst. ch. 85. and see the case of Darcy *v.* Allen, 44 Eliz. 11 Co. Rep. 85. Noy. Rep. 179.

(*f*) Ante, p. 12.

within the qualification of not being contrary to law, and mischievous to the state. (g)

Raising the price of commodities at home.

That injurious effect of monopolies in general, of raising the price of commodities at home, will seldom be produced by the limited monopolies of grants for inventions; for one of the objects of almost every patent is to diminish the price of the manufacture; or, by furnishing a better article, to render it, at the same nominal price, of more intrinsic value.

Being hurtful of trade.

One of the issues (*h*) to be tried on the *scire*

(g) 2 Hen. Bla. 492. by Eyre, C. J.

(*h*) K. *v.* Arkwright, Printed Case, p. 30. Mr. Justice *Buller*.—Mr. *Bearcroft*, what do you understand to be the meaning of the first issue? Mr. *Bearcroft*.—The evidence on our side will be to shew that the grant is prejudicial and inconvenient to his majesty's subjects in general. I mean to say, there is great danger from such a grant as this, that it will go into foreign countries, if the monopoly is permitted. Your lordship will permit me to state it. I mean to say, it is of such a sort that it may be taken into other countries without all doubt; and if you can only work it here, loaded with a monopoly, and in another country it may be worked without, it will be a great danger to the whole trade, as applied to all the cotton manufacturers. Mr. Justice *Buller*.—I dont see, with respect to that issue, you can be permitted to give any evidence at all: it is merely a consequential issue; it is a question of law, whether it is prejudicial or not? When the facts are stated, therefore, if you thought it necessary to attack the patent upon those general words of the Act of Parliament, you should have stated it in what respect it was so then,—the fact would be put in issue. This is such a surprise upon the party, he can never come prepared to answer it. Mr. *Lee*.—It strikes me the prejudice must be, in the nature of it, a matter of fact; and your lordship sees it is a condition annexed to every patent by the terms of the Act

facias to repeal Mr. Arkwright's patent was, whether the grant was not prejudicial and inconvenient to the king's subjects in general. It appeared, from the opening speech of the counsel, of Parliament. Now there is no making any sense, use, or application of that, but upon some idea the patent is to stand or fall upon the ascertainment of that fact. My lord, if the patent is to be void, if proved prejudicial to the public; and good, if no such prejudice arises from it, in the nature of it; then *ex vi termini* there must be some mode of ascertaining it. Mr. Justice *Buller*.—That is no answer to my question, Mr. *Lee;* my idea is, if the patent is void as a question of law, if prejudicial or hurtful to the country, you can only take issue upon some fact that makes it so; therefore your issue should not be in general terms prejudicial to the country: but you should state how, and then the party comes prepared to answer it. Mr. *Bearcroft*.—Then, according to your lordship's observation, it is an immaterial issue; and we should state the fact, in order to give notice to the party. Mr. Justice *Buller*.—Upon that issue, upon this record I must take it thus:—the other three are precise pointed issues; but the first is of consequence to stand or fall as they are proved. Mr. *Lee*.—Suppose this principle is assumed, and I conceive it may be fairly assumed, there is no one thing of equal importance in any country to the employing of the inhabitants that compose it. I will suppose any invention, and you have a right to put the most extravagant supposition upon earth. I will conceive all that manufactory which has been for ages carried on by men, women, and children, and the sustenance of them all, to be performed by an invention that does not admit of any human hands at all. It is possible, in the nature of the thing, all those spindles might, for aught I know, be worked by a turnspit dog, and afford no subsistence at all to any human being. I should conceive such a thing upon proof would be directly a public inconvenience, and destructive of the happiness of mankind. And yet it would not be necessary to shew that was the nature of it: but only

sel, that he intended to give evidence to shew that the patent would be hurtful to trade by loading the cotton manufactories of this country with a monopoly. Mr. Justice Buller would not allow him to call any witnesses to prove it, upon the ground that it was merely a consequential issue, and that it was a *question of law*, whether the patent was or was not prejudicial to the community.

The observations of that very learned judge were founded on the circumstance, that no facts shewing the inconvenience were stated in the record to be proved. The defendant was not able to learn by the pleadings from whence the supposed inconvenience arose. Such an investigation would be a surprise upon him. He could not possibly come prepared with evidence to rebut an undefined accusation.

Generally inconvenient.

A question of inconvenience arose in an early case, (*k*) whether Mr. Arkwright should obtain

to state that. Mr. Justice *Buller*.—Then you should state the fact upon record. Then he knows what he comes to answer. Whether you attack it upon one ground or the other, as to the inconvenience to thep ublic, it is impossible for a man to come to answer that.

(*k*) Arkwright *v.* Nightingale, Dav. Pat. Cas. 55. Lord *Loughborough*.—It is said, it is highly expedient for the public that this patent, having been so long in public use after Mr. Arkwright had failed in that trial, should continue to be open: but nothing could be more essentially mischievous than that a question of property between A. and B. should ever be permitted to be decided upon considerations of public convenience or expediency. The only question that can be agitated in Westminster Hall is, which of the two parties in law or justice ought to recover.

a verdict after having submitted upwards of three years to a nonsuit on a former trial, inasmuch as many persons had, in consequence of his apparent abandonment of the patent, laid out great sums of money in constructing his machine. Such submission merely prevented him from obtaining damages, because the patent still remained uncancelled.

Hence it is evident, that if an issue were joined on certain facts stated in the record of *scire facias*, which shewed that the patent had a tendency to produce any of the bad effects, of being contrary to law, hurtful to trade, or generally inconvenient, such issue would be capable of trial; and the patent might on that account be declared to be void.

Grant void in particular under the statute.

That the grant is invalid when the patentee is not the *inventor*, (*l*) when its *object* is not a manufacture, (*m*) and when the *specification* is not sufficiently correct, (*n*) has already been shewn. If the patent has not been *obtained* (*o*) in the usual mode, or will not bear the *construction* (*p*) that must necessarily be put upon it, it is also void. *Any one* of these circumstances appearing in evidence will be the means of destroying the patent; and it is not necessary to prove more than one objection or cause for cancelling the grant. (*q*)

Lord *Thurlow* declared that letters patent, even if they were granted in fee, could not stand half an hour, if *abused*, 1 Ves. jun. 118.

(*l*) Chap. II. ante, p. 52.
(*m*) Chap. III. ante, p. 57.
(*n*) Chap. IV. ante, p. 100.
(*o*) Chap. V. ante, p. 136.
(*p*) Chap. VI. ante, p. 153.
(*q*) K. v. Arkwright, Printed Case 187. Dav. Pat. Cas. 141.

II. What things do not vitiate Patents generally.

There are some instances in which mistakes do not vitiate a grant. (*r*)

1. Every false recital in a thing not material will not vitiate the grant, if the king's intention is manifest and apparent.

2. If the king is not deceived in his grant by the false suggestion of the party, but from his own mistake, upon the surmise and information of the party, it will not vitiate or avoid the grant.

3. Although the king is mistaken in point of law, or of matter of fact, if that is not part of the consideration of the grant, it will not avoid it.

III. Proceedings by scire facias to Repeal a Patent.

Upon these grounds letters patent are voidable in themselves, but cannot be treated as of no effect in law until they are cancelled by the legal process of a writ of *scire facias*; in the investigation of which it will be necessary to consider

1. By whom it may be obtained.
2. The necessary instruments.
3. The surrender of the patent.

(*r*) Bull. N. P. 75. and see as to construction, ante, p. 153.

If a patent be void for any of the reasons which have been assigned as sufficient to invalidate the grant, the king, *jure regio*, for the advancement of justice and right, may have a *scire facias* to repeal his own grant. (*s*)

1. By whom obtained.

A Subject also, who is prejudiced by a grant, may of *right* petition the king to use his name for its repeal. All persons are injured by the existence of an illegal patent for an invention, and every one is therefore at liberty to petition for a *scire facias* to have it cancelled. (*t*)

But between subject and subject, if the king has granted a patent to each of them for the same thing, then generally the *first* patentee may have a *scire facias* to repeal the second patent: (*u*) but the second patentee cannot bring a *scire facias* to repeal the first patent, though the better right should be in him. (*x*) In the case of two patents for the same invention, supposing the object to have been simultaneously discovered by the patentees, the second grant would necessarily be bad, even if the first were for some informality rendered invalid. (*y*)

2. The necessary instruments.

The *scire facias* for repealing letters patent is an original writ, and must be founded on some matter of record. (*z*) A patent for an in-

(*s*) 4 Inst. 88. For the law and practice of repealing letters patent by *scire facias*, see Tidd. Prac. 7th edit. 1123. 2 Wms. Saund. 72. p. q. Com. Dig. Patent F. 6. *id.* Pleader.

(*t*) Dyer 276. b. 2 Ventr. 344. 3 Lev. 220. S. C. 6 Mod. 229.

(*u*) 4 Inst. 88. Dy. 197. b. 198. a.

(*x*) Dy. 276. b. 277. a. (*y*) Ante, p. 61, 2.

(*z*) 4 Inst. 88. 3 Lev. 223.

vention is a record in Chancery, and therefore the writ must issue out of that court. It is directed to the sheriff of Middlesex, and made returnable in the petty bag office. (*y*) The record of the proceedings upon the writ is made up in that court, and sent into one of the courts of common law, to be tried. (*z*)

Memorial. The first step to be taken is to present a petition or *memorial* (*a*) to the crown for a *scire facias*. The next is to obtain the king's *warrant* to sue; (*b*) which is directed to the Attorney General, who thereupon grants his *fiat*. (*c*)

Summons. A summons is then sent to the defendant; which informs him that this writ has been issued against him, and warns him to appear to it. (*d*)

The *scire facias* in *form* recites the patent, and states the grounds upon which it is meant to be impeached; as that the patentee was not the first and true inventor, but that it had been previously invented or used by others, (*e*) &c.

Plea. After the defendant has appeared, he may plead either in abatement or in bar. The most usual defence is the *general issue* to force the prosecutor to prove all the allegations in the writ.

Demurrer If the matter be insufficient in law, upon the

(*y*) Rex v. Haine, 2 Cox 235. and see 3 Lev. 223. 6 Mod. 229. and ante p. 177.

(*z*) See 21 Jac. 1. c. 3. s. 6.

(*a*) 2 Rich. Prac. C. P. 391. (*b*) Id. 392.

(*c*) Id. 395. (*d*) See Tidd's Pract. 1158-1172.

(*e*) For precedents, see the priuted account of Mr. Arkwright's patent, where the whole record is set out; and Tidd's Pract. Appendix, chap. XLI. § 6. Lil. Entr. 411. 2 Rich. Pr. C. P. 395.

face of the proceedings, to support the writ, the defendant may demur. (*f*)

If there be a demurrer to part and issue on the residue, the whole record is sent by the Lord Chancellor to the court of common law; and judgment is given there upon the demurrer as well as upon the issue. (*g*)

After the defendant has been warned, and *nihil* twice returned, judgment for annulling the patent may be taken by *default*. (*h*) It is obtained by *confession*, if no defence is made after the appearance. (*i*) Judgment by default.

The record is delivered to the court of common law by the clerk of the petty bag: (*k*) and it is not necessray that the issue should be tried at bar; it may be at *nisi prius*. (*l*) And the court will not now grant trials at bar, unless some particular reasons are assigned.

The *evidence* is similar to that which must be produced upon the trial for an infringement; (*m*) except that the patentee being here the defendant, he does not want any *prima facie* evidence of the novelty of the invention, and the sufficiency of the specification; but he must be prepared strongly to rebut every allegation in the writ. Evidence.

If the patentee can, on an application to the court, shew any thing to induce them to believe New trial.

(*f*) 3 Lev. 221. (*g*) Latch. 3. 1 Eq. Cas. Abr. 128.
(*h*) Dyer 198. (*i*) Dyer 197. b.
(*k*) 1 Eq. Cas. Abr. 128, 9. 2 Wms. Saund. 6. (1.)
(*l*) Cro. Car. 313. (*m*) Ante.

that his case has not undergone the fullest investigation, they will grant a *new trial*: (*n*) but otherwise they will deny it.

Judgment

It is said that after trial the record is to be remanded into chancery, and judgment to be there given; yet the practice has been to give the judgment in common law courts.

If the verdict be for the *King*, the court adjudges that the letters patent be revoked, and the inrolment be cancelled; if it be for the *defendant*, then the judgment will be that the letters patent are valid.

This judgment is final. No writ of error, no appeal to another tribunal, can be made. The very nature of the proceedings precludes it.

Costs.

Although the statute 8 and 9 Will. III. c. 11. gives costs in suits upon writs of *scire facias*; yet inasmuch, as this proceeding is criminal, in its nature, that statute does not extend to it; and therefore *costs* are not payable to the crown, prosecutor, or defendant, on this *scire facias*. (*o*)

3. Surrender of the letters patent. Cancelling patent.

When the patent has thus been adjudged to be void, it must be delivered up to be cancelled. For until there is an actual *surrendering*, *cancelling*, or *vacatur*, entered *on* the enrolment of the patent, it is not sufficiently cancelled as to be of no effect in law.

If a patent be granted to two persons jointly for a simultaneous invention, and the Lord Chancellor, making a duplicate, deliver the ori-

(*n*) Ante. (*o*) The King *v.* Miles, 7 T. Rep. 367.

ginal to one and the duplicate to the other; if a surrender of the original patent be made, the grant is vacated, although the duplicate be not surrendered or cancelled; for the duplicate is made by the Chancellor without warrant.

The *surrender* must be enrolled; for it is then only that the patent is vacated. Enrolment.

A certificate should be obtained of the *vacatur* having been entered on the roll. The certificate.

BOOK III.

ON COPYRIGHT.

CHAP. I.

INTRODUCTION.—OF COPYRIGHT IN GENERAL.

THE history of that right by which authors have an exclusive power over the productions of their minds may be given in a few words; for it would be foreign to the plan of this work to enter into a discussion to shew whether that right existed at common law; upon which topic the most learned men have held different opinions.

It may suffice to say, that it was formerly supposed that the author of a book had at common law an unrestricted right to dispose, even after publication, of such productions in any manner he pleased; and that the statute 8 Ann. c. 19. was passed merely to *protect* that right, by subjecting those who encroached upon such literary property to severe penalties.

This doctrine was questioned; and underwent a learned discussion in the court of Common Fleas, in the case of Tonson *v.* Collins: (*a*) but the point was not determined. It was after-

(*a*) 1 Bla. Rep. 301, 321.

wards agitated in the court of King's Bench, (*b*) where three judges, among whom was Lord Mansfield, delivered very elaborate opinions to prove the existence of the right. But Mr. Justice Yates, in a most profound and eloquent opinion, declared that an author had not such a common law right. The same question arose for consideration in the case of Beckett *v.* Donaldson, (*c*) when it was decided without dis-

(*b*) Millar *v.* Taylor, 4 Burr. 2303. (and see 1 Bla. Rep. 675.) This was an action of trespass in the case. The plaintiff stated in his declaration that he was the true and only proprietor of the copy of a book of poems intituled the SEASONS, by James Thomson; and whilst he was sole proprietor of the said copy, caused 2000 books of it to be printed for sale at his own expense, and had a great number of the said 2000 books remaining in his hands for sale. That the defendant Taylor published and exposed for sale, several other books of the like copy, and bearing the same title; which latter books had been injuriously printed by some person or persons without the licence or consent of the plaintiff Miller; the defendant knowing that they had been so injuriously printed by some person or persons, without such licence or consent; by means whereof the plaintiff was deprived of the profit and benefit of the said copy and book, and of the books, printed at his expense as aforesaid, and then remaining in his hands unsold. Not guilty was pleaded, and the jury found a special verdict.

The question was "whether after a voluntary and general publication of an author's work by himself, or by his authority, such author had a *sole and perpetual property* in that work, so as to give him a right to confine every subsequent publication to himself and his assigns for ever." *Lord Mansfield*, C. J. *Willes*, J. *Aston*, J. were of opinion that an author had such right. *Yates*, J. contra.

(*c*) 2 Bro. P. C. 145. and 4 Burr. 2408. In this case,

cussion in favour of the right, in order that it might immediately be carried by writ of Error into the House of Lords: where it was settled that if the right contended for did ever exist, it had been abrogated by the statute of 8 Anne; and that all remedies for any violation of it

which came before the House of Lords, by appeal from the Court of Chancery, the judges were directed to deliver their opinions on the following points.

1. Whether, at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale; and might bring an action against any person who printed, published, and sold the same without his consent?

Upon this question, the judges Nares, Ashhurst, Blackstone, Willes, Aston, Perrot, and Adams; and Smythe, C. B. and De Grey, C. J. of the Common Pleas; delivered separately their opinions against Baron Eyre, that, at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action against any person who printed, published, and sold the same without his consent.

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

Upon this question, the judges Nares, Ashhurst, Blackstone, Willes, and Aston, and Smythe, C. B., were of opinion against Eyre, Perrot, Adams, and De Grey, C. J. of the Common Pleas, that the law did not take away his right upon printing and publishing such book or literary composition; and that no person might afterwards reprint and sell for his own benefit such book or literary composition against the will of the author.

3. If such an action would have lain at common law—is it taken away by the statute of 8 Ann. c. 19. (See this act).

cease at the expiration of the terms therein mentioned.

Supposing then that no right existed at common law; by the exercise of which an author might prevent others from multiplying the copies of his work, after he had published it: it follows therefore that when a person prints a literary composition—when he publishes a book—he has

And is an author by the said statute precluded from every remedy, except on the foundation of the said statute, and the terms and conditions prescribed thereby?

Upon this third question the judges Eyre, Nares, Perrot, Gould, and Adams, and De Grey, C. J. C. P. delivered their opinions against Ashhurst, Blackstone, Willes, Aston, and Smythe, C. B., that such action at law is taken away by the statute 8 Anne; and that an author by the statute is precluded from every remedy, except on the foundation of the said statute, and the terms and conditions prescribed thereby.

4. Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity by the common law?

The judges Nares, Ashhurst, Blackstone, Willes, Aston, and Gould, and Smythe, C. B. delivered their opinions (contra Eyre, Perrot, Adams, and De Grey, C. J.) that the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity, by the common law.

5. Whether this right is any way impeached, restrained, or taken away, by the stat. of 8 Anne?

The judges Eyre, Nares, Perrot, Gould, and Adams, and De Grey, C. J. C. P. delivered their opinions upon this fifth question against Ashhurst, Blackstone, Willes, and Aston, and Smythe, C. B., that this right is impeached, restrained, and taken away, by the stat. 8 Anne.

The Lord Chancellor (Lord Apsley) seconded Lord Camden's motion to reverse; and the decree of the court of Chancery was reversed accordingly.

now no other property in it than that which is recognized or vested in him by legislative enactments.

The rights conferred by the statute of copyright, 8 Ann. c. 19. have, at different times, been altered and enlarged, by the 41 Geo. III. c. 107. and by the 54 Geo. III. c. 156.

There is other property of a literary kind, differing in some degree from that claimed under the copyright acts, given by several statutes; as in prints and engravings, models and statues.

Hence all literary property or copyright is either founded by construction on the statute of 8 Anne, or given by the positive provisions of other acts of parliament.

This chapter being devoted to general matters, I shall proceed to state

1. The *enactments* of the several acts of parliament.
2. The *construction* which they generally have received.
3. The effect of any *obscenity, libels,* or *immorality,* contained in a work.
4. What in general amounts to a *piracy.*

1. Statute Law, 8 Ann. c. 19.

The excellent statute of 8 Anne (*d*) gave to the author or proprietor of a book, then (10th April 1710) already printed, the sole right of printing it for twenty years. And to the author and his assignee of a work then already com-

(*d*) 8 Anne, c. 19. § 1.

posed but not published, or of one that should thereafter be composed and published, the sole liberty to print and reprint it for the term of fourteen years; to commence from the day of first publishing it, *and no longer*.

It was further provided that if the author should be living at the expiration of that term, then the sole right of disposing of the copies of the work should *continue in him* for another term of fourteen years. (*e*)

15 Geo. III. c. 56. Next in chronological order comes the act of parliament (*f*) giving to each of the Universities a *perpetual* right over the literary property that had been, or might thereafter be, bequeathed to them. This statute will be more particularly noticed under the head of Universities.

41 Geo. III. c. 107. Immediately after the union with Ireland, an act of parliament (*g*) was passed to make the law of copyright in every respect the same all over the united kingdom.

In it were introduced provisions, extending the benefits arising from literary property to authors in Ireland, which are similar to those contained in the statutes of 8 Anne, and 15 Geo. III.

54 Geo. III. c. 156. The most important act of parliament on copyright was passed on the 29th July, 1814, in which all the provisions of the former statutes were consolidated, and at the same time considerable alterations were made in the law.

The time of copyright. By that act the *time* limited for enjoying the

(*e*) 8 Ann. c. 19. § 11.

(*f*) 15 Geo. III. c. 53. and see post, Chap. VII.

(*g*) 41 Geo. III. c. 107.

fruits of the copyright of a work, then not published, was extended from fourteen to *twenty-eight years*; (*h*) with a further provision, that if the author should be living at the end of that period, then that he should receive the profits accruing from it for the residue of his life. (*i*)

For the benefit of the *families* of those authors who were alive at the time the act passed, but who might die before the first fourteen years, from the day of publishing their works, had expired, a further term of fourteen years was given to their *personal representatives*, without prejudice to the assignees of all or any part of the former term. (*k*)

Places of protection.

The *places* of protection for copyright, named in that statute, are the United Kingdoms of Great Britain and Ireland, the Isles of Man, Jersey, and Guernsey, and every other part of the British dominions. (*l*)

Such are the acts of the Legislature by which the copyright in books is vested in authors and their assigns.

2. Construction of the statutes.

Before entering into the discussion of the law, as it respects each species of literary composition, the matter of this *Third Book* will be rendered more intelligible by first shewing in what manner these statutes, which, in the opinion of Lord Hardwicke, (*m*) are far from creating a monopoly, have generally been construed, and what things affect the property in all kinds of literary works.

(*h*) 54 Geo. III. c. 156. § 4. (*i*) Id. § 9.
(*k*) Id. § 8. and see post, Assignee, Chap. VII.
(*l*) Id. § 4. (*m*) 2 Atk. 143.

Duration and resulting term.

An author, who sells his work in general terms, without making any limitations, has no resulting right against his own assignee after the first term, formerly of fourteen, but now of twenty-eight years, is expired. Thus a book of roads, printed in letter press, was at the expiration of the first fourteen years sold again by its author to a person who published the high roads upon *copper plates*, and the cross roads in *letter press*. An injunction was granted to restrain the second publication of the letter press: but it did not extend to the delineations on copper plates, which were considered as forming a *new work*. (*p*)

It was ruled in the case of Brooke *v.* Clarke,(*q*) that if a work has been published more than twenty-eight years *before* the time of passing the stat. 54 Geo. III. c. 156. the author is not entitled to the copyright in it for the remainder of his lifetime; for that act was made to extend the rights *then existing*, and not to re-create any expired right. It was in that case admitted that if any persons had published the work after the expiration of the twenty-eight years, and before the act of 54 Geo. III. had passed, the author could not have interfered with them; and certainly, whether the public had or had not actually exercised that right, no difference could exist without some express words in the statute for that purpose.

General assignment.

The distinction between the point decided in

(*p*) Carnan *v.* Bowles, Trin. T. 26 Geo. III. 2 Bro. C. C. 80. and 1 Cox. 283. Rennett *v.* Thompson, Id.

(*q*) 1 Barn. and Ald. 396.

the case of Carnan *v.* Bowles, (*r*) and the *eighth* clause of the 54 Geo. III. c. 156. by which a second term of fourteen years, (when the author dies within fourteen years from the publication of a book published before the passing of that act,) is given to the personal representative, without prejudice to the assignee of the former term, must be carefully noticed.

The distinction appears to be this:—if an author, who has assigned away his right generally, under the act of 8 Anne, outlive the first fourteen years; or, according to the time now allowed, if he survive twenty-eight years, then his assignee by the *general assignment* will have the benefit of the resulting terms—fourteen years—or for the remainder of the life of the author. But if an author, who has assigned his right for fourteen years only, die after the enactment of 54 Geo. III., but within that term, then his assignee will enjoy the copyright for the first fourteen years only, and the personal representatives of the deceased will have the benefit of a further term of fourteen years without prejudice to the sale of the books printed by the assignee within the first term.

Entry at Stationers' Hall.

An entry of the title page of each book, (for certain purposes which will hereafter be explained,) must be made at Stationers' Hall, under penalties for every neglect.(*s*) It is not, however, absolutely necessary that it should be done to give a property in the work, and to sustain an action at law. In fact, any one who first

(*r*) Ante, 210.

(*s*) 54 Geo. III. c. 156. § 5. and post, Chap. VII.

publishes a book, may bring an action for an infringement, although he may not be the real author of it. (*t*)

3. Obscenity, immorality, libels, &c.

The courts of common law, and of equity, strive to protect the *morals* of the public. It is a principle on which this part of the law rests, that there cannot be a copyright in any work, the tendency of which is *obscene* or *immoral*. And whether the offensive matter be represented in prints (*u*) or pictures, (*x*) or expressed in a book, it makes no difference.

Bad public tendency.

And if a work be of such a libellous or mischievous nature as to affect the *public morals*, so that the author cannot maintain an action at law (*y*) upon it, a court of equity will not interpose with an injunction, to protect that which by the policy of the law cannot be called property, not even upon a *submission* in the answer to a bill. Not only will the Court not interfere when it *plainly* sees that the work is obscene or immoral: but even, if there be *a doubt* as to its

(*t*) 4 Esp. N. P. C. 169. Vide post, Chap. VIII.

(*u*) Fores *v.* Johnes, Esq. 4 Esp. N. P. C. 97. *Lawrence*, J. For prints, whose objects are general satire, or ridicule of prevailing fashions or manners, I think the plaintiff may recover: but I cannot permit him to do so for such whose tendency is immoral or obscene; nor for such as are libels on individuals, and for which the plaintiff might have been rendered criminally answerable for a libel.

(*x*) 2 Camp. 511.

(*y*) Hime *v.* Dale, 2 Camp. 27. n. See 2 Meriv. 427. where it is said that evidence of Priestley's MSS., which were burnt in the Birmingham riots, being libels on government, would have been admitted by Eyre, C.J. and see 60 Geo. III. c. 9.

evil tendency, the Lord Chancellor will not be prevailed on to grant an injunction. (*z*)

And protection has been denied to a translation of an immoral work. (*a*)

Libels on private individuals.

It seems that neither the courts of equity nor of law will support a copyright in any work which is a *libel on an individual,* and for which the author might have been rendered civilly or criminally answerable. In an action for destroying a picture, from the exhibition of which great profits were derived, Lord Ellenborough observed, (*b*) that the only plea on the record being the general issue of not guilty, it was unnecessary to consider whether the destruction of the picture might or might not have been justified. The material question was, as to the value to be set upon the article destroyed. If it were a libel upon the persons introduced into it, the law could not consider it valuable as a picture. He directed the jury, in assessing damages, not to consider it as a work of art, but merely to give the value of the canvass and paint.

The principle of law, that no action can be maintained for pirating a work calculated to do injury to the public, and that no injunction will be granted to protect the author, although his character as an individual may suffer by the pub-

(*z*) Walcot *v.* Walker, 7 Ves. 1. Southey *v.* Sherwood, 2 Meriv. 438. Murray *v.* Benbow, MSS. Lawrence *v.* Smith, MSS. And see an article in Quarterly Review for April, 1822, p. 123., and Blackwood's Mag. for July 1822.

(*a*) Burnet *v.* Chetwood, 2 Meriv. 441. n. post. 241.

(*b*) Du Bost *v.* Beresford, 2 Campb. N. P. C. 511. and see 4 Esp. N. P. C. 97.

lication, was fully recognized in Southey *v.* Sherwood. (*c*) In that case, Lord Eldon observed, "It is very true, that in some cases it may operate so as to multiply copies of mischievous publications, by the refusal of the Court to interfere by restraining them: but to this my answer is, sitting here as a judge upon a mere question of property, I have nothing to do with the nature of the property, nor with the conduct of the parties, except as it relates to their civil interests. If the publication be mischievous, either on the part of the author, or of the bookseller, it is not my business to interfere with it."

And so strong is this objection that Lord Ellenborough has held an *apprehension of a prosecution* for the immorality or illegality of a work, proved to be well founded by the production of the part printed, would justify a person for refusing to supply a bookseller with the remainder of the manuscript agreeable to a contract. (*d*)

But there seems to be an exception to the general rule, that equity will not interfere to protect a book of *bad* tendency, when the author *repents* of his work, and wishes to suppress it. In that case Lord Eldon has intimated that he might grant an injunction. (*e*)

4. What amounts to a piracy.

Having thus shewn the protection to which the author is entitled, it is necessary to enquire what are the acts of other persons which are considered as causing an injury to him.

(*c*) Southey *v.* Sherwood, 2 Meriv. 438. see ante, 213. n.(*z*.)
(*d*) Gale and another *v.* Leckie, 2 Stark. 107. post, Ch. VII.
(*e*) Southey *v.* Sherwood, 2 Meriv. 438.

The identity of any literary works consists entirely in the *sentiments* and *language*. The same conceptions, clothed in the same words, must necessarily be the same composition; and whatever method is taken of exhibiting that composition, to the ear or to the eye, by *recital* or by *writing*, or by *printing*, in any number of copies, or at any period of time, the property of another person has been violated; for the new book is still the identical work of the real author. (*f*)

Thus, therefore, a transcript of nearly all the sentiments and language of a book is a glaring piracy. To copy part of a work, either by taking a few pages *verbatim*, where the sentiments are not new, (*g*) or by imitation of the principal ideas, although the treatises in other respects are different, is also considered to be illegal.

Although it was held (*h*) by Ellenborough, C.J.

(*f*) 2 Bla. Com. 406.

(*g*) Trusler *v.* Murray, 1 East. 363. n. This was an action for pirating a book of chronology. It was proved by the plaintiff that some parts of the defendant's work were different; yet in general it was the same, and particularly from page 20 to 34, it was a literal copy.

Kenyon, C. J. was of opinion that if such were the fact, the plaintiff must recover, though other parts of the work were original. He said Lord Bathurst had been of that opinion; and he thought rightly with respect to an abridgment of *Cook's voyages* round the world. The main question here was, whether in substance the one work is a copy and imitation of the other; for undoubtedly, in a chronological work, the same facts must be related. The books were then referred to an arbitrator to be compared. Mich. Term, 1789. and see Pinnock *v.* Rose, cov. Sir J. Leach, V. C. 2 Bro. C. C. 85. n. Belt. Ed.

(*h*) In Cary *v.* Kearsley, 4 Esp. N. P. C. 169.

that a variance in *form* and *manner* is a variance in *substance*, and that any material alteration which is a *melioration* cannot be considered as a piracy; yet a piracy is committed, whether the author attempt an original work, or call his book an abridgment; if the *principal parts* of a book are servilely copied, or unfairly varied.

But if the main design be not copied, the circumstance that part of the composition of one author is found in another is not of itself piracy sufficient to support an action. A man may fairly adopt part of the work of another; he may so make use of another's labours for the promotion of science, and the benefit of the public: but having done so, the question will be—Was the matter so taken used fairly with that view, and without what may be termed the *animus furandi?* (*i*)

Quotations.

In judging of a quotation, whether it is fair and candid, or whether the person who quotes it has been *swayed* by the *animus furandi*; the *quantity* taken, and the *manner* in which it is adopted, of course must be considered.

If the work complained of is *in substance* a copy, then it is not necessary to shew the *intention* to pirate; for the greater part of the matter of the book having been purloined, the intention is apparent, and other proof is superfluous. A piracy has *undoubtedly* been committed.

But if only a *small portion* of the work is quoted, then it becomes necessary to prove that it was done *animo furandi*; with the intention of depriving the author of his just reward, by

(*i*) Roworth *v.* Wilkes, 1 Campb. 97. and see 17 Ves. 424.

giving his work to the public in a cheaper form. And then the *mode* of doing it becomes a subject of inquiry. For it is not sufficient to constitute a piracy, that part of one author's book is found in that of another, unless it be nearly the whole; or so much as will shew, (being a question of fact for the jury,) that it was done with a bad intent, and that the matter which accompanies it has been *colourably* introduced.

This view of the law on copyright, as it respects quotations, reconciles the opinions of Lord Ellenborough in Cary *v.* Kearsley, (*k*) and Roworth *v.* Wilkes, (*l*) which at first sight appear to be incongruous. (*m*)

It is my intention to state and illustrate the principles of the law on copyright, as it now stands, in the following order—

1. By describing the *different kinds* of literary property.
2. By inquiring into the *rights of persons* who are interested in them.
3. And concluding with an investigation of the *means of protecting* that property, and the *remedies* for violating it.

(*k*) 4 Esp. N. P. C. 170.
(*l*) 1 Campb. N. P. C. 97.
(*m*) See Eden on Injunctions, 281. n.

CHAP. II.

Of the Different Kinds of Literary Property.—Of original Compositions.

In the endeavour to treat with perspicuity of the different kinds of literary property, I have arranged them in such order, that those which are similar in their nature, or depend upon the same principles, may be found together in the same part of the work. Thus in one chapter are given *original compositions*, whether printed in a book, or preserved in manuscript; in another, *particular treatises on general subjects*, whether compilations, books of calculations, abridgments, translations, or notes and additions. The laws on *periodical publications*, as reviews, magazines, newspapers, or pamphlets; and *theatrical compositions*, as music or plays, will be found in other chapters distinctly apart by themselves. And then will follow a concise statement of the several acts of parliament which give a property of a literary nature in works arising from the exertions of genius in the *fine arts*, as in engravings and prints; in models and sculptures.

This Chapter is set apart for *compositions*, which, in the common and strict sense of the word, are called *original*, whether printed or in manuscript. And, therefore, it will be occupied

by an investigation of the laws relating to books on common topics, as contra-distinguished from those works, which, according to their peculiar contents, are subjected to different laws. I shall afterwards explain the reasons why manuscripts come within the meaning of the several acts of parliament on copyright thus—

1. Of a book generally.
2. Of works in manuscript.

I. A Book Generally.

Definition of a book.

Though it was for a long time doubted, yet it is now clearly settled, that a literary production, to be entitled to the protection of the statutes on copyright, and to come within the words mentioned in the recital of the statute of 8 Anne, "*Books and other writings,*" need not be a book in the common and ordinary acceptation of that word;—a volume made up of several sheets bound together. It may be printed only on *one sheet*, as the words of a song, (*a*) or the music accompanying it.

(*a*) Hime (or Hine) v. Dale, Sittings after M. T. 1803, 2 Car. 27. n. and in 11 East. 244. n. S. C. (see Amb. Rep. 404.) was an action for piracy the words of a song called "Abraham Newland," published on a single sheet of paper. Erskine, contending that this was a book, said, If a different construction were to be put upon the act, many productions of the greatest genius, both in prose and verse, would be excluded from its benefits. But, might the papers of the Spectator, or Gray's Elegy in a country church-yard, have been pirated as soon as they were published, because they were first given to the world on single sheets? The

Every distinct and independent *part* of a work, is also a book within the meaning of the statute, as one tale or piece of music printed and bound up with other tales or pieces of music. (*b*)

2. Without author's name.

It will be shewn hereafter that the name of

voluminous extent of a production cannot, in an enlightened country, be the sole title to the guardianship the author receives from the law. Every man knows that the mathematical and astronomical calculations, which will inclose the student during a long life in his cabinet, are frequently reduced to the compass of a few lines. And is all this profundity of mental abstraction in which the security and happiness of the species in every part of the globe depend, to be excluded from the protection of British jurisprudence? But there is nothing in the word *book*, to require that it shall consist of several sheets bound in leather, or stitched in a marble cover. *Book* is evidently the Saxon boc; and the latter term is from the *beech-tree*, the rind of which supplied the place of paper to our German ancestors. The Latin word *liber* is of similar etymology; meaning originally only the bark of a tree. *Book* may, therefore, be applied to any writing: and it has often been so used in the English language. Sometimes the most humble and familiar illustration is the most fortunate. The *horn-book*, so formidable to infant years, consists of one small page, protected by an animal preparation; and in this state it has universally received the appellation of a *book*. So, in legal proceedings, the copy of the pleadings after issue joined, whether it be long or short, is called the paper *book*, or the demurrer *book*. In the Court of Exchequer a roll was anciently denominated a *book*, and so continues in some instances to this day. An oath as old as the time of Edw. I. runs in this form, "And you shall deliver into the Court of Exchequer a book fairly written," &c.: but the book delivered into Court in fulfilment of this oath has always been a roll of parchment.

(*b*) *Id.* and White *v.* Gerock, 2 Barn. & Ald. 298. 1 Chit. Rep. 24. S. C.

the *printer* and *publisher* must be printed on every book. (*c*) But it is not necessary that the author's name should appear to secure any right given by the statutes passed for the protection of literary property.(*d*) If the author's name were omitted in the title page, says Yates, J., he might equally insist on his claim; for if the property be absolutely his own, he has no occasion to add his name to it. (*e*) But in the case of Hogg *v.* Kirby, in which it was endeavoured to be shewn that a new magazine was a fraudulent continuation of a similar work, the Lord Chancellor expressed a doubt whether he ought to interfere, because the latter book bore a *fictitious name.* (*f*)

By several acts of parliament it is enacted that the name of the publisher, and the time of publication, must be marked on pieces of music, (*g*) and engravings. (*h*)

The *property* in a book generally will be investigated under the title Author and his Assignee. (*i*)

II. Works in Manuscript.

As a literary work or treatise must necessarily exist in manuscript before it is printed, it ap-

(*c*) Post, Chap. VII.
(*d*) Beckford *v.* Hood, 7 T. R. 620.
(*e*) 4 Burr. 2366.
(*f*) 8 Ves. 226.
(*g*) Post, Chap. V.
(*h*) Post, Chap. VI.
(*i*) Post, Chap. VII.

pears at first sight more logical that manuscripts should have been treated of before the law, as it regards books in general, had been enquired into. But upon inspection it will be seen, that the protection given to manuscripts is founded on principles which are corollaries from the rules respecting the copyright in a book. One of the points proposed to the judges by the House of Lords in the case of Donaldson *v.* Becket, (*k*) was, whether an author had full power over his work as long as it remained in manuscript; and, with only the dissentient voice of Mr. Baron Eyre, the reply was that he had complete controul over it. It follows that literary compositions in their original state, that is, the *manuscripts*, with the right of first publishing them, are the private and exclusive property of the author. In that condition they may be kept for ever; and if they are taken from him, an action of trover, detinue, or trespass, may be maintained.

Compositions in manuscript may be arranged for consideration in the following manner:—

1. Manuscript works *not used.*
2. Manuscript works that have become *known.*
3. *Epistolary* writings.

1. Manuscript works not used.

The Courts of Equity soon interfered to restrain all other persons besides the author from printing and publishing manuscripts, as in the cases of Mr. Webb and Mr. Forrester: (*l*) the

(*k*) 2 Bro. P. C. 144. 4 Burr. 2408.

(*l*) Amb. 695. See Webb *v.* Rose, cited 2 Bro. P. C. 138.

former of whom had his precedents of conveyancing stolen out of his chambers and printed, and the latter had his notes on legal subjects, lent to a gentleman for his perusal, copied by a clerk, by whom they were printed. (*m*)

2. Manuscripts already published.

And accordingly it has been determined that a copyright in a piece of music was not lost, although it had been published in manuscript *a year* before it was printed. (*n*) The words "*printed and published,*" used in the statutes, have reference only to the *time* at which the author's exercise of the right is *to be dated;* and, therefore, the circumstance, of an author having previously published in manuscript any composition which is afterwards printed, only varies the period of time, from which the twenty-eight years is to be calculated. (*o*)

and Forrester *v.* Waller, *id.* and see Knaplock *v.* Curl, 4 Ven. Abr. 278. 2 Evans. Collec. Stat. p. 625.

(*m*) See Burnett *v.* Chetwood, 2 Mer. 443. n.

(*n*) White *v.* Gerock, 2 Barn. and Ald. 298. (Chit. Rep. 24. S.C.) *Abbott*, C. J.—I am of opinion that an author does not lose his copyright by having first sold the composition in manuscript; for the statute 54 Geo. III. c. 156. must be construed with reference to the 8 Ann. c. 19. which it recites, and which, together with the 41 Geo. III. c. 107. were all made *in pari materia*, for the purpose of enlarging the rights of authors. The 8 Ann. c. 19. gave to authors a copyright in works, not only composed and printed, but *composed and not printed;* and I think that it was not the intention of the Legislature, either to abridge authors of their former rights, or to impose upon them as a condition precedent that they should not sell their compositions in manuscript before they were printed. Rule refused.

(*o*) White *v.* Gerock, 1 Chit. Rep. 27.

And in Equity it was held that a copyright exists in the manuscript of a play, even after it has been performed at a Theatre. (*p*)

3. Epistolary writings.

There is a peculiar class of manuscript literary property—*Epistolary writings*. They appear to be of several descriptions.

Letters written, originally intended for the press.

The first species is that in which the *form* of letters is merely given to a work in order to allow the author a latitude of expression, for rendering himself intelligible, or for any other purpose, whilst the work is *really* a literary composition; differing in no other respect from a book in general than in the dress it has assumed; and consequently it is protected by the law like every other kind of literary property.

Letters of literary persons.

Letters of the second species are those, which, although they have passed from one person to another, may, from the nature of the subjects mentioned in them, and the literary character of the writer, be considered, when a great number of them are collected together, as forming a literary work.

When letters thus take the *character* of a literary composition, the writer, by the mere transmission of them to the person to whom they are addressed, does not give the receiver any right to publish them.

When it was objected that where a man writes a letter, it is in the nature of a *gift* to the

(*p*) Macklin v. Richardson, Amb. 694. and post, Chap. V. The *property* in MSS., and the right which possessors of them have over them, will be investigated under the division "Author and his Assignee," post, Chap. VII.

receiver, Lord Hardwicke observed, (*q*) "I am of opinion that it is only a special property in the receiver. Possibly the property in the paper may belong to him: but this does not give a licence to any person whatsoever to publish them to the world; for at the most the receiver has only a joint property with the writer."

If individuals, to whom such letters are addressed, have not the power to publish them, how much more strictly ought third persons, into whose hands they may have fallen, to be prevented from printing them? Lord Hardwicke granted and continued an injunction to restrain Curl, (*r*) from republishing in England a book containing Letters of Pope, Swift, &c., and their friends, which had been obtained without their consent, and first published in Ireland. The injunction being originally granted at the instance of Pope, it was made to extend to the letters written by him, but not to those which he had received from other persons.

Upon the same principle Lord Apsley granted an injunction to prevent the publication of Lord Chesterfield's Letters to his Son, although the widow of Mr. Stanhope was the publisher; because she had not obtained either the consent of Lord Chesterfield in his lifetime, or that of his executors after his death. (*s*)

The third species consists of common letters Common letters.

(*q*) 2 Atk. 342. (*r*) Pope *v.* Curl, 2 Atk. 342.

(*s*) Thompson *v.* Stanhope, Amb. 737. and Duke of Queensberry *v.* Shebbeare, cited in 4 Burr. 2330. S. C. 2 Eder. Rep. 329. and see 2 Evans. Collec. Stat. p. 624.

on business, and on every other subject that can occur in the intercourse of private life, but which never could have been intended to be published, and therefore *cannot be considered as literary* compositions, and entitled to protection on the ground of a copyright existing in them.

Although the courts of Equity will sometimes interpose to stop the publication of such letters; yet it is not upon the ground of copyright, but that the publication is a *breach of contract*, or *confidence;* or when they are intended to be made a source of *profit*, at the risk of wounding private feelings.

If in such cases ..rts of Equity were to interfere on any oth.. ..inciple, they would defeat the end of justice. An individual would be deprived of his defence in proving agency, orders for goods, the truth of an assertion, or some other fact; merely because the proof is contained in letters in which a pretended copyright is claimed.

Thus, upon the principle of *breach of contract*, an injunction was granted to prevent the publication of letters written by an old lady to a young man, to whom she had been foolishly attached; there being an agreement not to publish the letters, but to deliver them up for a valuable consideration; and a sum of money having been actually paid to the defendant. (*t*)

In a case before Lord Manners,(*x*) upon a bill

(*t*) — *v.* Eaton, 13th April 1813. ..ed 2 Ves. & Beam. 27.

(*x*) Earl of Granard *v.* Dunkin, 1 Ball. & Beat. 207. cited in 2 Ves. & Beam. 21.

filed by an executor, it appeared that the defendant, who was a relation of the testatrix, and as such had been *permitted to reside* in her house in Dublin, where she left a great number of letters, had refused to deliver them up, and threatened to publish them by subscription; an injunction was granted to restrain the publication.

But the court of Chancery (*y*) dissolved an

(*y*) Perceval *v.* Phipps, 2 Ves. & Beam. 28. *Sir Thomas Plumer*, V. C. This is the naked case of a bill, certainly, to prevent the publication of private letters; not stating the nature, subject, or occasion of them, or that they were intended to be sold as a literary work for profit, or are of any value to the plaintiff. Upon such a case it is not necessary to determine the general question, how far a court of Equity will interpose to protect the interest of the author of private letters. The interposition of the court in this instance certainly is not a consequence from the cases that were cited (Pope *v.* Curl—Thompson *v.* Stanhope); upon which I shall merely observe that, though the form of familiar letters might not prevent their approaching the character of a literary work; every private letter, upon any subject to any person, is not to be described as a literary work, to be protected upon the principle of copyright. The ordinary use of correspondence by letters is to carry on the intercourse of life between persons at a distance from each other, in the prosecution of commercial or other business; which it would be very extraordinary to describe as a literary work, in which the writers have a copyright. Another class is the correspondence between friends or relations upon their private concerns; and it is not necessary here to determine how far such letters, falling into the hands of executors, assignees of bankrupt., &c., could be made public in a way that must frequently be very injurious to the feelings of individuals. I do not mean to say that would afford a ground for a court of Equity to interpose to prevent a breach of that sort of confidence independent of contract and property.

injunction obtained on account of agency and *confidence*, when the answer denied confidence and avowed that the defendant's object in publishing them in a Newspaper, of which he was the proprietor, was not to obtain profit, but to *vindicate his character* from the imputation of having published false intelligence, publicly cast on him by the plaintiff; who failed on both grounds for the interference of a court of Equity—copyright and confidence.

CHAP. III.

Of particular Works on General Subjects.

MANY inconveniences would arise from allowing one person to engross a *general subject*; and therefore each original *particular treatise* on a general subject will always be protected by the courts of justice. (*a*)

When two persons exert their talents upon the same subject, they may produce works of great similarity, but each of them will justly be entitled to full power over his own book; and any priority of publication will not affect the property in the one last published. Taking the

(*a*) See Matthewson *v.* Stockdale, 12 Ves. 273. for an elaborate opinion of *Lord Erskine* on this kind of literary compositions.

same general subject, they may newly arrange what has been said upon it, add new parts, and omit useless ones; and each of them will respectively acquire a copyright in his production. There must not however be any *copying* from a former work. The *subject* is open to all, but the copyright exists only *in the result* of each man's labour.

It will be convenient to divide works on general subjects into,

I. *Compilations.*
II. *Books of Calculations.*
III. *Abridgments.*
IV. *Translations.*
V. *Notes and Additions to an old Book.*

I. Compilations in general.

It would be a difficult task to enumerate all the kinds of literary works which would properly be comprised under the term *Compilations*.

They are,—

1. Road Books.
2. Series of Chronology.
3. Calendars of Names &c.
4. Dictionaries &c.
5. Encyclopædias, &c. &c.

1. Road books.

Road Books are compilations. Captain Paterson, after he had sold *all* his right in his Book of Roads to Carnan, at the expiration of fourteen years published it with the high roads engraved upon copper-plates; and it was ultimately considered that although he had made a new

work as to that part; yet as to the letter press, the injunction obtained against his assignee was founded in equity, and was therefore continued. (*b*)

Mr. Cary, at great expense, improved Patterson's work; and had several times to defend his additions from piracy. In his endeavour to obtain an injunction against Faden he failed. (*c*)

(*b*) Carnan *v.* Bowles, 1 Cox. 284. (and see 2 Bro. C.C.80. Ed.by Belt, ante 210.) *Lord Thurlow* observed that, as the roads of Great Britain were open to the inspection and observation of all mankind, every one was at liberty to publish the result of such observation: the subject matter of these books were, therefore, *in medio*. But the question will be, whether the author has exhibited any new and distinct idea in the exposition of them; and then whether the subsequent editor has, in substance, adopted the same. When globes were first invented, this was a new scheme of exhibiting the face of the earth, different in substance from the plain chart. Now, then, the addition of a few places on the globe will not make a new invention, the substratum being the same. So, in the case of Newton's Milton, the court thought that Milton's Works were *in medio*: but the notes and other additions were not so; and therefore, as to them, restrained the publication, though they left the text open to any body. Now, here, if the scheme of exhibiting this information to the public is substantially and fundamentally the same in the second work as in the first, and the former is merely reprinted with such differences as not to amount fundamentaily to a different project of exhibition, the law ought to interfere and protect the exhibition. His Lordship thought the report not sufficiently clear; and directed that it should be again referred to the Master whether the books were the same, or whether the latter differed from the former so as to render the same a new and original work in any, and what particulars.

(*c*) Cary *v.* Faden, 5 Ves. 24.

In an action against Longman, (*d*) it was clearly proved that *nine-tenths* of the alterations and additions had been copied *verbatim*, and he had a verdict. In that against Kearsley (*e*) it appeared that, although Kearsley had transcribed into his book a great quantity of Cary's new matter, yet he had done it with additions and observations of his own, and with corrections of misprintings, and that he had broken several routes into two parts, and that no entire particular paragraph had been transcribed; and thereupon Cary was nonsuited.

All human events being equally open to the observation of all men, every one is at liberty to add to or improve the materials respecting them, already collected.

2. Series of chronology.

A *Series of Chronology* is therefore another general subject; and, in considering whether a treatise is a piracy of another book on the same events, the question will be, whether in substance the one work is an imitation of the other; whether the one book is a copy of the other, by the author having availed himself of the arrangement, with alterations merely colourable, or whether it is as original as the nature of the matter will admit; for undoubtedly, in chronological works, the same facts must be related. When it appeared that Dr. Trusler's book (*f*) had been

(*d*) Cary *v.* Longman, 3 Esp. N. P. C. 273. 1 East. 359.

(*e*) Cary *v.* Kearsley, 4 Esp. N. P. C. 168.

(*f*) Dr. Trusler *v.* Murray, M. 1789. cor. Lord Kenyon. 1 East. 362. n. and ante 215. n. and see Jeffery *v.* Bowles, 1 Dick. Rep. 429. Trusler *v.* Comyns, *id.* and 12 Ves. 273.

copied literally from page 20 to 34, Lord Kenyon held that he must recover in an action at law, although other parts of the defendant's work were original.

3. List of names.—Calendars.

Another kind of compilations are Calendars. It is a very numerous species, and questions respecting them have frequently been brought before the courts. But it has uniformly been decided, that although no copyright can exist in a *list of names* as a general subject, yet it may in an individual work; and when it can be traced that another book with a similar title is not an original compilation, but a mere transcript, with colourable variations, the one first printed will *immediately* be protected by injunction, because it is of a transitory nature. Every body may make an India Calendar, (*g*) a Court Calendar, (*h*) a Directory, &c. but no one is permitted servilely to copy one already published.

4. Dictionaries, &c.

Histories and *Dictionaries* are general subjects. Two men may give a relation of the same facts in the same order of time, in different historical works: and in different dictionaries interpretations must necessarily be given of the

(*g*) Matthewson *v.* Stockdale, 12 Ves. 270.

(*h*) Longman *v.* Winchester, 16 Ves. 272. *Lord Chancellor.* To the extent therefore in which the defendant's publication has been supplied from the other work the injunction must go: but I have said nothing that has a tendency to prevent any person from giving to the public a work of this kind, if it is the fair fruit of original iabour, the subject being open to all the world. But if it is a mere copy of an original work, this court will interpose against that invasion of copyright.

same words; and hence there must be great similarity between the performances; and yet if the one author has not copied from the other, which would easily appear upon examination, both books come within the meaning of the statutes on copyright. (*i*)

5. An Encyclopædia.

The largest compilation is an *Encyclopædia*, or Dictionary of Arts and Sciences. The authors of this kind of literary composition have generally taken from the works of others with unsparing hands. It was formerly thought that the essence of any work might be published in a scientific dictionary, because the latter could not diminish the sale of the original treatise; for no one would purchase a voluminous work as a substitute for a small book, and therefore that there could be *no intention* to pirate. It has been shewn to what extent quoting may be carried: and that, when large portions of a work are taken, intention to pirate is implied. (*k*) When it appeared that 75 out of 118 pages of a work on *Fencing* (*l*) had been transcribed into an *Encyclopædia*, the court held that a piracy had been committed. A compilation may be different from a treatise published by itself: but certain limits must be fixed to the transcripts. It must not be allowed to sweep up all modern works, or an Encyclopædia would completely destroy all literary property.

(*i*) Per Lord Mansfield in Sayre *v.* Moore, 1 East. 361. n.

(*k*) Ante 216, 7.

(*l*) Roworth *v.* Wilkes, 1 Camp. N. P. C. 98. and see Wilkins *v.* Aikin, 17 Ves. 422.

Maps, Charts, &c., were formerly considered as particular works on general subjects. Some doubts have been entertained whether they could properly be brought within the meaning of the copyright acts. They are now included among *Engravings*; and under that division the law respecting them will be found. (*m*)

II. Books of Calculations.

All books of Calculations, if correctly made, must necessarily be the same. Yet a copyright may exist in each book, because each work being the produce of the ingenuity and labour of its respective author, it is but fair that both of them should take their chances of success, and be protected against any infringement by a third person, who has not been instrumental towards promoting the public knowledge.

This kind of books consists of *Almanacks*, and those books which contain *Logarithms*, *Tables of Interest*, &c.

1. Almanacks. James the I., in the 13th year of his reign, granted to the Company of Stationers the right of printing such Almanacks as were allowed by the Archbishop of Canterbury and the Bishop of London, or either of them. A similar privilege was also granted to the Universities of Oxford and Cambridge. (*n*) The validity of these pa-

(*m*) Post, chap. VI. Sayre *v.* Moore, 1 East. 361. n. but see 12 Ves. 274.

(*n*) As to the equivalent given to the Universities, see post, Chap. VII.

tents, although many injunctions had been allowed in support of them, (*o*) was questioned in the fifteenth year of Geo. III. by *Carnan*, (*p*) a bookseller, in his answer to a Bill in Chancery, filed by the Company of Stationers, to obtain an injunction to restrain him from publishing Almanacks. The legal question was referred to the court of Common Pleas, who certified that the Crown had not a prerogative or power to make such a grant to them exclusive of others. The bill was accordingly dismissed. (*q*)

Any person may, therefore, make the calculations usually published in almanacks, and claim a

(*o*) Stationers' Company *v.* Lee, 2 Ch. Ca. 66. Same *v.* Wright, *id.* 76. Same *v.* Partridge, cited in Donaldson *v.* Beckett, 2 Bro. P. C. 137. Toml. ed.

(*p*) 2 Bla. Rep. 1004. and see post Chap. VII.

(*q*) The Almanack, divested of its prognostications, was first printed with the Common Prayer Book, for the purpose of regulating the feasts and fasts: but in strictness it is no part of it. 4 Burn. 2328. That is the one to which it is said the courts must refer. The judges have considered the calendar of sufficient authority for determining upon what day of the week a certain day of the month fell, and for other legal purposes. See Queen *v.* Dyer, 6 Mod. 41. Brough *v.* Parkins, id. 81. Page *v.* Faucet, Cro. Eliz. 227. 1 Leon. 328. 242. Hoyle *v.* Lord Cornwallis, 1 Stra. 387. Fortesc. 373. Harvey *v.* Road, Salk. 626. 6 Mod. 160. 6 Mod. 196. S.C. Fish *v.* Broket, Dyer 182, pl. 55. 1 Leon. 242.

The Calendar was reformed by act of parliament, 24 Geo. II. c. 23. whereby it was enacted that the day after the 2nd September 1752, should be considered as the 14th September. That act was afterwards amended by 25 Geo. II. c. 30. and 26 Geo. II. c. 34.

copyright in them. A stamp duty is paid on all almanacks. (*r*)

Nautical almanack.

Many acts of parliament (*s*) have been passed offering public rewards to such persons as should discover an exact method of ascertaining the Longitude. A power is given to the commissioners appointed to carry them into execution to publish a *nautical almanack*, or astronomical ephemeris. They are further empowered to give a *licence* to some one to print it. Any other person printing, publishing, or vending it, subjects himself to a penalty; of which one moiety is given to the king, and the other to the informer.

2. Tables of logarithms, &c.

Though books of *logarithms*, tables of *interest*, &c. must necessarily be the same, if correctly calulated; yet, inasmuch as great labour must be exerted, and much expense incurred in making the calculations, and publishing them, a

(*r*) It is one shilling and three pence for every almanack or calendar that will serve for one year: but if it is made for several years, then the duty is th. ount of that sum for each year. If the calendar be a perpetual one, the stamp is ten shillings, 55 Geo. III. c. 185. If a printer's apprentice print and sell an almanack unstamped, he may be imprisoned for three months, 55 Geo. III. c. 185.

(*s*) The statutes respecting the discovery of the longitude at sea, and the determining the longitude and latitude of the Port Towns, are 12 Ann. st. 2. c. 15. 14 Geo. II. c. 39. 18 Geo. II. c. 17. 26 Geo. II. c. 25. 2 Geo. III. c. 18. 3 Geo. III. c. 14. 5 Geo. III. c. 11. 5 Geo. III. c. 20. 10 Geo. III. c. 34. 13 Geo. III. c. 77. 14 Geo. III. c. 66. 16 Geo. III. c. 6. 17 Geo. III. c. 48. 20 Geo. III. c. 61. 21 Geo. III. c. 52. 30 Geo. III. c. 14. 36 Geo. III. c. 107. 43 Geo. III. c. 118. 46 Geo. III. c. 7[illegible] 55 Geo. III. c. 75. 58 Geo. III. c. 20. 1 & 2 Geo. IV. c. 2.

copyright exists in each work. And if any circumstance transpires by which it can be shewn that one book is merely a copy of another, an injunction will be granted: but, if that does not plainly appear, the bill will be dismissed. (*t*) It is, of course, competent to the defendant to shew that he made the calculations which he has published, and then both works are original.

Piracy of general subject.

The usual mode of proving *piracy* of compilations, and books of calculations, is by shewing that the mistakes and errors of the book first published have been copied into the one complained of. But that is not of itself sufficient. (*u*) Further proof is often given, as that parts of the first work were used at the press when the second was being printed; and that the alterations supplied in manuscript were merely colourable.

Some circumstance, which would shew that the works would not, in all probability, have been similar, but by the one being copied from the other, (as where in two calendars the persons of the name of Smith were arranged in the same but not alphabetical order of their *Christian* names,) (*x*) is good *presumptive* evidence of piracy.

In all these cases the *defendant* may prove in what the amendments and corrections consist; and that the alterations have been made by his labour, care, and expense.

(*t*) King *v.* Reed, 8 Ves. 223. n.
(*u*) 3 Esp. N. P. C. 273. 4 Esp. N. P. C. 168. 12 Ves. 275.
(*x*) 12 Ves. 271. 17 Ves. 425.

III. Abridgments, &c.

Nearly upon the same principles by which it is shewn that there cannot be a monopoly of a general subject, it appears that *books themselves* for certain purposes, besides the mere act of reading them, may be used by the public.

They are in fact general subjects—data—which may afford opportunities for other persons besides the authors to exercise their ingenuity. They may be taken as the ground work of other literary labours.

Thus a copyright may exist in *abridgments* or *translations* of works. Also in the *notes and additions* printed in a new edition of a book, over which the right of the author has expired. For one man may compose a work, for instance in the Latin language, another abridge it, a third translate it, and a fourth write annotations upon it; and every one of them will acquire a copyright in the product of his own ingenuity and labour.

Many valuable works are so voluminous that abridgments of them are extremely useful. To make them, some judgment must be exercised, and some labour employed; and therefore the authors of them ought certainlyto be encouraged.

In general, an abridgment tends to the advantage of the author, if the composition be good; and may serve the end of an *advertisement.*

The inquiry whether the work is *prejudiced* by the *manner* of making the abridgment cannot be entertained. An injunction was refused

to stop the publication in a magazine of an abridgment of Johnson's Tale of Rasselas; (*y*) when it appeared, that not one tenth part of the first volume had been abstracted, and that the injury, alleged to be sustained by the author, arose from the abridgment containing the narrative of the tale, and not the moral reflections. An abridgment of Dr. Hawkesworth's voyages(*z*) was protected in a Court of common law.

But then it must be a fair and real abridgment,

(*y*) Dodsley *v.* Kinnersley, Amb. 403.

(*z*) Lofft. Rep. 775. Injunction was prayed against an editor by Mr. Newberry, of an abridgment of Dr. Hawkesworth's voyages.

Apsley, C. was of opinion that, to constitute a true and proper abridgment of a work, the whole must be preserved in its sense; and then the act of abridgment is an act of the understanding employed in carrying a large work into a smaller compass, and rendering it less expensive, and more convenient, both to the time and use of the reader, which makes an abridgment in the nature of a new and meritorious work. That this had been done by Mr. Newberry, whose edition might be read in the fourth part of the time, and all the substance preserved, and convey in language as good or better than the original, and in a more agreeable and useful manner. That he had consulted *Mr. Justice Blackstone*, whose knowledge and skill in his profession was universally known; and who, as an author himself, had done honour to his country. That they had spent some hours together; and were agreed that an abridgment, where the understanding was employed in retrenching unnecessary and uninteresting circumstances, which rather deaden the narrative, is not an act of plagiarism upon the original work, nor against any property of the author, but an allowable and meritorious work. And that this abridgment of Mr. Newberry's falls within these reasons and descriptions. Bill dismissed.

the work must not be colourably shortened, (*a*) either by republishing only part of it, (*b*) or by omitting some parts, and merely transposing the remainder. (*c*) There must, at least, be invention, learning, and judgment shewn by the author of it. And an injunction will be granted, if the *terms* in which the facts are related be merely the same in both books. (*d*)

Lord Hardwicke (*e*) ruled, that the question of a supposed piracy, by making an abridgment, was a case more proper to be examined in equity than to be sent to law, upon account of the necessity of examining and comparing the two books.

Abridgments of works published in an Encyclopedia have been mentioned (*f*) and the law;

(*a*) Giles *v.* Wilcox, 2 Atk. 143. S. C. 3 Atk. 268. Barnard. 368. and see 17 Ves. 422.

(*b*) Read *v.* Hodges, mentioned in 2 Atk. 143.

(*c*) Butterworth *v.* Robinson, 5 Ves. 709 2 Evans. Col. St. p. 629.

(*d*) Bell *v.* Walker and another, 1 Bro. C. C. 451. An injunction was moved for to restrain the publication of a book entitled "Memoires of the life of Mrs. Bellamy." The bill stated that it was pirated from a book called "An Apology for the life of George Anne Bellamy." Affidavits were filed, in which it was sworn that Mrs. Bellamy was author of this latter work; and that she sold the property of the copy to the plaintiff, who had printed it in five volumes, which sold for fifteen shillings. The work against which the injunction was prayed was in one volume, and sold for two shillings and sixpence. Passages were read from each, to shew that the *facts*, and even the *terms* in which they were related in the latter work, were frequently taken *verbatim* from the original one. And an injunction was immediately granted.

(*e*) 2 Atk. 144. and see 4 Ves. 681. (*f*) Ante 233.

is the same in principle when they are inserted in reviews, &c. (*g*)

IV. TRANSLATIONS.

1. From ancient languages

That every person, who employs his time and abilities in making translations from the ancient classic authors, justly acquires a copyright in the productions, was never doubted.

2. When written by native in foreign language.

A translation of a book written in the Latin language by a British Subject, it has been held, is also a work to be protected. It was observed by the Court, that publishing a translation was not similar to reprinting the original, because the translator had bestowed his care and pains upon it. (*h*)

3. From modern authors.

This doctrine came under the consideration of the Court of Chancery in a late case, (*i*) when it was contended that there could not be an exclusive property in papers translated from the French and German languages, and published

(*g*) Post, 247.

(*h*) Burnett *v.* Chetwood, 2 Meriv. 441. n. The injunction was, however, granted, on the immorality of the original work; and that it was an improper book to be translated. See ante, 218.

(*i*) Wyatt *v.* Barnard, 3 Ves. & Beam. 77. This bill was filed at the instance of the proprietor of the REPERTORY OF ARTS to restrain the proprietor of the Tradesman's Magazine from copying the specifications of patents for inventions as well as the translations. But it was held that no *copyright could exist in the specifications*, although they were acquired from the patent office with some labour and expense. This case is also reported in the REPERTORY OF ARTS, Vol. XXV. p. 188.

in a periodical work, because all the booksellers had long considered such articles to be public property, and had been accustomed almost immemorially to copy them from the publications of each other.

The Lo.d Chancellor, however, granted an injunction, observing that translations, if original, whether written by the plaintiff, made at his expense, or *given* to him, could not be distinguished from other works, and were protected by the stat. of 8 Ann. c. 19.

V. Notes, Additions, &c. to an Old Book.

1. New edition with notes.

Great talents, ingenuity, and judgment, are in general required to compose good notes or additions to the established work of an author of reputation; and hence, when they are made to a book, which is already in the power of any one to print, for the purpose of presenting the public with a new edition of it, reason and justice say that they ought to confer a copyright as much as a separate and distinct work.

2. Additional pieces or parts.

It was said by Lord Kenyon, in the case of Cary *v.* Longman, (*k*) that the courts of justice had then been long labouring under an error,

(*k*) Cary *v.* Longman and Rees, 1 East. 358. (and see 3 Esp. N. P. C. 275. 1 B. & A. 396. 3 P. Wms. 255. and ante, 229.) This was an action on the case for pirating a book. The declaration stated that the plaintiff was the author of a certain book intituled Cary's New Itinerary, or accurate delineation of the great roads, both direct and cross, throughout England and Wales, &c. from an actual admeasurement made by command of his majesty's postmasters general, &c. and that, being the author of the said book within fourteen years last past, he had

that an author had no copyright in any part of a work, unless he had an exclusive right to the whole book.

published the same for sale, &c. that the defendants intending to deprive him of the profit thereof, and of the benefit of his copyright, injuriously published and exposed to sale divers copies of a certain book intituled "*A new* and accurate description of all the direct and principal roads, &c. from a late actual admeasurement made by command of his majesty's postmasters-general, &c. which said book had before that time been wrongfully and injuriously copied from the said work of the said plaintiff, without his consent, &c.

At the trial before *Lord Kenyon*, at Westminster, it appeared that the original foundation of both the plaintiff's and defendant's works was a book first published in 1771 by Mr. Patterson, the copyright of which in 1788, (the author being then living) became vested in Mr. Newberry. This work had gone through several editions, the eleventh of which was published in 1796. In 1797, the plaintiff was employed by the postmasters-general to make an actual survey of the principal roads; and the book published by him, with their permission, contained many material corrections of, and additions to, the last edition of the original work by Patterson. The principal of these consisted in some corrections of distances by actual surveys, in an admeasurement of the distances from inn to inn, in the several post towns, in addition to those from one town to another, in an index to the roads more copious than the former one, in an additional number of gentlemen's seats by the road side, the rejection of some routes and an addition of many others. On the other hand, the work published afterwards by the defendant *as the twelfth* edition of the original work by Patterson appeared to have been copied nine-tenths of it *verbatim* from the plaintiff's improvements, and many of the alterations merely colourable. Verdict for the plaintiff.

Kenyon, C. J.—Certainly, the plaintiff had no title on which he could found an action to that part of his book which he had taken from Mr. Patterson's: but it is clear that

It is now clearly settled that an action lies to recover damages for pirating the additions to an old work. Thus, when Gray's poems, (*l*) several years after they had been given to the public, were republished by Mason, with many *additional pieces*, an injunction was immediately granted to prevent an infringement of the copyright in the additional pieces.

Reprinting with notes, &c.

An injunction is always granted to restrain any one from printing the notes published with a new edition of an old book.

A person was enjoined not to print the *Paradise Lost* of Milton, with Dr. Newton's *notes*, although any one might have republished the Paradise Lost by itself. (*m*) This piracy was endeavoured to be concealed by mixing some new notes with the old ones: but the small number of the new ones (ten) shewed that it was colourably done.

On the other hand, notes or embellishments to a book, the copyright to which is not expired, confers no power to print the original. Although authors of works on the different branches of the law have often printed the statutes at large at the end of their books; (*n*) yet collusive notes to an

he had a right to his own additions and alterations, many of which were very material, and valuable; and the defendants are answerable at least for copying those parts in their books.

(*l*) Mason *v.* Murray, cited in 1 East. 360.

(*m*) Tonson *v.* Walker, cited in Amb. 405. and see Miller *v.* Taylor, 4 Burr. Rep. 2325. and in 2 Bla. Rep. 332. See 1 Cox. Rep. 283. Motte *v.* Falkner, 4 Burr. Rep. 2353. 1 Bla. Rep. 331.

(*n*) Post, Chap. VII. and see Cary *v.* Kearsly, 4 Esp.

edition of the statutes will not take the right of sole printing them out of the king's printer's patent.(*o*) But Lord Clare doubted whether the king's printer in Ireland could restrain any one who pleased from publishing the *Bible with notes*. (*p*)

Thus much it was necessary to say of additional pieces, and notes to old books. Corrections or additional parts which take place in works on general subjects have been before mentioned. (*q*) No doubt can be entertained but the critic has a copyright even in the verbal corrections and alterations which he makes; as, for instance, in those published by Dr. Bentley. 3. Corrections; verbal criticisms.

CHAP. IV.

Of Periodical Publications.

IT is not the *contents* of periodical publications, but the laws that regulate *the manner of giving them* to the public, which are now to be investigated. When the matter of which they are composed affects the proprietor's *legal right* to the work—when it may be of such a description as entirely to deprive him of all controul over it, and the courts of justice will not, on that account, protect him; it will then be necessary to

N. P. C. 169. for Lord Ellenborough's observations on publishing a part of Paley's philosophy with notes.

(*o*) Basket *v.* Cunningham, 1 Bla. Rep. 376. post, Chap. VII.

(*p*) Grierson *v.* Jackson, Irish T. R. 304. see 9 Ves. 341.

(*q*) Ante, Compilations 229.

notice and examine the substance of the work itself.

To render intelligible that part of the law which relates to such periodical publications as are distinct in their nature, it will be convenient to arrange the subjects for discussion in the following order.

I. *Of Reviews, Magazines, &c.*
II. *Of Newspapers.*
III. *Of Pamphlets.*
IV. *The Stamp-duties thereon.*
V. *The Property therein.*
VI. *The Legal Proceedings peculiar to Periodical publications.*

I. Reviews.

Reviews, Magazines, Literary Journals, and works of a similar description, consist of *Essays* and *criticisms.*

1. Original Essays.

The *Essays,* or original pieces, are to be viewed in the same light as though they had been published by themselves,—whether they are the composition of the proprietor himself, or are procured for him. (*r*)

The parts which contain the criticisms distinguish these productions from books in general. Those articles are compounded of matter taken from the works of other persons, and the observations of the reviewer. The law is therefore two-fold as it regards the extracts and the observations.

(*r*) Wyatt *v.* Barnard, 3 Ves. & Beam. 77. Hogg *v.* Kirby, 8 Ves. 215. See ante, 241.

2. Quotations.

The *extracts* must not be made too freely: sufficient may be taken to form a correct idea of the whole; but no one is allowed, under the pretence of quoting, to publish either the whole or principal part of another man's composition; (*a*) and therefore a review must not serve as a substitute for the book reviewed. If so much is extracted that it communicates the same knowledge with the original, it is an actionable violation of literary property. The *intention* to pirate is not (as has been shewn) *always* necessary to be proved in an action for violating this species of copyright; but is generally to be inferred from the *quantity* of matter copied. (*b*)

3. Observations of critics.

The *remarks* made by the critic must not be personal; they must not impugn the moral character of the author. It seems that when they are made upon the merits of the work, without any reference to the individual who composed it, they may be justified, however ridiculous he may be rendered, or how much soever the book may be depreciated in value. (*c*)

The *abridgments* and *translations* sometimes

(*a*) Roworth *v.* Wilkes, 1 Camp. 97. and see 4 Esp. N. P. C. 170. and Wilkins *v.* Aikin, 17 Ves. 422. Whittingham *v.* Wooler, Dec. 8th, 1817, Eden on Injunctions 281.

(*b*) Ante, 216. and 238.

(*c*) Carr *v.* Hood, 1 Camp. 355. (and see Nightingale *v.* Stockdale, Selw. Ab. 1013. 5th edit.) *Ellenborough*, C. J. Every man who publishes a book commits himself to the judgment of the public; and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. In the present case had the party writing the criticism followed the plaintiff

published in this description of literary works, are judged of in the same manner as abridgments and translations in general. (*d*)

II. Newspapers.

No other class of writings makes so great an impression on the public mind as periodical publications. The most powerful is a *Newspaper*.

The governments of every country have *therefore* been very careful to make rules and regulations concerning Newspapers. Under de-

into domestic life, for the purpose of slander, that would have been libellous: but no passage of this sort has been produced; and even the caricature does not affect the plaintiff, except as the author of the book which is ridiculed. The works of this gentleman may be, for aught I know, very valuable: but, whatever their merits, others have a right to pass their judgment upon them, to censure them if they be censurable, and to turn them into ridicule if they be ridiculous. The critic does a great service to the public, who writes down any vapid or useless publication; such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism: and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury, because it is a loss which the party ought to sustain. It is in short the loss of fame and profit to which he was never entitled. Nothing can be conceived more threatening to the liberty of the press than the species of action before the court. We ought to resist an attempt against free and liberal criticism at the threshold.

(*d*) Ante, 233. 238. 240. see Dodsley *v.* Kinnersley, Amb. 403. As to entry of them at Stationers' Hall, see 54 Geo. III. c. 156. s. 5. and for *property* in a review, see 8 Ves. 215. and post, 268.

spotic ones, they are subject to censors; but in England, where it is contrary to the spirit of the laws to anticipate the commission of evil, it is sufficient that the publishers are known, and may readily be called on to answer for the contents of their papers.

Of the laws respecting Newspapers it will be proper to notice,—

1. The rules that regulate the *publication*, so that the persons concerned in them may be easily known.
2. The *contents*, and what things are sometimes published in them, which give offence to the laws.
3. In what instances noticed by the law. The Gazettes, &c.

Papers for circulating News were first used in England in the reign of Queen Elizabeth. It was not until the reign of Queen Anne, that any notice appears to have been taken of them by the legislature.

Definition of Newspaper.

A Newspaper may now be *defined* to be a paper containing public news, intelligence, or occurrences, printed in Great Britain, to be dispersed and made public; and may consist of a sheet, half a sheet, or other piece of paper. (*e*) It must not exceed *thirty-two* inches in length, and *twenty-two* inches in breadth. (*f*)

(*e*) 55 Geo. III. c. 185. The oldest newspaper extant is dated July 23, 1588. "*The English Mercurie published by authoritie for the prevention of false reports.*" It is among the state papers in the British Museum.

(*f*) 34 Geo. III. c. 72. s. 2. 39 and 40 Geo. III. c. 72. s. 19. 44 Geo. III. c. 98. s. 22.

1. Manner of publication.

The few regulations, that were made for the better conducting the public press in those statutes that impose the stamps on Newspapers, all appear actually or virtually to be repealed by the act passed in 38 Geo. III., by which it is required

The affidavit.

that an affidavit (*g*) shall be delivered into the Stamp Office, before a Newspaper is published, under a penalty of 100*l*. (*h*) The affidavit, (to be renewed upon every change of circumstances) (*i*) must make known the names and residences (*k*) of the printer and publishers. If there are no more than two proprietors, then it must also specify them: but if there be more than two proprietors, then the names of the two that possess shares, not less in value than the others, must be joined with those of the printers and publishers, (*l*) even if any of them reside out of Great Britain. (*m*)

The affidavit must also contain a description of the *printing house* and the *title of the paper*. Any misrepresentation in it, either by mentioning parties who are not concerned in the paper, or leaving out any who are, makes the deposers liable to the penalties for perjury. (*n*)

This affidavit must be signed by the parties; and the publication of a Newspaper, before it is properly made, will subject them to a penalty of 100*l*. If the printers, publishers, and proprietors, do not exceed four in number, they must all depose. But if they are more numerous, then four are sufficient, provided notice, within

(*g*) 38 Geo. III. c. 78. § 1. (*h*) *Id.* § 1.
(*i*) *Id.* § 7. (*k*) *Id.* § 2. (*l*) *Id.* § 3.
(*m*) *Id.* § 23. (*n*) *Id.* § 5.

seven days after the affidavit is made, be given to all other persons not swearing, that they are named in it. For neglecting to give such notice, a forfeiture of 50*l*. is incurred.

This affidavit, filed by the commissioners, (*o*) or a certified copy made and signed by them, to be delivered on payment of one shilling, (*p*) will, in all matters, be *evidence of itself* against the makers of it. (*q*) A false certificate renders its maker liable to a penalty of 100*l*. (*r*) The prosecutor for penalties, upon producing a Newspaper, need not prove the purchase of it. (*s*) All notices will be sufficiently served, which are left at the printing office named in the act. (*t*) But if another affidavit has been made and delivered to the commissioners prior to the publication of any objectionable matter, in which it is specified that the maker of it has ceased to be engaged in the Newspaper, he will be exonerated from all liability imposed by the first affidavit. (*u*) Evidence of publication.

The *names* of the printers and publishers must also appear on the Newspaper itself;(*x*) and a copy of it, signed by the printer or publisher, must, within six days, be delivered to the commissioners of stamps, (who will pay for it), under a penalty of 100*l*. Such paper may, within two years after the publication, be produced Names on the paper.

(*o*) 38 Geo. III. c. 78. § 9. (*p*) *Id.* § 13 § and 14.
(*q*) *Id.* § 9. and see post p. 275. (*r*) *Id.* § 15, 16.
(*s*) *Id.* § 11. (*t*) *Id.* § 12. (*u*) *Id.* § 12.
(*x*) *Id.* § 8 and § 10. And a printer whose name does not thus appear, cannot recover in an action for work and labour for printing it. Marchant v. Evans, 2 B. Moore, 14.

at the expense of the party applying for it, as evidence in any court of justice. (*y*)

Hawkers. No hawker of Newspapers, or other persons, is allowed to let out any Newspaper to any person or to different persons, or from house to house, on pain of forfeiting 5*l*., to be recovered and applied as other penalties relating to the stamp duties. (*z*)

2. Its contents. A Newspaper is generally made up of *paragraphs*, either *essays* or observations of the editor, and *advertisements*.

Paragraphs. In neither shape can any thing *blasphemous*, *seditious*, or *libellous*, be given to the world. For the proprietor of a Newspaper, although he does not interfere in conducting it, is answerable, *criminally*, as well as civilly, for the acts of his agents by an insertion of offensive matter in his Newspaper. (*a*) The whole publication is considered in law as written by him; for otherwise he might give the form of letters, advertisements, &c., to his observations, and thus clude his merited punishment. In the case of Rex *v.* Woodfall (*b*) (proprietor of the *News*), in which the jury found a verdict of guilty of printing and publishing *only*, Lord Mansfield observed that when the act is in itself unlawful, (as in that case, being a libel on the King, signed *Junius*) the proof of justification or excuse lies on the defendant; and in failure thereof, the law *im-*

(*y*) 38 Geo. III. c. 78. § 17. (*z*) 29 Geo. III. c. 50. § 9.

(*a*) Rex *v.* Walter, 3 Esp. N. P. C. 21. The King *v.* E. Topham, 4 T. R. 127.

(*b*) 5 Burr. 2667.

plies a criminal intent in the proprietor, although it clearly appear that the offensive paragraph was not written by him.

A Newspaper must not be conducted or made use of, to the advantage of the enemies of this country. If any one shall presume to send a Newspaper to a foreign country, not at amity with England, he subjects himself to a penalty of 500*l.* A person, on suspicion of having done so, may be taken before a justice of the peace; and if he does not answer all lawful questions, he will be liable to forfeit 500*l.* (c) Sending newspapers abroad.

Nor can any seditious matter be published in any Newspaper, *under colour* of its having been printed in a foreign paper. (*d*) The proof that it has been so previously printed lies on the defendant. When that circumstance has been established, the matter is left cognizable by the law, as though that clause had never been enacted. (*e*)

In the newspapers are given, by the sufferance of parliament, the speeches that are made in the House of Lords and in the Commons, and also all copies of documents printed at the command of either of them, although they may contain reflections on individuals. (*g*) But if a Reports.

(*c*) 55 Geo. III. c. 185. which repeals 38 Geo. III. c. 78. § 22.

(*d*) 38 Geo. III. c. 78. § 24.

(*e*) *Id.* § 25.

(*g*) Rex *v.* Wright, 8 T. R. 293. It was contended that, although the report of the House of Commons could not itself be considered as a libel, the editor not acting under the authority of the House might be indicted for publishing with a view to general circulation.

member publish his speech himself in a newspaper, and it contain slanderous charges, an information for a libel may be supported against him, (*h*) as well as against the editor.

A correct statement of what passes in a court of justice (*i*) may be published in a newspaper, unless the Court intimate that it is their desire that no report should, *as yet*, be sent forth to the world, (*k*) for fear of prejudicing some of the

(*h*) K. *v.* Lord Abingdon, 1 Esp. N. P. C. 226. and see R. *v.* Creevy, 1 M. and S. 273. Rex *v.* Bate, Dougl. 387.

(*i*) Curry *v.* Walter, 1 Esp. N. P. C. 457. and 1 Bos. and Pul. 525. S. C. and see 5 Esp. N. P. C. 123. 2 Campb. 563.

(*k*) Rex *v.* Wright, 8 T. R. 293. (and see R. *v.* Clement, 4 Barn. & Ald. 218. Post, Chap. VII.) *Lawrence*, J.—The proceedings of courts of justice are daily published, some of which highly reflect on individuals: but I do not know that an information was ever granted against the publishers of them. Many of these proceedings contain no point of law; and are not published under the authority of the sanction of the Courts, but they are printed for the information of the public. Not many years ago an action was brought in the Court of Common Pleas by Mr. Currie *v.* Walter, proprietor of "The Time" for publishing a libel in the paper of "The Times," which supposed libel consisted in merely stating a speech made by a counsel in this Court on a motion for leave to file a criminal information against Mr. Currie. *Lord Chief Justice Eyre*, who tried the cause, ruled that this was not a libel, nor the subject of an action, it being a true account of what had passed in this Court; and in this opinion the Court of Common Pleas afterwards, on a motion for a new trial, all concurred, though some of the judges doubted whether or not the defendant could avail himself of that defence on the general issue. Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally

parties to the suit. And in an action for a libel it must be proved that the account given in the newspaper contains *in substance precisely* what was delivered by the Court.

An information will lie for publishing an injective statement, unconnected with argument, against a judge or jury, for any thing done in their respective capacities, under pretence of its being a report of legal proceedings. (*l*) And no person will be allowed to mix his own observations with what has passed in the Court. (*m*)

known. The general advantage to the country in having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be the subject of such proceedings. The same reasons also apply to the proceedings in parliament: it is of advantage to the public, and even to the legislative bodies, that true accounts of their proceedings should be generally circulated; and they would be deprived of that advantage, if no person could publish their proceedings without being punished as a libeller. Though, therefore, the defendant was not authorized by the House of Commons to publish the report in question; yet, as he only published a true copy of it, I am of opinion that the rule ought to be discharged. Rule discharged.

(*l*) Rex *v.* White, 1 Campb. N. P. C. 359. n. and see Rex *v.* Watson, 2 T. R. 199.

(*m*) Carr *v.* Jones, 3 Smith 491, 503. S. C. under the names of Styles *v.* Nokes, in 7 East. 493. 503. Lord *Ellenborough* and *Grose*, J. observed, that it must not be taken for granted that the publication of every matter which passes in a court of justice, however truly represented, is, under all circumstances, and with whatever motive published, justifiable: but that doctrine must be taken with grains of allowance. It often happens, *said Lord Ellenborough*, that circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry, are very distressing to the feelings of individuals on whom they reflect. And

It seems that editors of newspapers may abuse each other with impunity. But it is actionable to declare that any newspaper is *low in circulation*, and to insinuate that advertisers should avoid it. (*n*)

Advertisements.

The editor of a newspaper cannot, in answer to an indictment, say that the objectionable part is the *advertisement of another person*, and that he has no interest in it; and, therefore, that he ought not to be accountable for it, if he give up the real author. (*o*)

Libellous ones.

But some *advertisements* which appear to reflect on individuals, may be inserted. Thus an advertisement in a newspaper, whereby a person requested to be informed whether another had been guilty of a transaction which amounted to a felony, was held not to be a libel, because the advertiser, or his employer, was *interested* in the discovery; and the enquiry was not made with any intention of wounding his feelings. (*p*)

if such circumstances were afterwards wantonly published, I should hesitate to say that such unnecessary publication was not libellous, merely because the matter had been given in evidence in a Court of justice.

(*n*) Heriot *v.* Stuart, 1 Esp. N. P. C. 437. and see Stuart *v.* Lovell, 1 Stark. 93.

(*o*) Lewis *v.* Walter, 4 Barn. & Ald. 605. Brown *v.* Croome, 2 Stark. 297. 301.

(*p*) Delany *v.* Jones, 4 Esp. N.P.C. 191. *Ellenborough*, C.J. This paper is relied upon as necessarily carrying with it the imputation that the plaintiff was guilty of bigamy. You must be of opinion that it does carry such imputation before you can find a verdict for the plaintiff, as that meaning is necessary to make the paper a libel at all. The plaintiff's counsel contend that you are to take into your consideration only, whether the advertisement conveys a libellous charge against the plaintiff or not? I am of a different

Illegal advertisements.

Many statutes have passed to restrain the publication of certain description of advertisements. Under stat. 9 Ann. c. 6. s. 5. and 10 Ann. c. 26. s. 109. a penalty of 100*l.* is imposed on all persons, (the latter particularly mentioning printers and publishers,) for advertising the keeping of any office for illegal *insurances on marriage*, or offices under pretence of *improving small sums*.

By several statutes the publishing proposals *for gaming in the lotteries* has been restrained. By 22 Geo. III. c. 47. (*q*) it was enacted "that, in order to prevent all adventuring with lottery tickets, other than such as arise from the real and actual sale of tickets, and of such shares as are thereby permitted, it is enacted that it shall not be lawful for any person to sell the chance of any ticket, &c. or insure for or against the drawing of any ticket, *or to publish any proposal for any of the purposes aforesaid*," under the penalty of 50*l.* for every offence. One Smith was held to have incurred the penalty, because he had *published* a proposal in the usual way in his newspaper. (*r*) Lord Kenyon wished it to be understood that the distributor of *hand bills* of a similar description would be equally criminal.

It appeared in 1793 that many printers had

opinion: I conceive the law to be, that though that which is spoken or written may be injurious to the character of the party; yet, if done *bona fide* as with a view of investigating a fact, in which the party making it is interested, it is not libellous.

(*q*) 8 Geo. I. c. 2. 9 Geo. I. c. 19. 6 Geo. II. c. 36. 19 Geo. III. c. 21. s. 7. and 22 Geo. III. c. 47. s. 13.

(*r*) King *v.* Smith, 4 T. R. 414.

incurred penalties under the *lottery acts* for publishing illegal schemes; and, therefore, an act of parliament(s) was passed *to indemnify* them against the consequences.

And any person publicly advertising a reward, holding out a promise that no question should be asked, for the *return of things stolen* or lost, &c. and any person printing or publishing such advertisement, will be liable respectively to forfeit the sum of 50*l.* (*t*)

For advertising, or printing an advertisement, for a public debate on any subject upon the Lord's day, a person subjects himself to a forfeiture of 50*l.* (*u*) The action to be brought within six months.

3. In what instances noticed by the law.

A common newspaper is made *legal evidence* by several acts of parliament, for particular purposes, as of meetings to petition parliament, of notice of moving for a private bill, &c. (*x*)

But the newspaper of which the law takes the most notice is one published by authority, the *London Gazette*; (*y*) in which it is necessary to insert all dissolutions of partnership; (*z*) for

(*s*) The 32 Geo. III. c. 61. indemnifies against the penalties incurred under 3 Geo. I. c. 2. 12 Geo. II. c. 28. 22 Geo. III. c. 47. 27 Geo. III. c. 1.

(*t*) 25 Geo. II. c. 36. (*u*) 21 Geo. III. c. 49. s. 5.

(*x*) 36 Geo. III. c. 8. s. 1. and see Boydell *v.* Drummond, 2 Campb. N. P. C. 157. and Lord Gallway *v.* Matthews, 10 East. 264. Jenkins *v.* Blizard, 1 Stark. 418.

(*y*) First published in 1642. There is also a Dublin Gazette published by authority.

(*z*) Graham and another *v.* Thompson and another, Peak. Rep. 42. Graham *v.* Hope, Peake Rep. 154. and see 1 Sid.

there is a strong presumption that every body reads the Gazette, though it is not always held to be sufficient, without notice to each customer, unless it can be shewn that it is probable that the defendant saw it. Although the instructions for the dissolution of a partnership cannot be read without an agreement stamp; (*a*) yet the Gazette may, for it is only a mere recital that the partnership has been dissolved. (*b*)

Notices in gazette.

By several acts of parliament a notice published in the London Gazette is deemed to be good and sufficient notice to all his majesty's subjects. Several instances are given in the note. (*c*)

Rep. 127. Godfrey *v.* Turnbull and another, 1 Esp. Rep. 371. Peak. Rep. 155. n. S. C. Leeson *v.* Holt, 1 Stark. N.P.C. 186. Newsome *v.* Coles, 2 Campb. 617.

(*a*) May *v.* Smith, 1 Esp. N. P. C. 283.

(*b*) Jenkins *v.* Blizard, 1 Stark. N. P. C. 418.

(*c*) An alehouse keeper is not liable to the penalty for entertaining persons against whom process has issued for offences against the laws of the customs or assize, after *notice* has been given in the *Gazette* of the offenders having absconded, 9 Geo. II. c. 35. s. 30. and s. 31. Annuities granted on the duty on plate are to cease on notice in the Gazette, and payment of principal, 6 Geo. I. c. 11. s. 28. s. 38. Notice in the London Gazette of certain transactions at the Bank of England, 7 Ann. c. 27. s. 72. 3 Geo. I. c. 8. s. 38. and also of the meetings of commissioners of bankrupt, 5 Geo. II. c. 30. s. 2. is in each case deemed good and sufficient notice. The same rule applies to the proclamations for smugglers, 19 Geo. II. c. 34. s. 2. or felons, 9 Geo. I. c. 22. s. 4. to surrender themselves. And when a party has been robbed, and intends to sue the hundred on 27 Eliz. c. 13. 8 Geo. II. c. 16., he must give notice to that effect in the London Gazette, 38 Geo. III. c. 76. &c. &c.

III. Pamphlets.

Definition of a pamphlet.

A Pamphlet is defined to be a book consisting of one sheet, and not exceeding eight sheets in octavo, or any other lesser page; or not exceeding twelve sheets in quarto, or twenty sheets in folio. (*d*)

Pamphlets must now be distinguished into those that contain *more*, and those that contain *two sheets*, or *less* than *two sheets*. The former, for sake of distinction, may be denominated the *larger ones*; the latter, the *smaller ones*.

1. Larger pamphlets.

The larger pamphlets differ from other books only, by the mode of frequent or continuing publication; by the stamp duty; and by the necessity of an entry of them at the stamp office, to collect the duties on the advertisements which appear on the covers or wrappers.

2. Smaller pamphlets.

Of the smaller pamphlets the laws vary according as the matter or *contents* of them are of a *literary* or *political* character.

Literary ones.

Literary pamphlets of the smaller kind, like all the larger ones, are only distinguishable from other books by the stamp duty that is imposed on them, and the manner of publication.

Political ones.

But the smaller political pamphlets have of late been assimilated to newspapers: and are described in the statute 60 Geo. III. c. 9. to be, all pamphlets and papers containing public

(*d*) All the parts or numbers of any book or literary work, published in sizes answering to this description, are deemed pamphlets. 60 Geo. III. c. 9. s. 27.

news, intelligence, or occurrences, or remarks thereon, or in any matter in church or state, printed in the united kingdom for sale, and published periodically, or in parts, or numbers, at intervals not exceeding *twenty-six days*; where any of them respectively shall not exceed two sheets, (*e*) (being not less than twenty-one inches in length, and seventeen inches in breadth, (*f*) of which the cover forms no part,) (*g*) or shall be published for sale for less than *sixpence*, exclusive of the duty imposed by that act. Such papers are to be deemed to be within the 38 Geo. III. c. 78. (*h*) and 55 Geo. III. c. 30. 56 Geo. III. c. 56. and 55 Geo. III. c. 185. (*i*) and all other acts of parliament relating to newspapers.

It will be necessary to examine these political smaller pamphlets, as to

1. The mode of publication.
2. Their contents.

1. Mode of publication. The bond.

No person, (*k*) after thirty days from the 30th Dec. 1819, is to be allowed to publish a *newspaper* or any such *pamphlets* described above as the smaller ones, until he has entered into a recognizance before a Baron of the Exchequer; or has executed and delivered to some neighbouring justice of the peace, a bond to the King, with two or three sureties in three hundred pounds, if such newspaper, &c. is printed in

(*e*) 60 Geo. III. c. 9. § 1. (*f*) *Id.* § 2.
(*g*) *Id.* § 3. (*h*) Ante, p. 250, 1.
(*i*) Post, p. 265. (*k*) 60 Geo. III. c. 9. § 8.

London, or within twenty miles; and in two hundred pounds, if printed elsewhere, and his *sureties in a like sum* in the whole; *conditioned* for the payment of such penalty as may be imposed on publishing any *blasphemous or seditious libel*, under a penalty of twenty pounds.

The sureties.

If a surety (*n*) has paid the whole or part of the penalty in the recognizance or bond, or has become bankrupt, or has been discharged as an insolvent debtor, the person for whom he was bound must not publish any newspaper, &c. until he has (on being required so to do by the commissioners of stamps) entered into a new recognizance or bond, with sureties, in the same manner, and to the same amount as before, under a penalty of twenty pounds.

But a surety (*o*) may withdraw himself on giving twenty days' notice in writing to the commissioners of stamps, and to the persons for whom he is surety; and at the expiration of such notice he will only be liable for penalties previously incurred. The person for whom such surety was bound must not publish any newspaper, &c. until he has entered into a new recognizance or bond, under a penalty of twenty pounds. This bond is not subject to any stamp duty. (*p*)

A list of the recognizances is sent four times a year, and the bonds are transmitted by the justice within ten days from the time they receive them, to the commissioners of stamps. (*q*)

(*n*) 60 Geo. III. c. 9. s. 9.
(*o*) *Id.* s. 10.
(*p*) *Id.* s. 11.
(*q*) *Id.* s. 12.

A pamphlet, the day on which it is published, or within six days, must be delivered to the commissioners of stamps, (*r*) signed by the printer or publisher, with his name and place of abode, (which is to be kept and paid for by the commissioners) under a penalty of one hundred pounds. Delivery of pamphlet to commissioners.

If commissioners, &c. (*s*) refuse to receive or pay for any copy of such pamphlet, &c. on account of the same not appearing to be within the meaning of the act, they must, if required, deliver to the printer or publisher *a certificate* that a copy of such pamphlet, &c. has been by him duly offered to be delivered, and the printer, &c. will thereupon be exempt from all penalties.

Upon every such pamphlet, &c. must be printed *the price* at which it is published for sale, and the day on which it is first published, which must be on the *first day of every month*, or within two days before or after it, under a penalty of 20*l*. And the publisher, or any person who, within two months after the day of publication printed thereon, sells any such pamphlets, &c. on which the price printed shall be sixpence, or above that sum, *for a less price* than sixpence, he will forfeit 20*l*.: but this rule does not extend to the allowance made by the publisher to a distributor by retail. (*t*) The day and price to be printed on it. Retail dealers.

If the contents of the smaller pamphlets are of a literary nature, quite distinct from any thing political or blasphemous, then the authors are subject only to the laws that affect the contents 2. Contents of smaller pamphlets.

(*r*) 60 Geo. III. c. 9. s. 13.
(*s*) *Id.* s. 14.
(*t*) *Id.* s. 4. and s. 5.

of the larger pamphlets, or (except the stamp duty) to the law of periodical publications in general. (*u*) But the author of smaller pamphlets, which contain any seditious libels, or blasphemy, are punished in a peculiar manner, which will be explained. (*v*)

IV. Stamp Duties.

Stamp duties differing in amount are imposed on *advertisements* whether they are published on the wrappers of periodical publications, or in the gazette and newspapers, and also on the newspaper itself, and on pamphlets. The duty on the pamphlet varies according to its size, and the nature of its contents.

1. Duty on reviews and advertisements.

A review or magazine in general exceeding eight sheets, is exempt from the duties on pamphlets.

For every advertisement contained in or published on the wrapper of any periodical publication, or with any part or number of any book, or literary work published in parts or numbers, a duty of three shillings and sixpence is imposed; and no stamps are to be delivered out for pamphlets until security has first been given for payment of the duty of the advertisement. (*x*)

Hence it is required, whenever a work is published in parts, although it may be too large to be deemed a pamphlet, that *the first number* must be entered at the stamp office that the duties may be collected.

(*u*) Ante, 260. and post, 266. (*v*) Post, 271.

(*x*) 5 Geo. III. c. 46. s. 8. and 55 Geo. III. c. 185. sch.

2. Duty on Newspapers.

A stamp duty was first put on a newspaper in the reign of Queen Anne. (*y*) It has been increased at different times by many acts of parliament. (*z*)

Discount.

That duty is now four pence on every newspaper: (*a*) but a discount (*b*) of 20*l. per cent.* is allowed for prompt payment of any sum of 10*l.* or upwards, when the price of the paper does not exceed sevenpence; and 4*l. per cent.* to those who sell for a higher price than sevenpence. The newspaper must be marked to shew that the discount is allowed, and the price of it must be printed on it. A penalty of 20*l.* is inflicted on those who sell it for more than the printed price.

Unstamped newspapers.

No persons but commissioners of stamps or their officer can *supply paper* stamped for printing newspapers, until the person so supplying has given security to deliver once in six weeks an account of the quantities and kind sold, under a penalty of 100*l.* (*c*) If the papers are not duly stamped, the publishers stand indebted to the king in the sum that would have accrued if they

(*y*) 10 Ann. c. 19. s. 101.

(*z*) 11 Geo. I. c. 8. s. 14. 30 Geo. II. c. 19. s. 1. 13 Geo. III. c. 65. 16 Geo. III. c. 34. s. 7. The 55 Geo. III. c. 78. (sch. pt. 4.) and 55 Geo. III. c. 80. impose and regulate the duties on pamphlets, almanacks, and newspapers, in Ireland.

(*a*) 55 Geo. III. c. 185. repealing 37 Geo. III. c. 90. s. 22.

(*b*) *Id.* s. 9. This discount was first given by 29 Geo. III. c. 50. s. 8. instead of allowances on the cancelling of newspapers remaining unsold, which was extended by 37 Geo. III. c. 90. s. 22. and also by 41 Geo. III. c. 10. 42 Geo. III. c. 99. 44 Geo. III. c. 98 sch. C. and 49 Geo. III. c. 50.

(*c*) 38 Geo. III. c. 78. s. 26.

had been properly stamped. (*d*) There are several penalties respecting *unstamped* newspapers: 20*l*. for printing and publishing, (*e*) or for having possession of them, and 100*l*. for sending them out of the kingdom. (*f*) And whoever sells newspapers or pamphlets unstamped may be sent to the House of Correction for any time not exceeding three months, whilst the informer is entitled to a reward of 20*s*. (*g*)

On the advertisements in them.

A duty of 3*s*. 6*d*. is imposed on every advertisement in the London Gazette or other newspapers. (*h*)

These duties (*i*) are under the government of the commissioners of stamps.

The duties (*k*) are to be paid into the exchequer, and carried to the account of the consolidated fund; and the allowances and discounts thereon are to be made in the same manner as those on newspapers. It is felony, without benefit of clergy, to counterfeit the dye, or forge the stamp of newspapers, &c.

3. Duty on pamphlets. The larger ones.

On every sheet of any kind of paper contained *in one copy* of a pamphlet of the *larger* kind, and of the *literary smaller* ones, a duty of three shillings is imposed. (*l*)

One printed copy of every such pamphlet must be sent within six days after publication to the

(*d*) 38 Geo. III. c. 78. s. 27. (*e*) *Id.* s. 18, 19, 20.
(*f*) *Id.* s. 21, 22. (*g*) 16 Geo. II. c. 26. s. 5.
(*h*) 55 Geo. III. c. 185. sch. repealing 20 Geo. III. c. 28. s. 1. and 37 Geo. III. c. 90.
(*i*) 60 Geo. III. c. 9. s. 23.
(*k*) *Id.* s. 24.
(*l*) 55 Geo. III. c. 185. Ante, 260.

office of stamps, if it be published in London; if in the country, then it must be taken to a collector of stamps within fourteen days, (*m*) or all persons concerned with it will be liable to forfeit 20*l*., and all costs of each suit; (*n*) and a like penalty will be inflicted upon every person who sells it without the name and place of abode of the publisher being printed upon it. (*o*)

The *smaller political* pamphlets are subjected (*p*) to the same stamp duties as on newspapers, with the same allowances and discounts, and subject to all rules and regulations respecting newspapers. But they are to be free from the duties on the old or large pamphlets, (*q*) and any person selling such pamphlet *unstamped* is rendered liable to a penalty of 20*l*.(*r*)

4. Exemptions.

The works exempted from the duties on newspapers (*s*) and the pamphlets made newspapers (*t*) are,—acts of parliament, proclamations, orders of council, forms of prayer and thanksgiving, and acts of state, ordered to be printed by his Majesty; printed votes or other matters, by order of either House of Parliament; books commonly used in the schools of Great Britain; books containing only matters of devotion or piety; any paper containing a single advertisement printed and dispersed separately;

(*m*) 10 Ann. c. 19. s. 111. to which s. 4. of 55 Geo. III. c. 185. refers.

(*n*) 10 Ann. c. 19. s. 112.

(*o*) *Id.* s. 113.

(*p*) 60 Geo. III. c. 9. s. 1. and s. 24.

(*q*) *Id.* s. 7.

(*r*) *Id.* s. 15.

(*s*) 55 Geo. III. c. 185.

(*t*) 60 Geo. III. c. 9. s. 26.

daily accounts or bills of goods imported and exported, and the weekly bills of mortality, provided such bills or accounts do not contain any other matter than what hath been usually comprized therein. And also any work reprinted and republished in parts or numbers, whether wholly reprinted or abridged; provided the work was first printed and published two years before the reprinting and republication, and was not first published in parts or numbers.(*u*)

V. The Property in Periodical Publications.

The property in periodical publications is similar to that which has been shewn to exist generally in a book.(*v*) There are some peculiarities which must be here noticed, arising from their contents, and the manner in which they are sold. The matter of one number seldom having any reference to other parts of the work, it would be an easy task to obtrude a spurious publication of the same nature upon the public.

1. Property in review.

Hence, although generally two books may bear the same *title*, yet there is a property in the name given to a periodical publication. It has been decided that the title, form, and mode of publication of a *magazine* (*w*) cannot be imitated in such a

(*u*) 60 Geo. III. c. 9. s. 27.

(*v*) Ante, 219. Post Chap. VII.

(*w*) Hogg *v.* Kirby, 8 Ves. 215. And see Sedon *v.* Serrate, cited 2 Ves. and Beam. 220. Hogg published a work under the title of the *Wonderful Magazine*, by William Granger, Esq., a fictitious name. Kirby agreed to sell

manner as would necessarily mislead the public, and induce them to purchase the latter work instead of the continuing parts of the former one.

It is, however, lawful for any person to publish a magazine under a *similar* though not the it. After five numbers had appeared Kirby published a work under a similar title, described as the *new series improved.* In Kirby's first number was contained an index to the contents of the five numbers already published. One article, not finished in the fifth number, was continued in Kirby's, by commencing with the word at the bottom of the last page. *Eldon*, C. In this case, protesting against the argument that a man is not at liberty to do any thing which can affect the sale of another work of this kind, and that because the sale is affected, therefore there is an inquiry; (for if there is a fair competition by another original work really new, be the loss what it may, there is no damage or inquiry). I shall state the question to be, not whether this work is the same, but in a question between these parties whether the defendant has not represented it to be the same, and whether the injury to the plaintiff is not as great. And the loss accruing ought not to be regarded in equity upon the same principles between them, as it was in fact the same work. Upon the point whether the work was in fact meant to be represented to the public as the same, I do not say, that is not a question for a jury. But I must act upon the inference from the circumstances; and it is impossible not to say, till this is better explained, an intention does appear both upon the transaction as to the fifth number and the other circumstances; in some degree upon the appearance of the outside, in a great degree upon the first page, the index, and the promised contents, to state this as a continuation of the former work, in a new series indeed. I am not here to speculate upon the probable consequences of such conduct; for I have the actual consequences as far as fair reasoning can determine, that out of 2,000 purchasers 1,800 have bought this, a part of the old work. The point whether he,

same title, and of the like nature, if the latter be *distinctly different* from the former, and nothing has been done to injure the sale of the former work. (x)

Communications. The *communications from correspondents* to the editors or proprietors of periodical publications are of course the property of the person to whom they are directed; and cannot be published by any other person, who by chance may have obtained possession of them. (y)

2. Property in pamphlets. The property in a pamphlet is exactly the same as that in a common book.

3. Property in a newspaper. The property in a newspaper is personal, and may be dealt with like all other personalty. It may, however, be useful to collect the cases that relate particularly to them.

It may be devised. The printer of a newspaper

who carries his work into the world as that of another person shall not as between them be considered as publishing that work, if the consequences are the same, is new; and therefore fit to be discussed elsewhere as well as here. I must incur the hazard of occasioning finally some injurious consequence to one party or the other. The proper course will be to alter the terms of this injunction so as to make it clear, that is, to operate upon nothing but the publication handed out to the world as thecontinuation of the plaintiff's work, and to direct that as to these numbers that are handed out as such continuation the plaintiff shall bring an action, the defendant to plead without delay, that it may be tried with all due speed; then they who apply to dissolve the injunction shall imply, that reviews, magazines, and other works of this species may not be multiplied, and therefore shall alter the injunction myself.

(x) 8 Ves. 222, 3. (y) 8 Ves. 215.

(the Bath Chronicle), (x) bequeathed to his widow the benefit of that trade, subject to the trust of maintaining and educating her family. The foreman, by her assistance in giving him the use of the letter-press, &c. on the premises, set up a paper bearing the same name. An injunction was granted, at the request of the executors, to restrain him from carrying it on.

Bankruptcy of proprietor.

The interest in a newspaper, although of a fluctuating nature, comes within the meaning of "goods and chattels" in the bankrupt statutes; and therefore passes by the assignment of the commissioners, if the proprietor become a bankrupt. (*a*)

And if the printer and publisher of a newspaper assign his interest in it to a creditor as a security, but continues to print and publish as before, and *no affidavit of the change of interest has been delivered* to the commissioners of stamps, and he become bankrupt, the right to the paper will pass to his assignees. (*b*)

VI. Legal Proceedings peculiar to Periodical Publications.

The legal proceedings in respect of periodical publications, independent of those which may be taken to protect the copyright in them, take place

(x) Keene *v.* Harris, cited in 17 Ves. 338. and see Cruttwell *v.* Lye, 17 Ves. 335. and 8 Ves. 217.

(*a*) Longman *v.* Tripp and another, 2 New Rep. 67. See as to bankrupt patentee of an invention, ante, 166.

(*b*) 2 New Rep. 67.

by summons before *justices of the peace*, or by indictment or action in the courts of law. The manner in which the copyright *in general* to a book is protected will be investigated hereafter; but, inasmuch as the present Chapter is devoted to publications that appear periodically, this place seems most proper for introducing the practical part of the law peculiar to them.

1. Justices of the peace.

The power given to justices of the peace over *newspapers* is very great. Two of them may hear and determine offences against the 10 Ann. (*d*) in relation to pamphlets and newspapers, on complaint made within three months, and on conviction, either on view or information, they may issue warrants for levying the penalties on the goods of the offender, and cause sale to be made if they are not redeemed in six days; and, in default of goods, they may commit the offender to prison. *An appeal* is given to justices at sessions, who are finally to determine the same; and, in case of conviction, issue warrants. The justices may mitigate the penalty, so that they do not reduce it lower than one-fourth part above the costs.

It may be made (*e*) a part of the condition of the recognizance of a person, held to bail for publishing a libel, that he shall be of *good behaviour* during the continuance of the recognizance.

All penalties (*f*) imposed by 60 Geo. III. c. 9. are to be recovered before any two justices of the

(*d*) 10 Ann. c. 19. s. 120.
(*e*) 60 Geo. III. c. 9. s. 16.
(*f*) *Id.* s. 17.

peace of the county, &c. where the offence is committed: but no larger amount in the whole than one hundred pounds can be recovered before justices of peace, for penalties incurred in one day.

Two justices, (g) in all cases in which they are authorized to determine offences against that act, upon complaint made within *three months* after the offence, may summon the party accused, and the witnesses; and, upon appearance or contempt of the party in not appearing, they may examine the witnesses on oath, and give judgment for the penalties incurred; and, in case the penalties are not immediately paid, may commit the offender for a time not exceeding six months, unless such penalties are sooner paid. The party convicted may, on giving security, to the amount of the penalties adjudged together with such costs as may be awarded in case judgment is affirmed, *appeal to the next quarter or general sessions*, which court may summon witnesses, and hear and determine the same; and, on judgment being affirmed, they may award such costs against the appellant, as they may think proper. They may mitigate the penalties and at the same time allow the costs of the officers or informers above such mitigation, if it is done so as not to reduce the penalty below one fourth of its original amount over and above the costs.

Witnesses (*h*) summoned to attend before the justices, either for the prosecutor or the person accused, neglecting to attend, or appearing and refusing to give evidence, without a reasonable excuse, are liable to forfeit twenty pounds. Witnesses.

(g) 60 Geo. III. c. 9. s. 18. (*h*) *Id.* s. 19.

No removal of cause.

No order (*i*) or conviction, made under the acts respecting newspapers by any justices of peace, can be removed by any writ.

It is enacted that no person (*k*) shall commence any action or information in any of his majesty's courts, or before any justices of peace, for any penalty under those acts, unless in the name of the Attorney-General in England or Ireland, or the Lord Advocate in Scotland, or in the name of the solicitor or some other officers of the stamp duties in England, Scotland, or Ireland. All other actions, &c. are declared to be void.

2. The indictment.

Legal proceedings may be maintained against the authors and publishers of periodical works for misconduct, in the same manner as against other publishers, by indictment or information; (*l*) except as to the evidence of publication, which will be detailed in this chapter. (*m*)

3. Actions at law.

The penalties inflicted by the different statutes may also be recovered in any of the courts of common law.

All actions to recover penalties on the newspaper acts must be brought within six calendar months; and if the defendant should recover, he will be entitled to treble costs. (*n*)

Actions on newspapers. Declaration, variance.

If a party declare *in tort*, as the proprietor, *editor*, and publisher of a newspaper, and it ap-

(*i*) 38 Geo. III. c. 78. s. 20. and 60 Geo. III. c. 9. s. 20, 21.

(*k*) *Id.* s. 22.

(*l*) See post Chap. VIII.

(*m*) See post from p. 275. to p. 279.

(*n*) By 37 Geo. III. c. 90. s. 38., the provisions of which appear to be extended to 53 Geo. III. c. 185. by s. 4. and see 60 Geo. III. c. 9. s. 17.

pear in evidence that another person is the editor, but that it is conducted under the inspection of the plaintiff, the averment is entire; and he cannot recover as proprietor, (*o*) not even for distinct injuries committed against him in his separate rights of proprietor and publisher.

Evidence of newspaper.

The manner in which newspapers must be published, and also the mode, pointed out by the 38 Geo. III. c. 78., of producing them in evidence against the proprietors, has been stated. (*p*) The construction which has been put upon the clauses of that statute, now require attention.

It has been decided that the affidavit left at the stamp office, and a newspaper answering the *whole* description contained in that affidavit, produced by a person from the stamp office, is evidence, not only of the publication of the paper, but that it took place *in the county in which it is described as having been printed*; and that the provisions in the 11th section, which make it unnecessary to prove that the newspaper to which the trial relates was purchased at any house, apply to plaintiffs in *civil suits*, and prosecutors in *criminal ones*, as well as to persons seeking to recover *penalties*. (*q*)

(*o*) Heriot *v.* Stuart, 1 Esp. N. P. C. 438.

(*p*) 38 Geo. III. c. 78. s. 10. ante 251.

(*q*) The King *v.* Hart and another, 10 East. 91. *Bayley*. J. As to the evidence of publication, the statute was passed, as the title of it states, for the purpose of "preventing the mischiefs arising from printing and publishing newspapers by persons unknown;" and it was meant to facilitate the proceedings, either civilly or criminally, against the several persons concerned in such publications. For this purpose the

And the certified copy of the affidavit sworn to by the defendants at the stamp-office, and a newspaper corresponding with the title of the

act requires an affidavit to be made by the printers, publishers, and proprietors, specifying their names and places of abode, a true description of the house where the paper is to be printed, and the title of the paper. And such affidavit is made conclusive of the several facts stated in it, as against the persons signing it, unless they shew that they ceased to be the printers before the period of the particular publication complained of. Now, suppose the act had stopped there, and it had been proved, as in this case, that a paper, such as is described in the affidavit made and signed by these defendants, had been published, the affidavit is made conclusive evidence against them that one of the defendants was the printer, and the other the proprietor of a paper so entitled, and that it was printed at the place therein described, which is within the city of London, that would have been *prima facie* evidence that the paper produced, tallying with that description, was published by them there, and could have called upon them to prove that it was a fabrication; and, if it were, there could have been no difficulty in making that proof. But the act goes further; and by the 11th section expressly enacts, that after such affidavits shall be produced in evidence against the persons signing the same, &c. and after a newspaper shall be produced in evidence entitled in the same manner as the newspaper mentioned in such affidavit, and wherein the name of the printer and publisher, and place of printing, shall be the same, it *shall not be necessary* for the plaintiff, informant, or prosecutor, or person seeking to recover any of the penalties given by this act, to *prove that the newspaper to which such trial relates was purchased at any house*, &c. belonging to or occupied by the defendants, or their servants, &c. or where they usually carry on the business of printing or publishing such paper, or where the same is usually sold. And I cannot consider, as the objection supposes, that all these descriptions of persons, namely, plaintiff, informant, or *prosecutor*, or person seeking, &c. apply to the same person

newspaper described in the affidavit, were held to be sufficient evidence to support a count in an information charging the defendants with *composing*, printing, and publishing a libel. (*r*)

With respect to the certificate, (s) if it does not appear in the jurat, that the person, before whom it was made, had authority to take it, proof must be adduced that he had such power. (*t*)

Evidence at common law.

However, when the plaintiff is otherwise at a fault, he may have recourse to *common law*, at which it is sufficient evidence of publication, to give *the original affidavit* signed by the defendant, stating, that the party is the sole proprietor of the newspaper in question, and also naming the place where it is to be published, *accompanied by a newspaper* of a corresponding title, (containing the alleged libel,) which had been purchased at the place described in the affidavit. (*u*)

seeking to recover penalties given by the act: but I take these words to apply to a plaintiff seeking to recover damages in an action for the civil injury sustained by him from the publication of a libel; to the informant by an information granted by this Court, or exhibited by the Attorney-General for the same; to a *prosecutor* prosecuting by indictment for the libel; or, lastly, to any person seeking to recover penalties under the act. Therefore, independent of the 11th section, I should have thought that the evidence offered was *prima facie* evidence of the publication of the paper by the defendants in London. But, taking that section in aid, which is not confined to suits for recovering penalties, there can be no doubt that the necessity of further proof was superseded. Rule refused.

(*r*) Rex *v.* Hunt and another, 2 Campb. N. P. C. 583.

(*s*) Phil. on Evidence, p. 243.

(*t*) Rex *v.* White, 3 Camph. N. P. C. 99.

(*u*) *Id.* 100.

Evidence. Before the passing of 38 Geo. III. other modes had been resorted to in order to connect persons with the publication of newspapers. Thus it was considered sufficient evidence that a person was the publisher of a newspaper, when it was proved, that it was sold at his office, and that he, as proprietor of the paper, had given a bond to the stamp-office pursuant to the 29 Geo. III. c. 30. s. 10. for securing the duties on the advertisements, and that he had occasionally applied there respecting the duties on it. (*x*) And the publication of a newspaper was sufficiently proved by the evidence of the printer, who said that it was published in the usual way. (*y*)

Though a publisher is liable to a penalty for not having his newspaper stamped; yet, thus *unstamped*, it may be given in evidence; for this case is not like that of deeds and agreements, where the acts of parliament expressly declare that no such instrument shall be read in evidence until it is stamped. (*z*)

To explain the libel, and to mitigate the damages, the defendant has a right to have read in evidence extracts from a *different part* of the

(*x*) The King v. Topham, 4 T. R. 126.

(*y*) Peake N. P. C. 76. In the case of the King v. Weaver, Jan. 1821, K. B. MSS. it appeared that the place of publication, mentioned in the affidavit, and the one printed on the paper, were not the same. It was held not to be sufficient evidence of publication that the names on the paper were the same as those on the door of the house where the paper produced was bought.

(*z*) The King v. Pearce, Peake N. P. C. 75. and see 35 Geo. III. c. 78. s. 18, 19 and 20.

same newspaper, connected with the subject of the libellous passage. (*a*)

The publication of a weekly paper called Cobbett's Political Register, containing a libel on Mr. Plunkett, was substantiated by proof of a copy having been bought at his shop. (*b*) For the purpose of shewing that the first paper was circulated regularly and deliberately, the witness was asked, whether he had since purchased other papers of the same title at the same office.

Bill in Chancery to discover names.

But if a person has been libelled in a newspaper, and suspects the author to be a proprietor not named in the affidavit, he may file a bill in Chancery for a discovery of the names of any persons concerned in it. The defendants are not allowed to plead or demur, but must make the discovery required. Such information, when obtained, cannot however be used in any other proceeding, except in that for which the discovery is made. (*c*)

(*a*) R. v. Lambert, 2 Campb. N. P. C. 400. and see Tabart v. Tipper, 1 Campb. N. P. C. 350.

(*b*) Plunkett v. Cobbett, 5 Esp. N. P. C. 136.

(*c*) 38 Geo. III. c. 78. s. 28.

CHAP. V.

Of Musical and Dramatic Compositions.

The laws respecting the copyright in musical and dramatic works are very similar; and it therefore seems proper to place them together in the same chapter.

I. Musical Compositions.

The decisions on this branch of the law with regard to music will lead to the consideration of,

1. Whether a musical composition is protected by the copyright acts.
2. What property the composer has in it.
3. The manner of assigning it.
4. Piracy by taking it down at Theatre.

Musical compositions are books to be protected by the statute of 8 Anne, and those acts of parliament which have enlarged the benefits to be derived from it. (*a*)

(*a*) Bach v. Longman, Cowp. 623. This was a case sent from the Court of Chancery for the opinion of the Court of Law, whether a musical composition, a *Sonata* for the harpsichord, was within the statute of 8 Anne, c. 19.

We have seen what kind of publications are considered as books within the meaning of the words of that statute "books and *other writings*." Whence it appears that the protection is extended to a piece of music published on a *single sheet* of paper. (*b*) And that it is not material whether the matter pirated be a whole book of music, or some one tune of a particular name in a work bearing a different title. (*c*)

The *property* in a piece of music is exactly the same as that in a book. And therefore upon 2. Property in.

Lord Mansfield. The words of the act of parliament are very large:—"*Books and other writings.*" It is not confined to language or letters. Music is a science: it may be *written*; and the mode of conveying the ideas is by signs and marks. A person may use the copyright by playing it: but he has no right to rob the author of the profit, by multiplying copies, and disposing of them to his own use. If the narrow interpretation contended for in the argument were to hold, it would equally apply to algebra, mathematics, arithmetic, hieroglyphics. All these are conveyed by signs and figures. There is no colour for saying that music is not within the act.

(*b*) Clementi *v.* Golding (or Goulding) 11 East. 244. 2 Campb. N. P. C. 25. S. C.

(*c*) White *v.* Geroch, 1 Chit. Rep. 26. (S. C. in 2 Barn. and Ald. 298. ante p. 220.) *Abbott*, C. J. I am of opinion that the words of this act of parliament (54 Geo. III. c. 156) mean all original compositions, whether they are large or small; and are consequently entitled to the protection intended by the legislature. It has been held that a musical composition is a book; and that an action is maintainable for pirating a single sheet of music. The only distinction here is, that this piece of music is found in company with others instead of being printed by itself; and it seems to me that that does not make any difference in the principle of the question. Many different books or subjects may be

a person proving that he was the *composer* of a musical air, although the piracy was endeavoured to be justified, by shewing that the song was composed to be sung at the Italian Opera House, and that all songs brought out there belonged to the establishment, Lord Kenyon held, that such defence could not be supported; that the statute vests the property in the author; and that no such private regulation could be allowed to interfere with the public right. (*d*)

3. Assignment of.

The *assignment* of the copyright of music must be in writing. (*e*) Even where a composer had acquiesced for six years in the publication of a piece of music, and had given a receipt for the price of it, the court did not consider that he had transferred his interest in the copyright. (*f*) But if he has given leave to several persons to copy his book, or has not asserted his right, against violations by many persons, for several years, (*g*) the Lord Chancellor will not grant an injunction to restrain any one from pirating the work, until the author's right at common law is first established.

found in one: but that is no reason why each should not have the protection of the statute. Rule for a new trial refused.

(*d*) Storace *v.* Longman, 2 Camp. N. P. C. 27 n.: and see Wyatt *v.* Barnard, 3 V. & B. 77.

(*e*) See Power *v.* Walker, 4 Camp. N. P. C. 8. 3 M. & S. 7. S. C. and see Morris *v.* Kelly, 1 Jac. & Walk. 481. and post, Chap. VII. "*Author and his Assignee.*"

(*f*) Latour *v.* Bland, 2 Stark. N. P. C. 382. and see Moore *v.* Walker, 4 Camp. N P. C. 9. n.

(*g*) Platt *v.* Button, Coop. 303. S. C. 19 Ves. 447.

On the same principles by which persons are not allowed to take down a play in short hand at a Theatre, and publish it, they, who can write music as they hear it publicly rehearsed, may be prevented by injunction from violating the property of the composer by publishing it. (*h*)

4. Piracy of, by taking it down at theatre.

It may be observed that as the copyright in music is founded on the statute of 8 Anne, c. 19. all the reasoning respecting *books in general* applies to musical works. (*i*)

II. Dramatic Compositions.

The laws respecting dramatic compositions will perhaps be best explained by a consideration of plays,

1. Whenever they are printed.
2. Whilst they continue in manuscript.
3. Whenever they have been publicly represented.

Plays or dramatic pieces of every description, when printed and published, are books within the meaning of the statute of 8 Anne, c. 19.; and no one with impunity can multiply copies of them. (*k*)

1. Printed pieces.

The protection of the law is also extended to a dramatic composition, whilst it is yet in manu-

2. Manuscript plays.

(*h*) Post p. 284.

(*i*) See ante p. 218, and Rennet *v.* Thompson cited in 2 Bro. C. C. 80. as to the resulting term.

(*k*) See ante p. 214, as to piracy in general. *Observations* on performances at a theatre are not libellous, unless it appear that they are malevolent. Dibdin *v.* Swann, 1 Esp. N. P. C. 28. Ashley *v.* Harrison, Peake Rep. 194. and see Clifford *v.* Brandon, 2 Campb. 358. also ante 247.

script, and has not been publicly represented, in the same manner as to manuscripts in general. (*l*)

There is not any case in the courts of *common law*, in which it is determined whether the *representation* of a dramatic composition, that has *not been printed* but of which a copy has been obtained, is a piracy: but it would appear, from the decision in Coleman *v.* Walthen, (*m*) that it is not. However, *injunctions* are always granted to restrain persons from *acting* and also from *printing* plays which have not been published: thus, where a farce had not been published by its author, and a person was employed to take it down from the mouth of the performers, an injunction was granted, after some part of it had appeared in a magazine, to prevent the insertion of the remainder. (*n*)

3. Publication by acting them.

Much doubt formerly existed, whether the mere *acting* of a play, which had been *printed and published*, constituted a piracy, or an infringement of the copyright. In the *common law* courts it has been decided, that proof, that the defendant acted a piece on the stage of which the plaintiff had bought the copyright, was not evidence of a publication. (*o*)

(*l*) See ante p. 221.

(*m*) 5 T. R. 245.

(*n*) Macklin *v.* Richardson, Amb. 694.

(*o*) Coleman *v.* Walthen, 5 T. R. 245. This was an action on the statute of Anne for publishing an entertainment called *The Agreeable Surprize.* The plaintiff had purchased the copyright from O'Keeffe, the author; and the only evidence of the publication by the defendant was the representation of this piece upon his stage at Richmond.

And an action cannot be maintained against a person, who at his theatre publicly represents for profit an entertainment, which is *an abridgment* or alteration of a play printed and published by its author. (*p*)

But *in equity* injunctions have been and continue to be granted, to stop the performance of printed dramatic pieces at the instance or request of the author or proprietors of them. (*q*)

The transition from plays to players (*r*) is so easy and natural, that the wish to make this Treatise full and satisfactory to every class of Players.

Lord Kenyon, C. J.—The statute for the protection of copyright only extends to prohibit the publication of the book itself by any other than the author. It was so held in the great copyright case by the House of Lords. But here was no publication. *Buller*, J.—Reporting any thing from memory can never be a publication within the meaning of the statute. The mere act of repeating such a performance cannot be left as evidence to the jury that the defendant had pirated the work itself.

(*p*) Murray *v.* Elliston, 5 Barn. and Ald. 657. and S. C. 1 Dowl. and Ryl. 299. As to abridgments in general, see ante p. 238.

(*q*) Morris *v.* Harris, 1814, MSS. Morris *v.* Kelly, 1 Jac. and Walk. 481.

(*r*) A forfeiture of one hundred marks is incurred by representing a play derogatory of the book of *common prayer*, 3 Jac. I. c. 21.; and ten pounds for jesting of the holy name of God, or of Jesus Christ, or of the Holy Ghost or Trinity, 1 Car. I. c. 1. And also three shillings and sixpence for acting on a Sunday, 1 Eliz. c. 2. s. 9.

Unlicensed players are rogues and vagabonds, 10 Geo. II. c. 28. 25 Geo. II. c. 36. 28 Geo. II. c. 19. 3 Geo. IV. c. 40. And see Skinner. Rep. 625 to 630. King *v.* Bellerton, 5 Mod. 142. Skin. 625. S. C. Rex *v.* Handy, 6 T. R. 286. Jacob Hall's case, 1 Mod. Rep. 76. 1 Ventr. 169. S. C.

readers who may consult it, induces me briefly to state the law as it respects *players*. The principal part of it will be found in the note.

Ashley *v.* Harrison, Peak. 194. 1 Esp. 48. S. C. and Taylor *v.* Neri, 1 Esp. N. P. C. 386.

Respecting *country theatres*, see 10 Geo. II. c. 28. s. 6. and 16 Geo. III. c. 13.

For the authority of the *Lord Chamberlain*, see 10 Geo. II. c. 28. By the third section it is enacted, that no person shall, for hire, gain, or reward, act, or cause to be acted, any new play, or any part therein, or any new part added to an old play, or any new prologue or epilogue, unless a true copy thereof be sent to the Lord Chamberlain fourteen days before the acting, together with an account when and where it is intended to be acted, signed by one of the managers. The Lord Chamberlain may prohibit the same as he thinks fit; and if any such person shall for hire, &c. act or cause to be acted, without such copy being sent, or against such prohibition, he shall forfeit fifty pounds, and the licence of the playhouse shall be void.

For the power of the *Universities* over players see 10 Geo. II. c. 19. s. 1.

By 16 Geo. III. c. 31. and 28 Geo. III. c. 30. certain funds for *charitable purposes* are secured to Drury Lane and Covent Garden.

As to the interference of the *Court of Chancery* in the affairs of a theatre, see 7 Ves. 617.

A place kept for public *dancing*, music, or other public entertainment of the like kind, must be *licensed* by the magistrates, 25 Geo. II. c. 36. s. 2. made perpetual by 28 Geo. II. c. 19. A theatre without its licence, Gallini *v.* Laborie, 5 T. R. 242. 6 T. R. 286.; private houses in which persons are indiscriminately admitted to dance, whether money is paid for admission, Clarke *v.* Searle, 1 Esp. 25.; or not, Archer *v.* Willingrice, 4 Esp. 186.; are within the statutes: but neither a dancing master's room, Bellis *v.* Burghall, 2 Esp. 722., nor one used on a particular festival, Shutt *v.* Lewis, 5 Esp. 128., comes within its intention. A public room at a tea garden, with an organ in it, must be licensed, Bellis *v.* Beal, 2 Esp. 592.

CHAP. VI.

Of the Fine Arts.

UPON the same principles, and for the same reasons, that the legislature have protected the Scholar in the enjoyment of the fruits of his knowledge and industry; so it has provided that the Artist shall not exert his skill and ingenuity without a hope of reward from a limited monopoly in the result of his labours.

This Chapter, for convenience and distinctness, will be divided into three parts:—

I. *Engravings or prints.*

II. *Patterns for linen.*

III. *Sculptures, models, &c.*

I. Engravings or Prints.

It will be necessary to consider the law on engravings or prints in almost all the different ways in which the law respecting *a book* has been examined. By stating the statutes on which the right to a limited monopoly in them is founded, and the construction which they have received; by enumerating the different kinds of engravings, as prints in general, prints accompanying letter press, and charts or maps; by

shewing how far the subject of an engraving is an original compilation, or an abridgment or reduction; by investigating the nature of the subject, whether it be seditious or libellous, the property in prints, and the manner of making an assignment of them; and by examining, how far publications may be similar without a piracy having been committed, with the peculiar remedies which the statutes have provided for any injuries sustained by the artist.

The matter of this section will, therefore, be best elucidated by considering—

1. *The statutes* giving the right.
2. *The construction* as to the date, &c.
3. Prints accompanying letter press.
4. *Maps*, charts, &c.
5. The *subject* of an engraving.
6. Seditious or libellous prints.
7. The *property* in, and assignment of, prints.
8. What amounts to a *piracy*.
9. The *remedies* for an infringment.

1. The statutes.

A property in prints is secured to the inventors and engravers by three acts of parliament. By the first (*a*) it is enacted, "That from and after the 24th day of June, 1735, every person who shall *invent and design*, engrave, etch, or work in mezzotinto or chiaro oscuro, or *from his own works and inventions* shall cause to be designed and engraved, etched, or worked in mezzotinto or chiaro oscuro, any *historical* or other print or prints; shall have the sôle right and liberty of

(*a*) 8 Geo. II. c. 13.

printing and reprinting the same for the term of fourteen years, to commence from the *day of first publishing* thereof, which shall be truly engraved, with the *name of the proprietor*, on each plate, and printed on every such print or prints." (*b*)

Thus it appears that the property in historical and *other prints* was by the first act vested in the engravers, who took them from their *own designs*. This privilege was extended by the second statute; (*c*) and made to exist in the prints of any portrait, conversation, landscape, or architecture, *map, chart, or plan,* or any other prints whatsoever, whether they were taken from the artist's own original designs, or from *any* picture, drawing, model, or sculpture, either ancient or modern. (*d*)

The term for enjoying that right was enlarged from fourteen to *twenty-eight* years. (*e*)

2. The name and day of publication.

It has been shewn that by the 8 Geo. II. (*f*) the day of publication, and the name of the proprietor, must be truly engraved on each plate and print. No doubt can be entertained that the directions of the act must be strictly followed;

(*b*) The fifth clause of 8 Geo. II. c. 13. secures the property to John Pine in his prints of the Spanish invasion, although not taken from designs of his own invention, but from the tapestry in the House of Lords, &c.

(*c*) 7 Geo. III. c. 38. s. 1.

(*d*) *Id.* s. 2.

(*e*) *Id.* s. 7. By this act the sole right of publishing Hogarth's prints was vested in his widow for twenty years.

(*f*) c. 13. s. 1. The acts respecting printers do not extend to engravers, 39 Geo. III. c. 79. s. 31.

that the day and name must appear, to entitle the party to the *penalties* imposed by it. (g) But a question has arisen whether it be absolutely necessary to comply with the enactment to support an action at law, or a bill in equity for an injunction and an account. Lord Hardwicke (*h*) and Lord Ellenborough (*i*) have at different times held that the clause was only *directory*, and that the property was at once absolutely vested in the engraver: but Lord Alvanley, (*j*) and Lord Kenyon, and Buller, J., entertained the opposite opinion. (*k*) The latter judge, after observing that he differed from Lord Hardwicke, said that he believed the insertion of the name and date to be essential to the inventor's right.

This contrariety of opinions in such eminent and learned judges renders it necessary to investigate this point with attention; which task will be best accomplished by collecting the reasons that have *at different times* been urged in support of either side of the question.

The day and name ought, it is contended, both to be engraved on the plate, because the words of the act requiring it are in the same section with those which vest the right; and the liberty of printing and reprinting is given *of those prints which, &c.* are so marked, and therefore

(g) Sayer *v.* Dicey, 3 Wilson 60.

(*h*) Blackwell *v.* Harper, 2 Atk. 95. Barn. Chan. Rep. 210. S. C.

(*i*) Roworth *v.* Wilkes, 1 Campb. N. P. C. 97.

(*j*) Harrison *v.* Hogg, 2 Ves. jun. 323.

(*k*) Thompson *v.* Symonds, 5 T. R. 41.

only to them. And also because the date is of importance, that the public may know the period of the monopoly; and the name of the proprietor should appear in order that those persons, who wish to copy the print, may know to whom to apply for their consent.

The reasons given for maintaining the other side of this question are—that the interest being once vested by the statute, the common law gives the remedy;—that this clause is similar to the one in the stat. of 8 Ann. requiring an entry at Stationers' Hall, which is there in the same section with the words that give the property; and yet upon that act it has been decided, that an entry *is not* necessary in order to maintain an action for damages. (*l*) That the copyright in a work which has been sold in manuscript is protected by the stat. of 8 Ann. from the day of the first sale; and yet, when it is printed, that day does not appear. And moreover that the property in a book is not lost, because it has been published without the author's name being affixed to it.

And, lastly, it may be observed that in the stat. 17 Geo. III. c. 57., by which the special action on the case and double costs are given, not a word is mentioned about the date and name.

3. Prints that accompany letter press.

The prints that ornament and illustrate works are as fully protected by these statutes as those

(*l*) Beckford *v.* Hood, 7 T. R. 620. and see ante, p. 223. As to the implied warranty, in putting the name of an artist as the painter of any picture in a catalogue, that it is really the work of that artist: see Jendwine *v.* Slade, 2 Esp. N. P. C. 572.

which are published alone. They are not, as it has been contended, merely accessary to the letter press, like the diagrams of Euclid; and, therefore, to be copied and published by any one who purchases the work. (*m*) But if a person should *bona fide* make drawings from a perusal of the text, although there might, as of necessity there would be, a great similarity between them, yet he would acquire a copyright in the engraving which he had thus made. (*n*)

4. Maps, charts, &c.

It has been observed that Lord Mansfield held, that maps came within the spirit and meaning of the copyright acts. (*o*) To remove all doubt, maps, charts, and plans, are enumerated among the different kinds of prints; and the same protection is afforded to their proprietor as to other artists. (*p*)

5. The subject of an engraving.

Prints, like books, may be the offspring of the imagination of the artist, or may be taken from objects that have actual existence.

When an engraving is made of an object in nature, as of a particular flower or plant, the artist cannot restrain any one from executing a similar print of the same flower or plant: but no one is allowed to copy from the work of another

(*m*) Roworth *v.* Wilkes, 1 Camph. N. P. C. 97. and see Wilkins *v.* Aikin, 17 Ves. 422. In which case Lord Eldon decided whether a work on architecture was original, with the fair use of another work composed of plates and letter press, by quotation and compilation.

(*n*) By Lord Ellenborough, 1 Camph. N. P. C. 99.

(*o*) 1 East. 361. n.

(*p*) 7 Geo. III. c. 38. s. 1. and 17 Geo. III. c. 57.

person; each must draw from nature. When it was contended before Lord Hardwicke (*q*) that some engravings of plants could not be protected, because every herbal-book had prints of those plants in them, he observed, "The defendant, to make out the case he aims at, must shew me that these prints of medicinal plants are in any book or herbal whatsoever, in the *same manner and form* as they are represented here; for they are represented in all their several gradations, the flower, the flower cup, the seed vessel, and the seed."

The subjects of engravings are almost always *general* ones, and cannot be monopolized. Each particular print is protected by the statutes: but the subject is open to every artist. The prohibition extends only to the piracy of the particular prints; no exclusive right is created over the picture or common design. (*r*)

The subject of a *map or chart* is also a general one, on which every person may exert his skill and ingenuity.

An artist had, with the assistance of many manuscript journals and printed books, made four maps of a particular district from all the charts and maps extant.

Another person, making a chart of the same place, actually employed an engraver to take a draft of some parts of those maps; yet, inasmuch as he had *combined* the four maps together upon a more correct and useful principle, it

(*q*) Blackwell v. Harper. 2 Atk. 94. Barn. 210. S. C.

(*r*) See Compilations, ante. p. 22[illegible]. and 2 Smith. N. P. C. 34[illegible].

was considered that no piracy had been committed. (s)

(s) Sayre and others v. Moore, 1 East. 361. n. (and see Wilkins v. Aikin, 17 Ves. 422. ante, p. 234.) *Lord Mansfield*, C. J.—The rule of decision in this case is a matter of great consequence to the country. In deciding it, we must take care to guard against two extremes equally prejudicial: the one that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. The act that secures copyright to authors guards against the piracy of the words and sentiments: but it does not prohibit writing on the same subject. As in the case of histories and dictionaries: In the first, a man may give a relation of the same facts, and in the same order of time; in the latter, an interpretation is given of the identical same words. In all these cases the question of fact to come before a jury is, *whether the alteration be colourable or not?* There must be such a similitude as to make it probable and reasonable to suppose that one is a transcript of the other, and nothing more than a transcript. So, in the *case of prints*, no doubt different men may take engravings from the same picture. The same principle holds with respect to *charts*: whoever has it in his intention to publish a chart may take advantage of all prior publications. There is no monopoly of the subject here, any more than in the other instances: but, upon any question of this nature, the jury will decide whether it is a servile imitation or not. If an erroneous chart be made, God forbid it should not be corrected, even in a small degree, if it thereby become more serviceable and useful for the purposes to which it is applied. But here you are told that there are various and very material alterations. This chart of the plaintiff is upon a wrong principle, inapplicable to navigation. The defendant has, therefore, been correcting errors, and not servilely copying. If you think so, you will find for the defendant: if you think it is a mere servile imitation, and pirated from

It has been shewn (*t*) that there cannot be any property in an immoral, obscene, or libellous book. That doctrine equally applies to pictures and prints. (*u*) An action of atssumpsit cannot be maintained for the value of them, even against a purchaser at the suit of the person who sold them. (*x*)

6. Seditious and libellous prints.

The property in prints, by the several acts of parliament, is vested in him who *shall invent* and design, engrave, &c. or from his own works and inventions *shall cause* to be designed and engraved, &c. any print. (*y*)

7. The property in prints.

What things may be the subjects of engravings have already been explained. (*z*)

But it was held by Lord Hardwicke, in a case before him, that a person *procuring a drawing* to be made was not entitled to any monopoly to be derived from the statutes protecting engravings. (*a*) From which decision and the words

the other, you will find for the plaintiffs. Verdict for the defendant.

(*t*) Ante, p. 212.

(*u*) Du Bost *v* Beresford, 2 Camph. N. P. C. 511.

(*x*) Fores *v.* Jonnes, 4 Esp. N. P. C. 97.

(*y*) 8 Geo. II. c. 13. s. 1.

(*z*) Ante, p. 292.

(*a*) Jefferys *v.* Baldwin, Ambl. 164. (see as to the *gift* of a translation, Wyatt *v.* Barnard, 3 Ves. & Beam. 77.) The bill set forth that the plaintiff *had procured* a drawing or design to be made of the busses of the society of British herring fishery; that defendant had printed same in the London Magazine. It was objected on demurrer, that it was not a work of ingenuity of plaintiff, and therefore not within the statute. *Lord Hardwicke*, C.—The plaintiff has not made

of the act, it may be inferred, that although a person might procure another to make an engraving from a design of his own inventing, and claim a copyright in it; yet he cannot monopolize a print which has been made for him, without any assistance having been given by him in its design or formation.

Assignment of prints.

The property in prints is vested in the artist: but no mention is made of his *assigns*. It is, however, enacted, "That any person, who shall thereafter purchase any plate for printing from the original proprietors thereof, may print and reprint from the same, without incurring the penalties." (*b*) And moreover it is necessary, before a print can be copied with impunity, to obtain "the *consent* of the proprietor thereof *in writing*, signed by him in the presence of two witnesses." (*c*)

And, therefore, it was decided, that on these statutes *the assignee* of a print may maintain an action against any person who has pirated it. (*d*)

8. Piracy of engravings, &c.

A *fac simile* of an engraving is of course a gross infringement. By the statutes it is en-

a case for relief; therefore, need not go into the question as to discovery. It is not within the statute, which was made for encouragement of genius and art: if it was, any person *who employs a printer or engraver* would be so too. This statute is in that respect like the statute of new inventions, from whence it was taken. If he cannot claim property, he is not entitled to relief, which would only enable him to sue at law. Bill is frivolous; allow demurrer.

(*b*) 8 Geo. II. c. 13. s. 2.

(*c*) *Id.* s. 1.

(*d*) Thompson *v.* Symonds, 5 T. R. 41. and see 3 Wils. 60.

acted that a piracy is committed, if any person "in any manner copy in the whole or in part by *varying*, *adding to*, or *diminishing from* the main design" of any print whatsoever. (*e*)

The subject of an engraving, it has been shewn, (*f*) is often a general one, which cannot be monopolized; and the question for the jury to consider will be, whether the particular works have been engraved by the two artists from the general subject, be it a picture or plant, or any object in nature, or whether the similitude, which is supposed to exist between them, arises from accident, or from the nature of the subject; (*g*) or whether, in the case of plates to a printed work, they are satisfied that the artist sketched the designs from the text: or whether the one print is merely a copy from the other. (*h*)

The seller of pirated prints.

Not only must no person whatever infringe the right of the artist by *copying* his work: but any one who *sells* or *imports* for sale any pirated copies of an engraving is liable to the penalties inflicted by the statutes.

In the first legislative provisions (*i*) respecting prints, the words "*knowing* the same to be so printed or reprinted without such consent,

(*e*) 8 Geo. II. c. 13. 7 Geo. III. c. 38. 17 Geo. III. 57. and see 5 Barn. & Ald. 737. 1 Dowl. & Ryl. 400. 3 Campb. N. P. C. 111. De Berenger v. Wheble, 2 Stark. N. P. C. 548. and 1 East. 361. n. As to an abridgment or reduction of an engraving, see 17 Ves. 422.

(*f*) Ante, p. 293.

(*g*) Ante, p. 292.

(*h*) 1 Campb. N. P. C. 99.

(*i*) 8 Geo. II. c. 13. s. 1. See post. p. 303.

shall publish, *sell*," &c. occur: but they are not to be found in the last act of parliament on this subject. (*k*) And in consequence, although an attempt was made in argument to shew that the vendor or seller of a print was only liable to an action for disposing of *exact* copies, it was decided that the vendor of a print, which, with some trifling variations, is a copy of the main design of another print, is liable to an action for damages at the suit of the proprietor, although *he did not know* that the print which he was selling was a piracy. (*l*)

(*k*) 17 Geo. III. c. 57.

(*l*) West *v.* Francis, 5 Barn. & Ald. 741. (and S. C. 1 Dowl. & Ryl. 400.) *Abbott*, C. J.—This act of parliament was intended to preserve to artists the property of their works. The question is, what is the meaning of the word "*copy*" of a print. Now, in common parlance, there may be a copy of a print where there exist small variations from the original; and the question is, whether the words are used in their popular sense in this act of parliament; that is to be collected from looking at the whole clause, by which it is provided that if any one shall engrave, &c. 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 or reprint, or import for sale, or publish, sell, or otherwise dispose of any copy of any print, he shall be liable to an action. Now, if the selling of a copy with colourable variations is not within the act of parliament, the printing or importing for sale such copies will not be prohibited. The whole must be taken as one sentence; and the sale of any copy of a print, although there may be some colourable alteration, is within the act of parliament. The case of Gahagan *v.* Cooper proceeded upon a different act of parliament. In this case, I am satisfied, the verdict is right; and, therefore, this rule must be discharged.

Bailey, J.—I am of the same opinion. The provisions of

What amounts to a piracy has been stated. The penalty incurred by him, who has thus infringed the right of the artist, is to forfeit *the plates* on which the prints are copied, and *every sheet* on which the engraving has been printed, to the proprietor of the original print, who must forthwith damask or destroy them: and he must also forfeit *five shillings* for every print found in his custody. The same penalties attach to him who has published, exposed to

9. Remedies for an infringement. Penalties.

the 8 Geo. II. c. 13. are entitled to great weight in the construction of this latter act of parliament. That act imposes, first, a penalty upon any persons who shall engrave, copy, and sell, or cause to be copied and sold, in the whole or in part, by varying, adding to, or diminishing from the main design; and, secondly, upon persons selling the same, knowing them to be so printed or reprinted. The act of 17 Geo. III. c. 57. was passed to remedy the same mischief; and the words, "knowing the same to be so reprinted," are omitted. It may, therefore, be fairly inferred that the legislature meant to make a seller liable, who did not even know that they were copies. The former part of the 17 Geo. III. c. 57. s. 1. applies to persons who actually make the copy, and who, therefore, must know that it is a copy. But the latter branch applies to all persons who shall import for sale, or sell a copy of a print. Every person, therefore, who sells a copy which comes so near the original as this, is thereby made liable to an action. There can be no reason why a person should not be liable where he sells a copy with a mere collusive variation; and, I think, we should put a narrow construction on the statute, if we held such a collusive variation from the original not to be a copy. A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original. For these reasons, I think, the plaintiff is entitled to recover; and, consequently, that the rule must be discharged.

sale, or disposed of any pirated engravings: one moiety passes to the king, the other is given to the informer. (*m*)

Special action on the case.

Further, it is enacted by the 17 Geo. III. c. 57. "that a *special action on the case* may be brought against the person offending, to recover such damages as a jury on the trial of such action, or on the execution of a writ of inquiry, may give."

Limitation of action.

All actions for any thing done in pursuance of the acts 8 Geo. II. c. 13. and 7 Geo. III. c. 38. must be brought within *six* calendar months after the fact committed: but no time of limitation is mentioned in 17 Geo. III. c. 57. which gives the special action on the case.

The parties.

Not only the original proprietor, but also the assignee of a print, may maintain an action on 7 Geo. III. against any person who pirates it. (*n*)

Declaration.

As pirated copies are made very much to resemble the original in particular parts, and to be totally distinct in other parts, care must be taken to draw the declaration, for *copying part*, as well as for copying the whole. (*o*)

Plea.

The defendant is permitted to plead the general issue, and to give any special matter in evidence under it. (*p*)

(*m*) 8 Geo. II. c. 13. s. 1., and see 7 T. R. 620., and 1 Campb. N. P. C. 98. where it is held, that statute having given a right, the common law gives the remedy by action without the conditions of the statute being complied with.

(*n*) 5 T. R. 41.

(*o*) 5 Barn. and Ald. 737. and 1 Dowl. & Ryl. 400. S. C.

(*p*) 8 Geo. II. c. 13. s. 3. and 7 Geo. III. c. 38. s. 8.

In this action it is not necessary to produce the plate itself, for one of the prints taken from the original plate is sufficient evidence. (*q*) Evidence.

It seems the best way to continue the name of the first proprietor on the print; for it is doubtful whether a plate with the name of the assignee (although the date be correct) is good evidence. (*r*)

Although no mention is made of proceedings to be taken in equity; yet it follows as a matter of course that the Court of Chancery will in aid of the statutes interpose with an injunction to prevent or stop the injury sustained by the artist from a piracy of his work. (*s*) Equity.

If the plaintiff is successful in suing for penalties, he is entitled to his *full costs*: (*t*) if he succeed in the special action on the case, then he is to have *double* costs of suits. (*u*) And to the defendant, when the plaintiff is nonsuited or discontinues, full costs are to be allowed. (*x*) Costs.

(*q*) Thompson *v.* Symonds, 5 T. R. 41.

(*r*) In Bonner *v.* Field, cited in 5 T. R. 44. Lord Mansfield nonsuited a plaintiff under similar circumstances.

(*s*) Ante, p. 183. and see post. Chap. VIII.

(*t*) 7 Geo. III. c. 38. s. 5.

(*u*) 17 Geo. III. c. 57.

(*x*) 7 Geo. III. c. 38. s. 8.

II. Patterns for Linen.

The pattern of a piece of printed linen often increases the value of the commodity, from its novelty and beauty. Some ingenuity and skill is necessarily exerted in its formation. The Legislature has by three Acts of Parliament given a limited monopoly to him who designed it.—We shall consider the subject as it relates to,

1. The statutes giving the right.
2. The construction of them as to the date, &c.
3. The property in, and assignment of, the pattern.
4. A piracy and remedy at law.

1. The statutes.

This monopoly limited at first to two months, but afterwards extended to *three months*, (*y*) is given "to the proprietor of any new and original pattern for printing linens, cottons, calicos, or muslins, to commence from the day of first publishing thereof, which must be truly printed with the name of the printer or proprietor at each end of every such piece of linen."

2. The name and day of publication.

The much agitated question, (*z*) whether it is necessary to comply with the directions of the statute, as to the date and name, in order to sup-

(*y*) 27 Geo. III. c. 38. made for one year, and afterwards enlarged by 29 Geo. III. c. 19., and made perpetual by 34 Geo. III. c. 23.

(*z*) Ante, p. 289, 290, 291.

port an action at law, was here raised. It came before the Court in arrest of judgment (*a*) on an alleged defect in the declaration, which stated, that the defendant pirated the pattern "within the term of three months from the day of the first publishing thereof, and whilst the said plaintiffs were such proprietors of the said pattern as aforesaid, and were entitled to have the sole right and liberty of printing and reprinting the same."

It was contended that the day of publication ought to have been averred. The Court held that as the plaintiff must necessarily have proved that the date was on the linen to entitle him to a verdict, they must after verdict infer that he had adduced such proof; and, therefore, that the declaration was aided after verdict.

3. The property in, and assignment.

The property in the patterns is given to the inventors or proprietors. No mention is made of assigns. But it is enacted (*b*) that "no one shall print work copy or cause to be printed, &c. such original pattern, or shall publish, *sell*, or expose to sale, or *cause* to be published, &c. any linen, &c. so printed without the consent of the proprietor first obtained *in writing* signed by him, in the presence of two or more credible witnesses, *knowing* the same to be so printed."

From which a power *to assign* may be in-

(*a*) Macmurdo *v.* Smith, 7 T. R. 518. This case strengthens the argument in the affirmative of the question as stated at p. 290.

(*b*) 34 Geo. III. c. 23. s. 1.

ferred. (c) It is worthy of remark, that it is probable, that a *sale* of a copied pattern would be no offence if the vendor did *not know* that it was a pirated one, although we have seen that the law respecting the sale of pirated engravings is quite different. (d)

4. Piracy, and remedy for it.

The remedy for an infringement is a *special action* in the case, to recover such damages as a jury, on the trial of the action or at the execution of a writ of inquiry, may assess.

Limitation of action.

The *time limited* for bringing actions in pursuance of these acts is *six* months.

Plea.

The defendant may plead the general issue, and give the special matter in evidence. (e)

Equity.

And to render the remedy at law more effectual, proceedings may be taken in equity. (f)

Costs.

Full costs are given to the plaintiff, if he succeed: (g) but if he discontinues, or is nonsuited, or the verdict is against him, then the defendant has full costs allowed him. (h)

(c) Ante, p. 269.

(d) Ante, p. 297.

(e) 34 Geo. III. c. 23. s. 2.

(f) Ante, p. 183, 4. and see post. Chap. VIII.

(g) 34 Geo. III. c. 23. s. 1.

(h) *Id.* s. 2.

III. Sculptures, Models, &c.

There is yet another limited monopoly, creating a property in the productions of the inventive faculties of genius; but which can scarcely be called Literary Property. It is given to the first maker of all original sculptures, models, copies, and casts.

The same order of investigation will be pursued as in the last section, as to,

1. The statutes giving the right.
2. The construction of them.
3. The property in, and assignment of, a model, &c.
4. A piracy, and the remedy at Law.

1. The statutes.

The first act (*i*) on this subject was found on trial to be so defective, that it was held to be no offence under it *to make* a cast of a bust, provided it were a *perfect* fac-simile of the original. And on the other hand, although it was evident that a piracy had been committed, yet, if there was some addition to or diminution from the original, a person was not liable to an action for *selling* a cast thus pirated.

To remedy these defects another Act of Par-

(*i*) 38 Geo. III. c. 71. Gahagan *v.* Cooper, 3 Camp. 111. and see West *v.* Francis, 5 Barn. & Ald. 737. and S. C. 1 Dowl. & Ryl. 400.

liament (*k*) was obtained, by which the property, in all sorts of sculptures, models, copies and casts, particularized and enumerated at great length, so as to include every species of them, is vested in the inventor for fourteen years; provided the proprietor causes his name, with the date, to be put on them before they are published; with the same term in addition if he should be living at the end of the first period, unless he had parted with his invention before the time at which that act passed.

The provisions of the second statute extended as well to those sculptures, &c. which *had been* put forth under the protection of the first, as to those *thereafter* to be made.

2. The construction of the acts.

No case has been decided on the new act, as to the insertion of the name, and day of publication: but from analogy it is clear, that the reasoning on the statutes giving monopolies in prints and in patterns for linen will apply to that Act of Parliament. (*l*)

3. The property in, and assignment of, model.

The property in the models is given to inventors. And it is enacted that the purchaser, if by a deed in writing, of any original sculpture or model, shall be exempted from an action for copying, or casting, or vending the same (*m*)

4. Piracy and remedy at law.

The enactment against piracy—against making, selling, or importing, any thing mentioned in the statute, is very general; and gives to the proprietor or his assignee *an action on the case*

(*k*) 54 Geo. III. c. 56.

(*l*) Ante, p. 295, and p. 302.

(*m*) 54 Geo. III. c. 56. s. 4.

for damages (with double costs) to be brought within six months against all persons who shall *in any way* imitate the sculpture, &c. (*n*)

The limitation for all actions either for things done *in pursuance* of, or *against* this statute must be brought within six months.

In the former case the defendant, if successful, is entitled to full *costs*. (*o*)

CHAP. VII.

Of the Persons and Corporations interested in the Publication of Books.

HAVING in the first Chapter of this Book, explained the nature of copyright in general—by stating the enactments of the several acts of parliament respecting it, and the construction which has been put upon them—and by shewing the effect of obscenity, libels, or immorality, upon the copyright in a work, and what in general amounts to a piracy—an attempt was made to investigate the law, as it relates to the different kinds of literary property. That task being accomplished,

(*n*) 54 Geo. III. c. 56. s. 3.
(*o*) *Id.* s. 5.

it is proper in the next place to lay before the Reader an account of the *Persons and Corporate Bodies* that are peculiarly interested in the publications of books: which will be done in the following order,—

I. *The Author and his Assignee.*
II. *The King and his Printers.*
III. *The Company of Stationers.*
IV. *The Universities.*
V. *The Courts of Justice.*
VI. *Printers.*
VII. *Booksellers.*

I. The Author and his Assignee.

To explain the nature of the property acquired by any one in a literary work, of whatever description it may be, it will be necessary to examine the *right* originally vested in the author or composer—the *extent* to which a book may be affected by its contents,—and the modes by which it may be *disposed of* by the author.

The right of authors and men of science over the productions of their minds has been shortly stated in the several chapters in which each kind of literary property has been investigated. It may be useful to collect the whole matter into one place, and to add to it such rules and observations as could not, without destroying the

nnity of the descriptions, be before introduced. Thus:—

1. The property in manuscripts.
2. In all kinds of literary works.
3. In the productions of the fine arts.
4. How affected by their subject matter.
5. The assignment of literary property.
6. Devise of it.
7. When taken under an execution, &c.
8. Abandonment of it by the author.

1. Property in MS.

An author has an absolute property independent of statute law over his work whilst it continues in manuscript (*a*). Nor will the mere delivery of the manuscript copy to the printer divest the author of his right; for the consent to be allowed to print must be in writing (*b*).

And a bookseller was restrained from publishing certain manuscripts of which he had gained possession, but which had been left by Dr. Paley for the use only of his own parishioners (*c*).

Neither is a person, to whom a manuscript has been lent, with liberty to take a copy of it, and to make what use of it he thinks fit, at liberty to print and publish the work (*d*).

Authors engaging to write.

On the other hand if an author engage to furnish a bookseller with a manuscript, he must answer in damages for not fulfilling his contract (*e*).

(*a*) 4 Burr. 2340. 2379. 2 Meriv. 435. See ante p. 221.

(*b*) Knapcock *v.* Curl, 4 Vin. Abr. 278.

(*c*) Cited in 2 Ves. & Beam. 23.

(*d*) Duke of Queensberry *v.* Shebbeare, 2 Eden Rep. 329. See 4 Burr. 2397.

(*e*) Gale *v.* Lechie, 2 Stark. N. P. C. 107.

And Lord Eldon held that a covenant in articles of agreement, by which Mr. Colman undertook not to write dramatic pieces for any other than the Haymarket Theatre, was a legal covenant (*f*).

But where a gentleman had contracted to supply a bookseller with Reports of the Cases argued in the Court of Exchequer (g) upon certain terms, and afterwards sold them to another bookseller; the Lord Chancellor would not grant an injunction to restrain the publication, and force him to report and give his manuscript to the bookseller; observing that he could not grant an injunction whereby *the person* of the defendant would not be at liberty.

2. Property in a book.

We have seen that if an author, at common law, had the sole right of publishing a *printed work* in perpetuity, it was taken away by the stat 8 Ann. c. 19. (*h*) by which act the time limited for an author enjoying the copyright in his work was confined to fourteen years, with a second term of fourteen years, if he was alive at the end of the first period (*i*).

And also that the time was afterwards altered, and that now the copyright in all

(*f*) Morris v. Colman, 18 Ves. 437.

(*g*) Clarke v. Price, 2 Wils. Ch. Rep. 157.

(*h*) 2 Bro. P. C. 145. and 4 Burr. 2408. ante p. 205, 6. By 7 Geo. II. c. 21. the sole liberty of printing and reprinting the *Histories of Thuanus*, with additions and improvements during the time therein limited, is granted to Samuel Buckley.

(*i*) 8 Ann. c. 19. s. 1. and s. 11. Ante, p. 208.

books published since the 29th July, 1814, is to continue for twenty-eight years, and to the end of the author's life, if he should survive that period (*k*).

But that the resulting term for life could not be enjoyed by one whose work had been published twenty-eight years before the 29th July, 1814 (*l*).

And, moreover, if a person who had published a work *before* the 29th July, 1814, was alive on that day; but died before the fourteen years, from the day of publishing his book, had transpired; then a further term of fourteen years was given to his *personal representatives*, but without prejudice to the assignees of all or any part of the former term (*m*).

Name of author.

Copyright is a property which depends for its continuance on the life of the author, and all controul over a work should be derived from him: and yet he is not bound to put his name in the title page in order to preserve it (*n*).

(*k*) 54 Geo. III. c. 156. s. 1. s. 4. and s. 9. ante, p. 208, 9. In the case of a *joint authorship*, would the copyright continue to the end of the life of the survivor, supposing both of them outlived the twenty-eight years from the day of publication? And would there be any resulting term, supposing one of the authors died within the twenty-eight years?

(*l*) 1 Barn. and Ald. 396. ante, p. 210.

(*m*) 54 Geo. III. c. 156. s. 8. ante, p. 209. Supposing the two authors of one joint work to be alive on the 29th July, 1814, and both to die (one before the other) before the first fourteen years had transpired, to whom would the work pass?

(*n*) 4 Burr. 2367.

Lord Eldon doubted how far he would relieve the publisher of a work with a fictitious name (*o*): but he granted an injunction, until answer or further order, to restrain the publication of a work in the name of Lord Byron, who was abroad, upon an affidavit of his lordship's agent, of circumstances making it highly probable that it was not a work by his lordship, and on the refusal of the defendant to swear as to his belief that it was written by him (*p*).

But the publisher of a work, however he has gained the materials, has sufficient property in it to maintain an action against any other person for pirating it (*q*).

3. Property in the fine arts.

In engravings.

The proprietory right over engravings or prints (*r*) continues for twenty-eight years without any resulting term for the life of the artist; and that over patterns for linen expires at the end of three months (*s*).

In patterns.

In models.

But in sculptures or models a property is vested for fourteen years, with a further term of fourteen years, if the artist be living at the end of the first period (*t*).

The property in a work of art, whether it be

(*o*) 8 Ves. 226.

(*p*) Lord Byron *v.* Johnson, 2 Merir. 29.

(*q*) 4 Esp. N. P. C. 169. Hence a questi[illegible]ses whether a person who first publishes a work written by a foreigner and transmitted to him, for a contemporaneous publication of it, can maintain an action against any other person who prints it.

(*r*) Ante, p. 289.

(*s*) Ante, p. 302.

(*t*) Ante, p. 306.

a book (*u*), an engraving (*x*), or a piece of sculpture, is necessarily destroyed by its subject being blasphemous, seditious, or libellous; or by its being obscene or immoral: and an author may desist from supplying a publisher with the manuscript of a work, if he is justly apprehensive that the contents of it will subject him to punishment (*y*).

4. How affected by the subject matter.

The assignment of a copyright (*z*), and of engravings (*a*) and models, (*b*) must be in writing, to enable the assignee to protect his interest either at law (*c*) or in equity (*d*).

5. Assignment.

And it has been shewn that, by the general assignment of *all his right* in a work, the assignee has the benefit of the resulting term for the life of the author, when he survives the twenty-eight years from the day of publication (*e*).

And it was held, that a publication for six years, by a person not the composer of some music, was not sufficient in itself to prove that the interest in the copyright had been transferred. And the production of the receipt given by the

(*u*) Ante, p. 212, 3.

(*x*) Ante, p. 294.

(*y*) 2 Stark. N. P. C. 107. ante, p. 214.

(*z*) 8 Ann. c. 19. s. 1. 54 Geo. III. c. 156. s. 4. and see Powell v. Walker, 3 Maule & Selw. 7. and 4 Campb. N. P. C. 8. S. C.

(*a*) 7 Geo. III. c. 38. s. 1.

(*b*) 54 Geo. III. c. 56. s. 1.

(*c*) Latour v. Bland, 2 Stark. N. P. C. 382.

(*d*) Post, Chap. VIII.

(*e*) 2 Bro. C. C. 80. ante, p. 210.

proprietor for the price of the copyright was held not to be a bar to the action (*f*). But a plaintiff was immediately nonsuited, when one of his witnesses stated that he had heard him declare, that he had parted with all his interest in the copyright, although he did not mention in what manner the transfer had been made (*g*).

The title necessary to support an injunction.

However, on the contrary, an instance has occurred in which the assignee of a copyright, to whom the assignment was made *by parol*, obtained an injunction. The distinguishing feature of that case was this, that some of the defendants had actually received the purchase money, and had permitted the plaintiffs to print and publish the work (*h*).

But an affidavit, in which it was stated that the plaintiff had purchased or legally acquired the copy, was considered to be bad, for not stating that he had purchased it from the author (*i*).

But it was considered to be sufficient for an *assignee of an assignee* to shew that the assignment to himself was in writing without deducing a title from the author (*k*).

And, moreover, a book will pass to the assignees under a commission of bankrupt, although a manuscript will not (*l*).

(*f*) Latour *v.* Bland, 2 Stark. N. P. C. 382.

(*g*) Moore *v.* Walker, 4 Camp. N. P. C. 8. n.

(*h*) Longman *v.* Oxberry, November 1820. MSS.

(*i*) Gulliver *v.* Snaggs, 4 Vin. Abr. 278.

(*k*) Morris *v.* Kelly, Eden on Injunctions. 288.

(*l*) See ante, p. 271. as to the bankruptcy of the proprietor of a Newspaper.

We have seen that under some circumstances a copyright becomes vested in the personal representatives of the author, when at his decease that right would otherwise have expired (*m*). Devise of a copyright.

The copyright in a work is a personal chattel, and may be devised (*n*); and a manuscript will pass to the author's executors (*o*).

It is doubtful whether an unpublished manuscript can be taken in execution by creditors (*p*): but the better opinion seems to incline against such rule of law; because, until the act of publication is accomplished, an author has an undoubted right to have full controul over it (*q*). 7. Taken under execution.

It is said that an author may by his conduct *abandon* his work, and give to the public a power to publish his book before the usual time of copyright has transpired (*r*). 8. Abandonment.

There is no authority on the point; and it is very difficult to say, what circumstances would induce a court, either of law or equity, to consider a work as given up to the public by its author. But still it may be capable of proof; as where an author, upon delivering a manuscript to a bookseller, says, "I will make a present of this

(*m*) 54 Geo. III. c. 156. s. 8. ante, p. 209.

(*n*) See ante, p. 270. as to the devise of a newspaper.

(*o*) See ante, p. 226, 7.

(*p*) 4 Burr. 2311.

(*q*) See ante, p. 222, 3.

(*r*) 4 Burr. 2346. 2367. 2466. and see 2 Stark. N. P. C. 382. 4 Camp. N. P. C. S. n.

work to you to publish: I wish to give it to the public," &c. (*s*).

II. The King and his Printers.

Hitherto the questions on copyright in books have been discussed with relation to the several acts of parliament vesting that property, on the ground of the original right of first publication, arising from the mental labour bestowed on the works by their authors.

But there is a power exercised over some books which is said to be founded on different principles. It is said, that the King by a prerogative right *vested in the crown* has the exclusive privilege of printing, (*t*) 1st. Acts of Parliament, Proclamations, Orders of Council, &c. 2nd. The Liturgies and Books of Divine Service, &c. and, 3rd. The Bible.

These works are called *prerogative copies;* and in consequence patents have been granted, by successive kings from the time of Henry the Eighth, to different persons, giving them full power to print and re-print them in exclusion of all other persons. The king's printer in England (*u*) enjoys the benefit to be derived from printing the

(*s*) Murray *v.* Rundall, 5 Nov. and 7 Nov. 1822. In Chancery, MSS.

(*t*) 2 Bla. Com. 410. Chit. Jun. Prerog. of Crown, 239. But see the observations of Sir W. D. Evans, Vol. II. Collection of Statutes, Pt. III. Class I.

(*u*) There are also King's printers for Scotland and Ireland to whom similar patents have been granted.

acts of parliaments, &c. The universities of Oxford and Cambridge, in common with the king's printer (*v*), claim a right to print all bibles to be circulated in England. The Company of Stationers formerly exercised an exclusive power of printing almanacks: but their patent was afterwards declared to be void (*x*).

Whether such a prerogative really exists in the crown, *to the extent claimed* by the patentees, has, of late years, been much questioned; (*y*) which doubt receives strength from the circumstance, that the only patent amongst them, which has ever been fully investigated in a Court of Common Law, was adjudged to be invalid. It becomes a duty, therefore, to give the subject a full investigation.

The question is surrounded with many difficulties: and it would be presumptuous to state in what manner it would probably be decided in a Court of Common Law. The better way of disposing of it seems to be, to contrast all the authorities and reasoning that are to be found in our law books; and to add to them the arguments that have an appearance of reason in them, which have been advanced on either side of the question.

1. A prerogative generally.

First. It is said that, for the sake of public peace, and to keep all the laws of the land pure and correct, the King has a prerogative right *generally* to print all ordinances of the state, as

(*v*) 6 Ves. 689.

(*x*) Stationers' Company *v.* Carnan. See Vol. I. of Lord Erskine's Speeches.

(*y*) See 5 Bac. Abr. tit. Prerogative, p. 594. Carter Rep. 89.

acts of parliament, proclamations, orders of the privy council, &c. and all papers which relate to the good government of the land (≈).

Which position is answered by saying, that all prerogatives must have existed from time immemorial—that the art of printing was introduced into England in the reign of Henry VI. within the time of legal memory.

The length of time enjoyed.

An argument in favour of the prerogative is then derived from the length of time that it has been exercis'd which commenced with the *first introduction* of the art of printing into England.

On the other hand it is contended, that length of time warrants no wrong; and that the prerogative, as at first assumed, has been continually diminished. Thus, the king at first exercised a power over the *art of printing* itself; and when that was in some degree lessened, he still controuled the publication of books with respect to their *contents*: a right which is not now attempted to be claimed. And farther that, when these patents were first granted, the prerogatives of the crown were maintained on principles, which the most servile courtiers would at this day blush to name.

(≈) 2 Ves. & Beam. 21. See the observations of Mr. Justice Yates, in 4 Burr. 2381. But Lord Mansfield said, crown copies are, as in the case of an author, *civil property*: which is deduced, as in the case of an author, from the King's right of original publication. The *kind* of property, in the crown, or patentee from the crown, is just the same: incorporeal; incapable of violation but by a civil injury; and only to be vindicated by the same remedy, an action on the case, or a bill in equity.

That they were all granted before the expiration of the licensing acts; (*a*) and that one of them—for almanacks—as *ancient in its date* as the others, has been declared to be invalid and cancelled.

On the other hand, on the same principle—length of time—an inference *against* prerogative copyrights is drawn from the old method of promulgating the laws, before the art of printing was discovered, by which the sheriff read them in the public market place in every town: at which time every person who pleased might have taken a copy of them. And it is added that no trace of an authority, for supposing that any one was ever prevented from making transcripts for sale, can be found.

2. As executive magistrate.

Secondly, It is said, that if there is not such a general common law prerogative, yet, for political and *public convenience*, the King, *as supreme executive Magistrate*, ought to promulgate to the people all acts of the state and government; and, consequently, that he has the exclusive privilege of printing, at his own press or that of his grantees, all acts of parliament, proclamations, and orders of council. (*b*)

On the other hand it is contended, that the King has not any power to grant to his patentees the privilege of printing the acts of the state, *in exclusion of all other persons*, even on the ground of "*political and public convenience*;" but that the principle, in its farthest extent,

(*a*) First enacted in 1662, 13 & 14 Car. II.; and finally done away with in 1694.

(*b*) 2 Bla. Com. 110. 2 Ves. & Beam. 21.

only warrants a prerogative right to print a sufficient number for *the use of the officers of state*, as for the judges, magistrates, &c.; and that every person is afterwards at liberty to multiply copies for his own convenience or profit. For, it is added, when the reason ceases the law ceases, and although an act of parliament not printed by the king's patentee could not be used as authentic in the courts of justice, yet it would certainly answer the private purposes of the subjects.

3. As head of the church.

Thirdly, It is said that the King, as *supreme Head of the Church*, has a right to the publication of all liturgies and books of divine service, and in consequence his patentee has the exclusive privilege of printing the forms of prayers for a particular occasion. (*c*)

This argument, it is contended, destroys the proposition which it is adduced to support; for if the king, *as head of the church*, has the exclusive right of printing *all books* of divine service, why not, as head of the church, have a right to print the principal book used in the divine service—*the Bible*,—and all kinds of Bibles, in whatever language they might be written? And yet the principle of *property* is resorted to, for the right of printing the present edition of the Bible: and Lord Mansfield has declared, that there is no prerogative right to the Bible in the original languages. (*d*)

(*c*) Eyre and Strahan *v.* Carnan, cited 6 Ves. 697. and reported at length in 5 Bac. Abr. tit. Prerogative, p. 597.

(*d*) 4 Burr. 2405. *Lord Mansfield.* The copy of the Hebrew bible, the Greek testament, or the Septuagint, does

It is therefore insisted, that the prerogative claimed as head of the church must be taken with a limitation, similar to that claimed as executive magistrate: That the King's patentee may provide all the clergy and members of the church with copies of the liturgies, books of divine service, &c.; but that every one of his majesty's subjects is then entitled to make a copy for himself, and to print others for those persons who may please to buy them.

And, farther, it is contended that, when the *reason* for the law ceases, the *law* itself ceases; and therefore, when all the persons concerned in the administration of justice have been provided with authentic copies of the laws, and all the ministers of the gospel have been furnished with the books of divine service, it is not for the good of the public that only one set of men should print other editions of the statutes and Bible, for general circulation in the kingdom, or for exportation into foreign parts, for not belong to the king: it is common. But the English translation he bought: therefore, it has been concluded to be his property. If any man should turn the Psalms, or the writings of Solomon, or Job, into verse, the king could not stop the printing or sale of such a work: it is the author's work. The king has no power or controul over the subject matter: his power rests in property. His whole right rests upon the foundation of property in the copy by the common law. What other ground can there be for the king's having a property in the Latin grammar, (which is one of his ancientest copies,) than that it was originally composed at his expense? Whatever the Common Law says of property in the king's case, from analogy to the case of authors, must hold conclusively, in my apprehension, with regard to authors.

their own private profit. And it is added that, so far from the King's printer's situation being a place of emolument, it appears that in ancient times it was merely *an office*, and that it was formerly granted by that name, with a fee annexed to it; and, when appointed the Printer he was *sworn into the office* (*e*).

4. The King's right from purchase.

Fourthly. It was formerly maintained that the King had a right *by purchase* to such works as were compiled at the expense of the crown. By which rule was meant, not a book written and composed by the King himself, in which the common law might have given him a copyright; that was not taken away by the stat. 8 Ann. c. 19.: but a work compiled by the order of government, and made, in other words, at the expense of the people. And also inasmuch as the King appointed the judges, who made the decisions in the courts of law, that therefore he had a prerogative to print all law books (*f*).

And, upon the principle of *purchase*, he had a prerogative copy in the old Latin Grammar, which had been written and composed at his expense (*g*).

The position that the King has a prerogative copy in law publications, or in the Latin grammar, is now considered to be perfectly ridi-

(*e*) 4 Burr. 2384. 3 Mod. 77. and see Eyre *v.* Carnan, 5 Bac. Ab. 597. As to the King's Printer's right being merely an authority, see 6 Ves. 713.

(*f*) Ante, Roper *v.* Streater, cited in Skin. 234. 1 Mod. 257. and see 4 Burr. 2316. 2 Show. 260. 10 Mod. 106. Vern. 120.

(*g*) 4 Burr. 2329, 2101.

culous (*h*). And yet upon the very *same principles of purchase*, combined with the principle of the King being the *head of the church*, the prerogative over Bibles is said to be founded (*i*).

The answers, given to the reasons urged in The Bible. support of the prerogative in the crown copies, arising from the King's being the chief executive magistrate and head of the church, having been stated, it will be proper to collect the arguments that may be advanced against the position, that the King has, *by purchase*, (*j*) a prerogative copy in the present edition of the Bible.

It might be taken for granted (inasmuch as in the great case of Donaldson *v.* Becket in the House of Lords, seven judges were of opinion that there was a common law copyright, and only four judges were of a different one,) that it may fairly be inferred that an author at common law had a right to print and publish his work in perpetuity. And, therefore, supposing the King

(*h*) 4 Burr. 2315. Gibbs *v.* Cole, 3 Pere Williams, 255. which was on a patent for the sole printing a book of Architectural Designs.

(*i*) 2 Bla. Com. 410.

(*j*) See 4 Burr. 2384. *Yates*, J.—It is mentioned as one ground of the King's right to print them, "that some of these prerogative books were composed at his expense." But in fact it is no private disbursement of the king; but done at the public charge, and part of the expenses of government. It can hardly be contended that the produce of expenses of a public sort are the private property of the king, when purchased with public money. He cannot dispose or sell one of those compositions. How, then, can they be his private property, like the private property claimed by an author in his own compositions?

were to write a book himself, with his own hand, he (not being mentioned in the stat. of 8 Ann. c. 19.) might have a perpetual copyright in it.

But the King *did not himself* write the present translation of the Bible; it was done by many learned men from each of the Universities, who were employed and paid by the government.

And it has never yet been contended that the mere act of purchasing a work, conferred on him by whom the manuscript was bought, a copyright dependent on the purchaser; (*k*) for such a proposition would establish a rule that, under the present acts of parliament, the copyright in a book ought to continue for *the life of the purchaser* of the manuscript, and not for the lifetime of the author: a proposition evidently absurd.

It is true that a person, by a *mere gift*, may have such a power over a publication as to maintain an action, or obtain an injunction, against any one who pirates it. And so he might, even if he *came wrongfully* by the manuscript from which it was printed; but those decisions proceed upon the principle, that title arising from possession is sufficient evidence of property, against the pretensions of a third person: and not on the ground of copyright.

To which reasoning it is, on the other part of the crown, *replied*, that the translators of the Bible had, *at the time* the King *purchased* the copy, a common law copyright in the production. That the king took such interest; and, therefore, inasmuch as he is not bound by the statute

(*k*) 4 Burr. 2346. 2401. Amb. 164. sed vide 3 Ves. and Beam. 77.

of Anne, taking away the common law copy-right of authors in general, that his power to print and reprint the Bible is a perpetual right, or a prerogative in the crown.

It is further contended, that the acts of parliament, &c., books of divine service, &c., and Bibles, are works in which *no one* can claim property by *authorship*; and, therefore, inasmuch as the King has not a right to books and publications abandoned to the public, he can have no property in the books called crown copies.(*l*)

Statutes and Bibles published with notes.

And it is added that, both with respect to acts of parliament and the Bible, any one is at liberty to print them *with notes*. (*m*) And yet if the principles upon which the prerogative right is maintained be correct—that it is on purpose to keep the acts of parliament from mutilation, and the Bible from being incorrectly printed,—that the power over them is vested in the crown; why does it not extend to the editions with notes? for both evils may arise in the editions with notes, as well as in the copies without them.

No attempt has ever been made to prevent any person from publishing a translation of one book, or *of a part* of the Bible, from the original text, and enjoying a copyright in his production.

And it was admitted by Lord Mansfield, that any person making *an abstract* of the records of the courts of law might publish it. (*n*)

(*l*) Mod. 256. 3 Mod. 75. 4 Burr. 2347. 2402.

(*m*) Ante, p. 244. 2 Evans Collect. Stat. Part III. Class I.

(*n*) 4 Burr. 2104. Lucas 105. 2 Ch. Ca. 76.

5. This prerogative is supported by decisions in equity and law.

Fifthly, It is said, that the validity of the crown copies is supported by the injunctions that have continually been granted in the Court of Chancery, on the supposition of the legality of the patents, and by a decision in the Court of King's Bench.

To which it is answered, that many reasons may be assigned for granting of an injunction besides the legality of the patent; and that injunctions were often obtained for infringements of the patent granted to the Stationers' Company, conferring on them the sole right of printing Almanacks; and yet, the first time the legality of that patent was discussed in a court of common law, the validity of it was questioned, and it ultimately was declared to be void.

It is therefore contended, by those persons who think that the patents of the University and King's printer are not founded in law, that injunctions are not authority in a common law question, particularly in the present subject, because very few of them ever came on to be heard; and that the circumstance of an injunction being granted and continued until the hearing does not furnish an argument in favour of the validity of the patent, because injunctions are now granted until the hearing, although the right may be doubtful, if there has been a long possession under it (*o*)

But formerly an injunction was refused to a complainant, unless he had a plain right: (*p*)

(*o*) 8 Ves. 215. and see 12 Ves. 270. 17 Ves. 424.

(*p*) 1 Vern. 129. 1 Atk. 284. Hills *v.* The University of

and in one instance an injunction was actually dènied on the motion of the King's patentees to stop the sale of English Bibles printed beyond sea, until the validity of the patent had been tried at law. (*q*) The difference arises from the change of practice in the Courts of Chancery.

Respecting the authority of the opinion of a judge sitting in a court of Equity upon a

Oxford, 1 Vern. 275. In the year 1684 the King's printer filed a bill to restrain the University of Oxford from printing Bibles, &c.; and although the Lord Keeper was of opinion that it was never meant by the patent to the university that they should print more than for their own use, or at least some small number more to compensate their charge, yet he thought the validity of the patent was a matter proper to be determined at law, and would grant an injunction until the trial had settled the right.

(*q*) Anon. 1 Vern. 120. Hil. Term, 1682. In which case it is said that the patent for law books had been adjudged good in the House of Lords. *And see* Baskett *v.* Cunningham, 1 Bla. Rep. 370. 2 Eden, 137. S. C. Cunningham and other booksellers were publishing a Digest of the Statutes with notes. They had engaged the proprietors of the patent for printing law books to print the work; and it was being printed at their press. Baskett the king's printer moved against the proprietors, and the law printers for an injunction. It was contended that the book was not within the meaning of the letters patent, being a work of labour and industry, and in a method entirely new; and that it was printed at a privileged press. *The Lord Chancellor* was of opinion that the work was entirely within the patent of the king's printer, and that the notes were *merely collusive*; and he accordingly granted an injunction. But he would not interfere between the two contending patents in the summary method of injunction: but left them to adjust their respective rights in due course of law.

question of common law, Mr. Justice Yates observed (*r*) that "great attention and respect were undoubtedly due to the decisions of the Lord Chancellor: but they were not conclusive upon a court of common law. Had these injunctions (which were only temporary) been perpetual they could have no effect on a court of common law, in a common law question."

On the other hand Lord Chancellor Eldon has said, (*s*) "the court takes upon itself that which may involve it in a mistake—to determine the legal question—and the observations of Mr. Justice Yates are very material on this point; particularly if he was accurate in saying he did not consider these cases upon injunction as determining the legal question; which, if he meant as in no case determining it, is not accurate; as it is, if he meant only that it is a decision by a Judge sitting in Equity upon a legal question, and therefore not having all the authority of a decision by a court of law; but giving an opinion and pledging to maintain it, unless there should be occasion to alter it. The principle of granting injunction in those cases is, that damages do not give adequate relief."

It is further contended, that even the decision which took place in the court of common law (*t*)

(*r*) 4 Burr. 2353.

(*s*) 8 Ves. 224.

(*t*) Baskett *v.* The University of Cambridge, 2 Burr. 661. (and see 1 Bla. Rep. 105). The plaintiffs were the King's printers, and brought a bill in the Court of Chancery to restrain the defendants from printing or selling a book intituled "An exact Abridgment of all the Acts of Par-

cannot be considered as an authority in the point; for that was a question between two rival

liament relating to the excise on Beer, &c." It was sent unto the King's Bench for the opinion of the court upon the acts of parliaments aud patents.

Several letters patent were insisted on by the plaintiffs: the last bore date in the 12th year of Queen Anne, by which the *sole* power of printing all and all sorts of abridgments of all and singular statutes and acts of parliament was given to the grantees, with a *prohibition* against all others.

The defendants contended, that by a patent granted in the 26tl. year of Hen. VIII. they might lawfully print within the university all manner of books approved by the chancellor and vice-chancellor, and three doctors; and might put them to sale wherever they pleased; and that by a patent dated 3 Car. I. the King confirmed that right to the university, *notwithstanding* any grant or prohibition contained in the subsequent letters patent, or any of them.

The case was argued four times during the space of six years; and the *following certificate* was made by Lord Mansfield and the other judges.

"Having heard counsel on both sides, and considered of this case, we are of opinion that during the term granted by the letters patent dated the 13th of *October*, in the twelfth year of the reign of Queen *Anne*, the plaintiffs are entitled to the right of printing Acts of Parliament, exclusive of all other persons not authorized to print the same by prior grants from the crown."

"But we think that by virtue of the letters patent bearing date the 20th day of *July*, in the 26th year of the reign of King *Henry* the Eighth, and the letters patent bearing date the 6th of February, in the third year of the reign of King *Charles* the First, the chancellor, masters and scholars of the university of *Cambridge*, are intrusted with a *concurrent authority* to print Acts of Parliament and abridgments of Acts of Parliament within the said *university*, upon the terms in the said letters patent." Baskett *v.* University of Cambridge, 1 Bla. Rep. 105. 2 Burr. 660.

patentees, (the King's Printer and the University of Cambridge) in the discussion of which the legality of the patents could not be mentioned. It was taken for granted that each of the patents was good; and then the certificate of the Judges shewed how far the respective patentees had a right to print the same books—Acts of Parliament. So much so that, upon the question being carried into the House of Lords, when one of the counsel was about to impugn the patent of the King's Printer, he was reminded that by that means he would destroy the grant to his clients. (*u*)

A similar reason may be given for the strong expressions made use of by Lord Erskine, when counsel at the bar of the House of Commons for Carnan the opposer of the Patent for Almanacks, *in favour* of the prerogative copies, in the Statutes, the Bible, &c. He was an advocate much too shrewd to contend before such an assembly as the House of Commons, on a bill brought in by the minister, that they ought not to revest a monopoly in the Stationers' Company, (the patent formerly granted having been declared to be invalid) *because none* of the patents of prerogative copies were founded in law or justice.

On the authority of Basket *v.* The University of Cambridge, although a case between two rival patentees, Lord Mansfield, and the Court of King's Bench, considered the patents of the King's Printers and the Universities to be valid; and

(*u*) 2 Evans Collec. Stat. Pt. III. Cl. I. (9), and see Bruce *v.* Bruce, 1 Ves. 505. Baskett *v.* Parsons, *ibid.*

thence *inferred* that there was a common law copyright in authors over their publications. (*v*) It is contended as, by the decision in Donaldson *v.* Beckett, it is *doubtful* whether there ever was such a common law copyright, that the *premises* of his lordship—the legality of the patents—being the converse of the proposition then to be proved, has at least been rendered *doubtful.*

The King's printer.

It follows as a matter of course, that if the King has the prerogative of the exclusive right to printing the books called Crown Copies, that his grantees may enjoy the same privileges (*w*).

III. The Company of Stationers.

To trace the rise and progress of the Company of Stationers, and to give a full account of their grants and charters, would be as tedious and irksome as it would be useless and unnecessary. It is sufficient to observe, that they were first incorporated by very important charters granted to them in the years 1556 and 1558, and that, whilst the Star Chamber was in existence, in the hands of that oppressive and tyrannical court they were the monopolists of books and the destroyers of literature. By a charter granted to them by James the First they, for a long time, in concurrence with the universities of Oxford and Cambridge, claimed an exclusive right to print alma-

(*v*) 4 Burr. 2332. 2346.

(*w*) The first appointment of a King's Printer extant, was that of Grafton by Edward VI.

nacks (x), and frequently obtained injunctions in the Court of Chancery in support of that grant: (y) which, upon its being referred to a Court of Common Law, was declared to be invalid (z).

At present the Company of Stationers have little more to do with literary productions than to make an entry of each work in their books, in order to secure to the authors the penalties for any infringements; and to take in and deliver to the learned bodies those copies of works to which, by act of parliament, they are entitled.

1. The entry of Stationers Hall.

That every person may know in what works a copyright is claimed, it is provided by the stat. 8 Anne (a), that no person shall be subjected to the penalties for printing or reprinting any book, unless the title to the copy of such book be entered in the register book of the Company of Stationers; nor be answerable to the assignee, unless the consent of the proprietor, by which he parted with the copyright, is in a like manner entered.

But now, without any express repeal of the first

(x) See title "*Almanacks*" ante, p. 234, 5.; and 2 Bla. Rep. 1004.

(y) Stationers' Company v. Lee, 2 Ch. Ca. 66. 93. 2 Show. 258. S. C. Same v. Wright, *Id.* 76.

(z) Stationers' Company v. Partridge, 10 Mod. 105., and cited in 2 Bro. P. C. Toml. Ed. 137. See Same v. Marlow, 2 Show. 261. Lelly Entr. 63. 1 Mod. 256. 2 Bla. Rep. 1009. 4 Burr. 2329. 2370. 2372. 2382. Company of Stationers v. Parker, Skin. 233. Same v. Seymour, Mod. 256. 3 Keb. 279. S. C.

(a) 8 Ann. c. 19. s. 2.

parts of 8 Ann. c. 19. and 41 Geo. III. c. 107. which relate to the entry of the title of the book at Stationers' Hall in order to ascertain what books may from time to time be published, it is directed (*a*) that the title to every book which is published shall be entered within one calendar month from the day of publication, if published in London; and within three calendar months for those books which are published in any other part of the British dominions, under a penalty of five pounds, and the price of eleven copies; to be recovered in an action at law by the managers of the public libraries.

It was held, though with some hesitation, that an injunction might be obtained in Chancery,(*b*) or an action maintained at law (*c*), although the book had not been entered at Stationers' Hall: but, to remove all doubt, it was enacted that a failure in making the entry should not affect the copyright, but only subject the publisher to the penalty for not causing it to be made. (*d*)

For every entry two shillings is to be paid. (*e*) The register book may always be consulted upon payment of one shilling, and for the like sum a certificate of an entry must be granted. If the clerk refuse or neglect to make the entry, or to give a certificate of it, an advertisement in the Gazette will have the same benefits at-

(*a*) 54 Geo. III. c. 156. s. 2.

(*b*) Beller *v.* Walker, cited in 2 Atk. 94.

(*c*) Beckford *v.* Hood, 7 T. R. 620. and see ante, p. 291.

(*d*) 54 Geo. III. c. 156. s. 5.

(*e*) *Id.* s. 5.

tached to it, and the clerk will forfeit twenty pounds to the proprietor of the work.

2. The copies for the public libraries.

In making entries at Stationers' Hall of magazines, reviews, or other periodical publications, it is sufficient to make the entry within one month next after the publication of the first number or volume. (*g*)

It was also provided by the stat. of 8 Ann. (*h*) that nine copies of each book, upon the best paper, should be delivered by the printer to the warehouse keeper of the Company of Stationers at their Hall before publication made, for the use of certain public libraries in England; to which were added two more copies for libraries in Ireland. This arrangement was afterwards altered when it was enacted (*i*) that *eleven copies* of every book of the largest impression, with all its maps and prints, should, on demand being made thereof, in writing, within one twelve months of the publication, on the publisher, under the hand of the warehouse-keeper, or a person properly authorized by the manager of the library at the British Museum, Sion College, the Bodleian at Oxford, the public one at Cambridge, of that belonging to the faculty of Advocates at Edinburgh, of the four Universities in Scotland, Trinity College Dublin, and King's Inn Library Dublin; to be delivered by the publisher to the warehouse-keeper for the use of each of the libraries that should request it within one month after the demand.

(*g*) 54 Geo. III. c. 156. s. 5.
(*h*) 8 Ann. c. 19. s. 5.
(*i*) 41 Geo. III. c. 107. s. 6.

The warehouse-keeper (*k*) is directed to deliver the said books within one month afterwards to the keeper of the respective libraries, or any person by them properly authorized. For neglect of duty the publishers and warehouseman are liable to a penalty of five pounds, besides the value of it, for every copy not so delivered, received, and handed over.

In the event of a *second edition* being published (*l*), it is not to be delivered to the libraries unless it contains additions and alterations; nor even then, if the additions are delivered over by themselves.

And the warehouse-keeper of the Company of Stationers is directed every three months to transmit correct lists of the books entered to the librarians of the eleven public libraries, and also to call on the publishers for as many copies as are demanded (*m*). But the publisher of a book is at liberty to deliver it himself to the librarians, who are authorized to give a receipt for the same; and such delivery is equivalent to one to the warehouseman (*n*).

It was at one time imagined that, unless the title of the book was entered at Stationers' Hall, a publisher was not bound to deliver up copies for the use of the public libraries: but it was held (*o*) that the copies of each book, upon the

(*k*) 54 Geo. III. c. 156. s. 2.
(*l*) *Id.* s. 3.
(*m*) *Id.* s. 6.
(*n*) *Id.* s. 7.
(*o*) The University of Cambridge *v.* Bryer, 16 East. 317.

best paper, must be delivered to the warehouse-keeper of the Company of Stationers for the use of the library of the University of Cambridge, notwithstanding the title to the copy of the book, and the consent of the proprietor to the publication, were not entered in the register-book of the Company.

IV. The Universities.

The Universities of Great Britain are deeply interested in the laws repecting the publication of books. But the regulations that more particularly relate to those learned bodies are few in number. They will be explained in the following order:

1. The right to print Bibles.
2. The right to print the Statutes.
3. The patent respecting Almanacks.
4. The general copyright of the Universities.

Upon the introduction of the art of printing into England by Hen. VI. a press was set up at Oxford: and a great power over the publication of books was for many years very naturally assumed by that learned body. It was increased by charters and grants made to the Universities of Oxford and Cambridge by several kings, in which were given to them powers to print and reprint Bibles, Statutes, Almanacks, &c. How far the Crown really pos-

sesses a prerogative copyright in those works has been a subject of discussion in a former section. Supposing that those patents are valid which have not been declared to be void, it will be proper to set forth the interest in them that is claimed by the Universities.

1. The right to print the Bible,

The right of the Universities to print Bibles is claimed under charters from several of our kings (*p*).

The grants to the Universities are made in general words;—all manner of books and works of whatever description, not prohibited by public authority, which shall be approved of by the authorities in the Universities. It is under letters patent granted in the 13th year of Elizabeth that they claim to print Bibles. (*q*)

The same power is vested in the King's printers for England, and in those for Scotland and Ireland (*r*).

2. The right to print the Statutes.

By similar grants full power is delegated to them to print the statutes. A question arose as to the right of the University of Cambridge to print an Abridgment of the Statutes; and it was decided (*s*) that by virtue of letters patent, bearing date the 28th day of July, in the twenty-sixth year of the reign of King Henry the Eighth, and

(*p*) 2 Bla. Rep. 1004.

(*q*) *Id.*

(*r*) See the Universities of Oxford and Cambridge *v.* Richardson, 6 Ves. 689. and 9 Ves. 341. Irish T. R. 304.

(*s*) Bla. Rep. 304. 2 Burr. 661. Burn Ecc. L. 347. 4 Burr. 2401. 6 Ves. 697. See Skinn. 234.

the letters patent bearing date the 6th of February in the third year of the reign of King Charles the first, the Chancellor, Masters, and Scholars, of the University of Cambridge *are intrusted* with an authority concurrent with the King's printer to publish acts of parliament, and abridgments of them within the University upon the terms in the letters patent mentioned.

3. The right to print Almanacks.

We have seen that the crown has not the privilege of a prerogative copy in Almanacks; and that the grants of it by the King, to the King's Printer, and the Universities, were declared to be void. (*t*) Upon a petition presented to Parliament by the Universities, stating that they had demised their supposed privilege to the Company of Stationers for 1000*l.* *per annum*, an Act of Parliament was passed by which 500*l.* *per annum* of the duties arising from the stamps on Sheet Almanacks were given to each University. (*u*)

4. The Copyright of the Universities generally.

Alarmed lest the seats of learning should suffer by the judgment of the House of Lords, by which the supposed common right of authors to their works was declared to be restrained by the statute of 8 Ann. the Legislature passed an act (*x*) that

(*t*) Ante p. 234. 2 Bla. Rep. 1004.

(*u*) 21 Geo. III. c. 56. s. 10.

(*x*) 15 Geo. III. c. 53. The Syndics of the press in the university of Cambridge are the vice-chancellor, the heads of colleges, and doctors of each faculty, the orator and all public professors, with the proctors, taxors and scrutators. To these, or the major part, not less than five, of whom the vice-chancellor must be always one, full powers must be committed for the better regulating and management of the same.

the Universities in England and Scotland, and the Colleges of Eton, Westminster and Winchester, should at their *respective presses* have for ever the sole liberty of printing such books as had been given or bequeathed to them, or which should thereafter, not being then published, be given to them, or in trust, for the purpose of appropriating out of the profits arising from them a fund for the advancement of useful learning, and other beneficial purposes of education; unless the books are given or bequeathed only for a limited time.

The penalties to be inflicted on persons offending against these provisions are the same as if the books were the property of an individual. (*z*)

This exception in the favour of the Universities is to extend only to their own books, so long as they are printed at the College press, and for their sole benefit; and any delegation of the right works a forfeiture, and the privilege becomes of no effect.

A power is given to the Universities of selling or disposing of the copyrights bequeathed to them. (*a*) And the books must be registered at Stationers' Hall within two months after any such gift shall come to the knowledge of the officers of the Universities. (*b*)

The duties imposed on the Company of Sta-

(*z*) 41 Geo. III. c. 107.
(*a*) 15 Geo. III. c. 53. s. 3.
(*b*) *Id.* s. 4.

tioners to take care that the two Universities are provided with copies of all new books have been mentioned. (c)

V. The Courts of Justice.

The Courts of Justice have a controul over the publication of their own proceedings. It is claimed and exercised, not on the grounds of copyright and property, but on the principle that it is necessary for the due and *impartial administration of the laws.*

Some doubt has been thrown upon the subject. (*d*) If the right is possessed by any of the courts, it is a privilege belonging to all of them. The present enquiry will, therefore, be confined to those courts in which the right has been exercised and afterwards questioned, as where Reports have been given from,

1. The House of Lords.
2. The Privy Council.
3. The Courts of Law.
4. The Mayor's Court.
5. A Coroner's Inquest.

(c) Ante p. 334. Provision is made for the preservation of *Parish Libraries*, by 7 Ann. c. 14. s. 10. which empowers a justice of the peace to grant his warrant to search for a book that is lost. The Acts of Parliament respecting the *British Museum* are, 26 Geo. II. c. 22. 27 Geo. II. c. 16.

(*d*) In a "legal and constitutional argument against the alleged judicial right of restraining the publication of reports of judicial proceedings," by J. P. Thomas, Esq. 1822.

Both Houses of Parliament treat a publication of their proceedings as a *breach of privilege*; and it is only by an indulgence in not punishing for the contempt that the Reports of the debates are allowed to appear in the newspapers. (*e*)

Different reasons have been assigned in the several courts, for the exercise of this power over the publication of judicial proceedings, but all of them have for their ground work the impartial Administration of Justice.

The House of Lords, the highest judicial court in the kingdom, has, ever since the trial of Dr. Sacheverell, considered that it was the exclusive *privilege* of the house to publish its own judicial proceedings. This is usually done by ordering the Lord Chancellor to cause the trial to be published; at the same time prohibiting all other persons from doing the like.

An order had been made by the House of Lords for the printing the trial of the Duchess of Kingston; and an injunction was granted to restrain one Kearsley who had without such permission dared to print it. (*f*)

Lord Erskine also granted an injunction until the hearing to restrain the publication of the trial of Lord Melville, which had been directed to be printed by an order of the House of Lords,

(*e*) See ante p. 253, 4. and 8 T. R. 293. 1 Bos. and Pul. 525.

(*f*) Bathurst *v.* Kearsley, Easter Term, 1776, cited 13 Ves. 504.

and the privilege of doing it conferred on Mr. Gurney. (g)

His Lordship observed that he desired it to be understood that he had not delivered any judgment in the case, further than by granting the injunction until the hearing upon the precedent of Bathurst *v.* Kearsley, and that he should therefore consider *the question open* in any future stage.

Neither of these cases came to a hearing: but it may be safely inferred that the House of Lords possesses the power, as a privilege of the House, to make an order restraining all persons excepting the one appointed by the Lord Chancellor, from publishing their judicial proceedings.

2. The Privy Council.

On the ground of *public policy*, an injunction was once granted to restrain the publication of matters of the Privy Council. (h)

3. The Courts of Law.

A similar privilege is claimed and exercised by the Courts of Law at Westminster. Formerly no reports of their proceedings were allowed to be published until they had received the imprimatur of the Judges. (i) Although decent and correct accounts of what passes in Courts of Justice may, it has been shewn, (k) be given to the public; yet it must be by the consent of the Judges

(g) Gurney *v.* Longman, 13 Ves. 493. But yet reports of legal arguments in the House of Lords are regularly given, unnoticed by their lordships.

(h) Mentioned in argument in Percival *v.* Phipps, 2 Ves. and Beam. 23.

(i) See the Preface to Douglas's Reports.

(k) Ante, p. 254, 5.

implied by their not interfering to stop it. If an intimation is given from the Bench that the matter of any particular case must not be reported, it is a *contempt* of Court to publish it. In a late case (*l*) the Proprietor of the Observer newspaper was fined 500*l*. for reporting part of the trial of Thistlewood for High Treason, after the Court had stated that it was their wish that the whole of the proceedings might be published together, and that no part of them should be printed until the trials of several other prisoners were over. The reasons for this power thus exercised, by courts of justice, are too obvious to need any mention being made of them.

This privilege is not claimed by the court as a right *wholly to prevent* the publication of a trial; but merely for the sake of justice, to restrain all ex-parte statements which must necessarily conduce to the detriment of one party; and in criminal cases more particularly to the injury of persons under trial. The publication is not an infringement of any copyright: but a *contempt* of the court.

4. The Lord Mayor's Court.

Not only have the higher courts of justice this power over the publication of their own proceedings: but it is also possessed by the *Mayor of London.*

A bill was filed by some printers, who had bought from the Lord Mayor the copies of the

(*l*) The King *v.* Clement, 4 Barn. and Ald. 218. As to advertizing for evidence in a cause, see Poole *v.* Sacheverel, 1 Pere Williams, 675, and see 4 Burr. 2329. Bac. Ab. Courts and their Jurisdiction, 3 Inst. 182.

Sessions Paper; and Lord Hardwicke, upon the ground that it had always been usual for the Lord Mayor to order a printer of the trials, and to take a consideration for it, granted an injunction until the hearing. At the hearing the injunction was made perpetual by Lord Northington. (*m*)

5. Coroner's Inquest.

A criminal information will lie for publishing an *ex parte* statement of the proceedings upon a coroner's inquest. Mr. Justice Bayley (*n*) observed "this is a matter of great criminality; for the inquest before the coroner leads to a second inquiry, in which the conduct of the accused is to be considered by persons who ought to have formed no previous judgment of their case. It is a statement of evidence taken wholly *ex parte*; and where there is no opportunity for cross-examination. A jury, who are afterwards to sit upon the trial, ought not to have *ex parte* accounts previously laid before them: they ought to decide solely upon the evidence which they hear upon the trial."

VI. Printers.

Among the persons peculiarly interested in literary property, and the publication of books, *Printers* may be classed. The enactments and rules of law respecting them, will therefore very properly find a place in a Treatise on Copy-

(*m*) Manby v. Owen, cited in Millar v. Taylor, 4 Burr. 2330. 2404, 5.

(*n*) The King v. Fleet, 1 Barn. and Ald. 384.

right; and may be investigated in the following order, by stating,

1. The statutes respecting printing in general.
2. How far printers are affected by the matter of the books.
3. The rules respecting printing newspapers.
4. Their legal liabilities.
5. The proceedings to punish offenders.

1. Printing in general.

Every person having a printing press or types for printing must give a notice thereof, signed in the presence of and attested by one witness, to the clerk of the peace, of the place in which it is intended to be used, who will grant a certificate; and, after filing such notice, he will transmit an attested copy of it to the Secretary of State. An omission in giving such notice, or a using the press in any other place, subjects the printer to a forfeiture of 20*l.* (*o*)

The name of the printer.

Upon the front of every paper, which is printed on one side only, and upon the first and last leaves of every paper or book which consists of more than one leaf, the printer, whether it be done gratis or for money, must in legible characters print his name, and that of the city, town, parish, or place, with the name of the square,

(*o*) 39 Geo. III. c. 79. s. 23. Not to extend to his Majesty's printers or the universities in England, *id.* s. 24. ante, p. 316. and p. 338, 9. But *letter-founders* must give a similar notice, *id.* s. 25. and keep an account of types and printing presses sold by them, which must be produced, when required by a justice, under a penalty of 20*l.* *id.* s. 26.

street, lane, court or place in which his usual place of abode is situated, under a penalty of 20*l.* for every copy. (*p*) But the offender is not liable to more than twenty-five penalties for the omission, with respect to any number of copies of *one* paper or book. (*q*)

The name of the employer.

Upon a copy of every paper that is printed the printer must *write* the name and place of abode of his employer, and keep it for six calendar months; and must produce it to any justice who, within that term, may require to see it, under a penalty of twenty pounds for each omission. (*r*)

These regulations, however, do not extend to impressions of engravings; (*s*) or to printing by letter-press, names, address, business or profession of any person, and the articles in which he deals, or to any papers for sale of estate or goods by auction or otherwise; (*t*) nor to alter the regulations respecting newspapers. (*u*)

And no regulation made by 39 Geo. III. c. 79. nor by the 51 Geo. III. c. 65. (*x*) is to extend so

(*p*) 39 Geo. III. c. 79. s. 27. Not to extend to papers printed by the authority of Parliament, *id.* s. 28.—Sometimes an indemnity is granted for omission of the names, &c. See 49 Geo. III. c. 69.

(*q*) 51 Geo. III. c. 65. s. 1.

(*r*) 39 Geo. III. c. 79. s. 29.

(*s*) See ante p. 289.

(*t*) 39 Geo. III. c. 79. s. 31.

(*u*) See ante p. 250.

(*x*) 51 Geo. III. c. 65. s. 3. Before which time, indemnity acts were passed on that account. 39 and 40 Geo. III. c. 95. and 41 Geo. III. (U. K.) c. 80.

far as to require the printer's name or residence to be printed on any note or post bill of the Bank of England, bill of exchange, or promissory note, or any bond or other security for payment of money, or on any bill of lading, policy of insurance, letter of attorney, deed, or agreement, or on any transfer or assignment of any public funds or securities, or of the stocks of any public corporation or company authorized by statute, or on any dividend, warrant of or for the same, or on any receipt for money or goods, or on any proceeding in law or equity, or in any inferior court, warrant, order, or other papers printed by authority of any public board, or officer, in execution of their respective offices, notwithstanding the whole or any part of such securities, &c. shall be printed.

2. Printers affected by the matter of the books.

There are many subjects offensive to morality and the government, upon which no papers whatever must be printed.

A printer is liable to a penalty of 100*l.* for printing any thing relating to insurances on marriages, births, christenings, or services; or any office under the denomination of sales of gloves, of fans, of cards, of numbers, of her majesty's picture, for the improvement of small sums, or the like offices under that pretence: (*y*) and to a penalty of 50*l.* for printing any proposal for gambling in the lottery. (*z*)

(*y*) 10 Ann. c. 26. s. 109. and see 9 Ann. c. 6. s. 56.

(*z*) 22 Geo. III. c. 47. s. 13. and see the King *v.* Smith, 4 T. R. 414. For an account of other penalties to which printers are liable, see ante, p. 256, 7, 8.

And a prosecution may be instituted against the printer as well as against the author and publisher of a libel, whether it be on an individual; (*a*) or be of a blasphemous or seditious nature. (*b*)

3. Printers of Newspapers.

The method by which a newspaper is to be printed has been stated; (*c*) and the responsibility of every person engaged in its publication has been examined. (*d*)

4. Their legal liabilities.

It is doubtful whether a printer can recover in an action for work and labour for printing a work, on the first and last leaves of which his name and place of abode are not printed, according to the direction of the statute. (*e*)

A printer is not, by the custom of his trade, entitled *to be paid* any thing until he has completed the book: but he is not by custom bound to *insure* for the Bookseller the paper of the work (*f*). And he has a *lien* on the latter

(*a*) Holt on Libel.

(*b*) 60 Geo. III. c. 9. see ante, p. 252.

(*c*) Ante, p. 250.

(*d*) Ante, p. 252 to p. 258.

(*e*) Bensley *v.* Bignold, 5 B. & A. 335. Marchant *v.* Evans, 2 B. Moor, 14. 8 Taunt. 142. S. C. In which case it was held that an action for work and labour cannot be maintained by a printer for printing and publishing a weekly periodical work, parts of which were *printed on stamped paper*, and distributed as newspapers, and parts on unstamped paper, which were half-yearly bound into volumes, unless such printer lodge an affidavit at the stamp office, or have his name or place of abode printed in some part of the publication, as required by the statute 38 Geo. III. c. 78.

(*f*) Gillet *v.* Mawman, 1 Taunt. 136. and Mawman *v.* Gillett, 2 Taunt. 325. n.

parts of a work published at different times for the printing of the first parts. (*g*)

5. Proceedings to punish offenders.

It is enacted that *any person*, to whom or in whose presence any paper, not printed according to the statute, is offered for sale or exposed to public view, may take the offender before a magistrate, who may determine upon his guilt; (*h*) and may, if he see cause, mitigate the penalty to any sum not less than 5*l.* above all reasonable costs. (*i*)

A justice of the peace, who, from information upon oath, may have reason to suspect, that some presses are being used without the requisite notice having been given, or not in the place named in it, may empower an officer, to search the premises and to secure and carry away the press, and types, and the printed papers found with them. (*j*)

Justices of the peace may proceed in a summary way to enforce the payment of a penalty not exceeding the sum of 20*l.*; and, if it is not forthwith paid, may levy the same by distress and sale of the offender's goods; and if there is not sufficient under the distress, they may commit the offender to the House of Correction, for a term not exceeding six, nor less than three, calendar months. (*k*)

Limitation.

All prosecutions for penalties are to be com-

(*g*) Blake *v.* Nicholson, 3 M. and S. 167.
(*h*) 39 Geo. III. c. 79. s. 30.
(*i*) 51 Geo. III. c. 65. s. 2.
(*j*) 39 Geo. III. c. 79. s. 33.
(*k*) *Id.* s. 35.

menced within three months after the penalty is incurred; (*l*) one moiety of which is forfeited to the king, whilst the other is given to the informer. (*m*)

Appeal to sessions.

Any person, aggrieved by a determination of a justice of the peace, may appeal to the Quarter Sessions next after the expiration of twenty days from the making thereof, first giving six days' notice of appeal to the person prosecuting for such penalty, and the court may dispose of the matter with the *costs*, in any manner they may think reasonable. (*n*)

But any penalty mentioned in 39 Geo. III. c. 79., an act of the legislature to suppress unlawful assemblies, as well as to regulate the manner of printing, *exceeding* 20*l.*, may be recovered by action of debt, in any court of record at Westminster: and the plaintiff, if he recovers, will be entitled to full costs. Not one of the penalties imposed by that statute, as far as it relates to *printing*, exceeds 20*l.*; and consequently all offences under it, of that description, must be determined by justices of the peace. An attempt was made to sue in the King's Bench, for 60*l.*, or three penalties: but, after verdict for the plaintiff, the judgment was arrested (*o*).

(*l*) 39 Geo. III. c. 79. s. 34.

(*m*) *Id.* s. 36.

(*n*) 51 Geo. III. c. 65. s. 4.

(*o*) Fleming qui tam *v.* Bailey, 5 East. 313. *Lord Ellenborough.*—A common informer can have no right to sue for any penalty, but where power is given to him for that

VII. Booksellers.

All booksellers are much interested in the laws that protect literary property; and yet the laws respecting them, merely as sellers of books, are very few in number. When they assume the characters of publishers, they are in fact assignees of the authors, of whom much has already been said (*p*). It will be proper to examine,

1. The statutes respecting buying and selling and importing books.
2. How far booksellers are affected by the matter of a work.
3. Their legal liabilities.

1. Buying and selling and importing books.

The vendor of a pirated work destroys literary property as much as a publisher; and, therefore, not only are penalties inflicted on those who print and import books protected by the statutes purpose by the statute. Now the statute in question only says that a common informer may sue in any court of record for any pecuniary penalty imposed by the act exceeding 20*l.* The penalty given for this offence, each of which must be taken by itself, and cannot be reckoned accumulatively, does not exceed 20*l.*; and therefore it is not within the provisions of the 35th clause, which give an action. And the sense of that clause requires that the form of the declaration there afterwards given should be read the same as if the sum to be recovered were left in blank;—for how otherwise can the penalty of 100*l.* given by the 15th section be recovered?

(*p*) Ante p. 315.

of copyright; but they, who, knowing them to be so printed without the consent of the proprietor, will venture to sell them, are made liable to the same penalties mentioned in 8 Ann. c. 19. (*q*).

But it was further provided that nothing in that act should extend to prohibit the importing, vending or selling of any books in the *Greek, Latin,* or any other *foreign language,* printed beyond the seas (*r*).

By the 12 Geo II. c. 36. the importation of books reprinted abroad, and first composed or written and printed in Great Britain, is prohibited under a forfeiture, of the books to be destroyed, with a penalty of five pounds, and double the value of the books: but it does not prevent the importation of any book *inserted among other books* or tracts, to be sold therewith, in any collection where the greatest part of such collection shall have been first composed or written and printed abroad. (*s*)

To the same purpose is the 57th section of the statute 34 Geo. III. c. 20., which increases the penalty from five to ten pounds, and allows the

(*q*) The price of books was formerly regulated, see 25 Hen. VIII. c. 15. s. 5. 8 Ann. c. 19. s. 4. and 12 Geo. II. c. 36. s. 3.

(*r*) Sect. 7. The acts of Parliament respecting the selling and importing books that have become obsolete are numerous. 1 Rich. III. c. 9. s. 12. 25 Hen. VIII. c. 15. 7 Ann. c. 14. s. 10. 12 Ann. st. 2. c. 5. Duties are imposed on pictures imported, 8 Geo. I. c. 20. 11 Geo. I. c. 7. and on the canvass used to paint on. The Attorney-general v. Brandon, 3 Price, 360.

(*s*) See 41 Geo. III. c. 107. s. 7. and 54 Geo. III. c. 156.

commissioners of customs and excise to reward officers for seizing such books; in it is another exception on the restraint of importation, that it shall not extend to any books that shall not have been printed in this kingdom, within twenty years before the same shall have been so printed abroad.

By the wording of these statutes it seems immaterial whether the author's copyright is extinct or not, if the book has not been reprinted in England within twenty years. (*t*)

Printers and booksellers may however, with the exceptions above mentioned, export books upon condition that all the duties upon the paper and bindings have been paid, (*u*) provided that if books are written in the Latin, Greek, oriental or northern languages, then that they have not been printed at the press of either of the Universities in Great Britain. A drawback is allowed of the duty on the paper.

On the stat. 12 Geo. II. c. 36., it has been decided that two penalties might be incurred in the same day. A sale by the defendant in the morning, and another by his wife in the afternoon of the same day, were considered by the court to be two distinct acts of sale, for which two penalties might be recovered (*v*).

(*t*) 2 Bla. Com. 407. n. Ed. Christian.

(*u*) The Acts of Parliament respecting the duties on paper are very numerous.

(*v*) Brooke *v.* Milliken, 3 T. R. 509.

2. How far Booksellers are affected by the contents of a book.

Booksellers have always been made answerable for the contents of the works which they may sell. It was formerly a grievous offence to sell, or import for sale, any work which was considered heretical. (*w*)

The laws respecting libels very materially affect Booksellers; for it has been decided that the circumstance of buying a libel in the shop of a known Bookseller is sufficient *prima facie* evidence to convict him of the publication. (*x*)

There is a duty payable on the importation of books. It varies according as the works are in sheets or bound up; and its amount has been altered by many acts of parliament.

3. Their legal liabilities.

The liabilities to which Booksellers are peculiarly subjected are not very numerous.

Not only can a Bookseller in general be made a bankrupt, but it was adjudged that a person who was daily accustomed to buy the whole impression of a newspaper from the proprietor,

(*w*) See 3 and 4 Edw. VI. c. 10. 1 Mar. s. 2. c. 2. 1 Jac. I. c. 25. 3 Jac. I. c. 5, &c.

(*x*) Rex *v.* Almon, 5 Burr. 2686.

(*y*) The trade of a *bookbinder* was known in England previous to 5 Eliz. c. 4., and was within that statute; and consequently before the repeal of that statute, to employ a journeyman who had not served an apprenticeship in any substantive part of that business was a violation of it. Pratt *v.* Fraser, 3 Campb. N.P.C. 14. and see Martins *v.* Galloway, 3 Campb. N.P.C. 121.

and to resell it at a profit bearing the loss arising from the copies unsold might become a bankrupt.

CHAP. VIII.

Of the Remedies for an Infringement of a Copyright.

Having described the different kinds of literary and scientific works, stated the nature of the property which exists in them, and given an account of the several persons peculiarly interested in publications, it becomes necessary to proceed, lastly, to point out the several *remedies* that may be pursued for injuries done to literary property.

As the property in the productions of the Fine Arts, is not vested in the inventors by the statutes which relate to the copyright in books, I have for the sake of perspicuity, and in order to make each Chapter as complete in itself as the nature of the subject would admit, already given statements of the penalties by which the property in engravings or prints is guarded; (*a*) and described the actions that may be maintained for piracies

(*z*) Gillingham *v.* Lang, 6 Taunt. 532. 2 Marsh. 236.
(*a*) Ante, p. 299.

of patterns for linen (*b*), and of sculptures (c) or models.

It is now therefore proper to investigate the remedies for an infringement of the copyright of a *book*, which may be

I. *By a suit for penalties.*
II. *By an action on the case for damages.*
III. *By proceedings in equity.*

I. The Suit for Penalties.

A piracy. What conduct amounts to a piracy of a book either generally, (*d*) or of the different kinds of literary works in particular, as of books on general subjects, (*e*) abridgments, (*f*) musical compositions, (*g*) and dramatic pieces, (*h*) has been fully described.

The Penalties. The penalties given by the stat. of Anne against piracy are, that every offender shall forfeit the book, and every sheet, being part of it, to the proprietor of the copy of it, who shall forthwith damask, and make waste paper of them; (*i*) and further that every such offender shall forfeit one

(*b*) Ante, p. 304.
(*c*) Ante, p. 306.
(*d*) Ante, p. 214 to 217.
(*e*) Ante, p. 237.
(*f*) Ante, p. 239.
(*g*) Ante, p. 283.
(*h*) Ante, p. 284.
(*i*) To be done on motion to the court. 41 Geo. III. c. 107. s. 1.

penny (now three pence) (*k*) for every sheet which shall be found in his possession, either printed or priuting, published or exposed to sale; one moiety to the Queen, the other to the informer. (*l*)

That no person however may through ignorance offend against that act, none of its penalties can be imposed on any one, unless the title of the book before its publication be entered in the register book of the Company of Stationers. The consent to publish,—that is, every assignment of the copyright,—must also be entered.

If, on the other hand, any person be prosecuted for violating the statute of 8 Anne, he may plead the general issue, and under it give any special matter in evidence. If he obtain a verdict, or the plaintiff be nonsuited, or discontinue his action, then he is to have his full costs.

Any proprietor, bookseller, or printer, or the warehouse-keeper of the Stationers' company, not observing the directions of the act respecting delivering the copies to the libraries, and making default therein, is liable to forfeit *five pounds* for every copy not delivered, besides the value of the printed copies not so delivered, to be recovered with full costs.

Independent of the remedies at law necessary

(*k*) 40 Geo. III. c. 107. s. 1, and repealed in 54 Geo. III. c. 156. s. 4.

(*l*) 8 Anu. c. 19. s. 1.

to recover a compensation for an injury done to the copyright in a book, there are some works, periodical publications, as newspapers and pamphlets, which may be the subjects of legal proceedings peculiar to themselves, that have been before investigated. (*m*)

The action for them.

These penalties are recoverable in actions to be maintained in the courts at Westminster. The time limited for bringing them has in the several statutes been continually altered. It is now twelve months. (*n*)

II. The Action on the Case for Damages.

Literary property is not only protected by penalties for which few persons would sue, but the proprietor may maintain a special action on the case for any injury he may have received by a piracy of his book. (*o*)

It was for some time doubted whether an author whose work had not been entered at Stationers' Hall could maintain an action on the case for damages (independent of the statute) against the person who had pirated his work. It was first decided in equity that no objection could be taken to a bill for an injunction and

(*m*) Ante, p. 271.

(*n*) 8 Ann. c. 19. s. 10. 41 Geo. III. c. 107. s. 8. 54 Geo. III. c. 156. s. 10.

(*o*) 54 Geo. III. c. 156. s. 4.

an account, because the book had not been registered at Stationers' Hall. (*p*)

And afterwards at common law it was decided, that the stat. 8 Anne, by creating a right in authors, also gave to them the concomitant remedy, (an action on the case for damages) for any injury done to it, although it were not entered at Stationers' Hall, or had not the author's name affixed to it. The penalties, it was observed, were given to the informer; and the author, who might be anticipated in suing for them, ought to be otherwise reasonably defended. (*q*)

(*p*) Baller *v.* Walker, see Blackwell *v.* Harper, 2 Atk. 94.

(*q*) Beckford *v.* Hood, 7 T. R. 620. see 2 Wils. 145. This was an action on the case for publishing without the consent of the plaintiff, his book called "Thoughts upon Hunting." Neither of its editions had been entered at Stationers' Hall.

By the Court.—The question is "Whether the right of property being vested in authors for certain periods, the common law remedy for a violation of it does not attach within the times limited by the Act of Parliament. Within those periods the act says, that the author shall have the sole right and liberty of printing, &c.; that the statute having vested this right in the author, the common law gives the remedy by action on the case, for the violation of it. Of this no doubt could have been made, had the statute stopped there: but it has been argued, that as the statute in the same clause that creates the right, has prescribed a particular remedy, that remedy and no other can be resorted to. But the meaning of the legislature in creating the penalties in the latter part of the clause was to give an accumulative remedy. Nothing could be more incomplete as a remedy than penalties alone; for without dwelling upon the incompetency of the sum, the right of action is not given to the party aggrieved, but to any common informer. Now the action for the penalties given to a common informer can only be considered

But now by the 54 Geo. III. c. 156. the doubt as to the necessity of an entry to vest the copyright is removed; and it is provided that a special action on the case may be main-

as an additional protection: but not intended to oust the common law right to prosecute by action any one who injures this species of property, which would otherwise necessarily attach upon the right of property so conferred. Where an Act of Parliament vests property in a party, the other consequently follows of course, unless the legislature make a special provision. The penalties to be recovered may, indeed operate as a punishment upon the offenders: but they afford no redress to the injured party. The action is not given to him, but to any person who may get the start of him. It is no redress for the civil injury sustained by the author in the loss of his just profits. It is also to be observed that the penalties to be given by the act attach only during the first fourteen years of the copyright; and during that time only is the offender liable to such penalties if he invade the author's right: but he is liable during the whole period prescribed by the act to make good in an action for damages any civil injury to the author. If this construction were not to prevail, during the last fourteen years of the term the author would be without remedy from any invasion of his property. Although six or five of the judges who delivered their opinions in Donaldson *v.* Becket were of opinion that the common law right on action was taken away by the statute of Anne, it appears that the amount of their opinions went only to establish that the common law right of action could not be exercised beyond the time limited by the statute."

"In respect to the entry at Stationers' Hall, it has always been holden that such entry was only necessary to enable the party to bring his action for the penalty. The entry serves as a notice and warning to the public, that they may not ignorantly incur the forfeitures or penalties before enacted against such as pirate the works of others."

tained by the proprietor of a book against any person for printing, reprinting, or importing or publishing, or exposing it to sale, by which he may recover such damages as the jury may think proper to assess.

The pleadings.

In the pleadings in an action for damages for infringing a copyright, there is nothing to distinguish it from actions on the case in general. (*u*)

Plea.

The plea allowed by the statutes is the general issue, Not Guilty, with liberty to give the special matter in evidence under it.

The time limited for bringing an action has been altered in the several statutes. It is now twelve months. (*v*)

Evidence.

The books are usually adduced in evidence, that by comparison it may appear to the court and jury that the one is an infringement of the copyright of the other work. How far the circumstance of the same errors being found in two publications on the same subject is evidence of a piracy has been considered. (*w*)

Judgment, costs, &c.

There is nothing particular in the judgment. Double costs are given to the plaintiff when successful in maintaining a special action on the case: but if he discontinue, or is nonsuited, then costs are to be allowed to the defendant.

(*u*) For the precedents of the declaration, see 8 Went. 420, 434. 2 Chit. Pl. 351. 7 T. R. 618, 620.

(*v*) Ante, p. 358.

(*w*) Ante, p. 257. 4 Esp. N. P. C. 168.

III. The Proceedings in Equity.

The jurisdiction of the courts of equity over literary property is similar to that exercised over patents for inventions; and arises from an anxiety to give effect to the legal right, and to restrain, by means of the short process of an *injunction*, any violation which might become an injury irremediable by the slow proceedings of the common law. (x)

Motion for an injunction.

Clear title.

At first the courts of Chancery would not give assistance, unless the complainant had a clear *legal right*.(y) It was considered that injunctions to restrain an infringement of a copyright were of the same nature as those for staying waste; and never to be granted but upon a clear legal title. If moved for upon filing the bill, the right must have appeared clearly by affidavit; if moved for upon answer, it must have been clearly admitted by the answer, or at least not denied. (z)

Lord Northington in one case refused to interpose between two contending patents: (a) and in another, where the great question of the common law right of an author to his own productions after the expiration of the term allowed

(x) Ante, p. 183. and see 6 Ves. 705. 3 Bac. Ab. Injunctions.

(y) See Eden on Injunctions, 284. Anon. 1 Vern. 120. Hills v. University of Oxford, *ib.* 275.

(z) Millar v. Taylor, 4 Burr. 2303, 2325, 2328, 2400, 2407.

(a) Basket v. Cunningham, 2 Eden 137. 1 Bla. Rep. 370.

by the statute of Anne (upon which there was at that time no decision at law) came before him, he refused to interpose before a trial had at law, on the ground of the right being so extremely doubtful. (*b*)

And though we shall presently see that the law has been altered; yet still, where there is no possession, and the title depends upon the effect of an agreement, an injunction has been refused until the recovery in an action. (*c*)

Possession under colour of title.

Although afterwards the severity of that rule was a little relaxed, yet aid was not afforded to a plaintiff unless he could shew *possession under colour of title.* Thus when the University of Cambridge in the year 1743, claimed the right of printing acts of parliament, although they never had exercised such a privilege, Lord Hardwicke said that whilst the question was so doubtful, he would not grant an injunction in favour of persons who never had possession. (*d*)

What time shall be considered as sufficient length of possession appears to be uncertain: for Lord Clare refused to grant an injunction at the instance of the king's printer in Ireland until his right to the sole publication of Bibles had been established at law, although for forty

(*b*) Osborne *v.* Donaldson. Miller *v.* Donaldson, 2 Eden 327.

(*c*) Walcot *v.* Walker, 7 Ves. 1.

(*d*) Baskett *v.* University of Cambridge, 1 Bl. Rep. 105. 2 Bur. 661. and cited in 6 Ves. 710. and see 6 Ves. 607. and 2 Evans' Collec. Stat. p. 610.

years there had been *possession under colour of title.* (*i*)

Possession without title.

The practice in the Courts of Equity received a third modification; and it appears that now injunctions are granted and continued until the hearing upon possession alone, although the title to the book or patent may be very doubtful (*k*).

It has been shewn that if the right should be clear, and there has not been any possession, that an injunction will be refused. Nor will the Court interfere when there *has been possession;* if the colour of title, by the imprudence of the real proprietor, is with another person; as when several individuals have been permitted to publish and sell the subject of the copyright without any interposition on the part of the proprietor: Although that circumstance cannot be alleged as a justification of the infringement of another man's right; yet it is a sufficient ground to induce a Court of Equity not to interpose an injunction until the copyright has been established at law. (*l*)

The cause next comes on to be argued, when an order that meets the justice and equity of the case is made. If the injunction is continued, the cause is seldom ever heard of again; for it is almost as impossible as it is useless to obtain an account of the profits.

(*i*) Grierson *v.* Jackson, Irish T. R. 304.

(*k*) 6 Ves. 689. Id. 707. 8 Ves. 505.

(*l*) Walcot *v.* Walker, 7 Ves. 1. Platt *v.* Button, 19 Ves. 447. Cooper Rep. 303.

We have seen that equity loathes all impurity, and that it will never protect such a publication as that on which an action at law could not be maintained. In such a case it will not decree an account even on submission in the answer. (*n*)

The bill.

In an elementary work on Copyright, it would be useless to go very particularly into the *practice* of the Courts of Equity respecting Injunctions in general. On that head reference must be made to the books in Chancery practice. (*o*) It will be sufficient to describe those parts which more immediately relate to injunctions for copyright.

Affidavit of title.

Having shewn that some sort of title either clear or colourable with possession is necessary to obtain an injunction; the affidavit, which is considered strong enough to claim a title, must next be investigated.

We have seen that the assignment must be in writing, and under what circumstances relief will be given; and, therefore, to support the bill of an assignee of a copyright, there must be an affidavit that the assignment was made in writing. (*p*)

An affidavit, in which it was stated generally that the copy had been purchased or legally ac-

(*n*) 7 Ves. 1. Southey *v.* Sherwood, 2 Meriv. 435. and see ante, p. 212, 3.

(*o*) Ante, p. 185. Eden on Injunctions, Chap. 15. 2 Maddox Chan. chap. 7. Cooper's Pleadings in Chancery. Mitford's Pleadings 111, and 119. 2 Ves, Jun. 486.

(*p*) See ante, p. 313, 4.

quired by a person, was held insufficient, as it did not mention that he had purchased it of the author. (*q*)

An instance has occurred in which the *agent of a writer* of great reputation who was abroad made an affidavit that a work of which he had strong reasons to believe that the Poet was not the author, was advertised to be published in his name: and an injunction was granted and ordered to be continued until, upon notice thereof, the defendant would swear (as to his belief) that the work was not the compilation of the agent's employer. (*r*)

It is also the practice, that an affidavit as to facts, filed *after* the answer, may be read at the hearing; but that an affidavit as to title cannot be received. (*s*)

It very seldom happens that an answer is put in to a bill alleging a piracy; for the question in dispute is generally settled on the motion for an injunction.

The Hearing of the cause

The practice with respect to the hearing of the motion for an injunction to protect a right, whether in a patent or a book, has been mentioned. (*t*)

The defendant is at liberty immediately to move that the injunction may be dissolved; and, in case of an imitation or piracy, the Lord Chancellor will read the works; or a reference

(*q*) Gilliver *v.* Snaggs, 4 Vin. Ab. 278.
(*r*) Lord Byron *v.* Johnston, 2 Meriv. 29.
(*s*) Platt *v.* Button, 19 Ves. 447. Cooper 303.
(*t*) Ante, p. 186.