

ernment; but no evidence to that effect was offered. The Lord Chief Justice is reported to have said that, "if any such evidence had been produced, he should have held it fit to be received against the claim made by the plaintiff."

This ruling was correct; for the question of damages would have been clearly affected by proof showing that the publication of the manuscripts by the author would have been unlawful by reason of their seditious character. And to this extent only go the expressed views of the Chief Justice who presided at the trial. But this *dictum*, on which Lord Eldon based his decision in *Southey v. Sherwood*, gives no support whatever to the doctrine there affirmed. There was a vital distinction between the two cases. Southey claimed the right to prevent publication; whereas Dr. Priestley sued for the loss of profits, which he alleged he might have realized by publication.¹

PUBLICATION.

We may now inquire what is a publication of an intellectual production, and what kind of a publication it is that works a forfeiture of the owner's common-law rights. Properly speaking, a work is published when it is communicated to the general public. Literary, dramatic, and musical compositions may be published by being read, represented, or performed, or by the circulation of printed or manuscript copies. Paintings, works of sculpture, and similar productions, are published when publicly exhibited. In short, to publish a thing is to make it public by any means or in any manner of which it is capable of being communicated to the public.² At common law, the

¹ Lord Campbell has sharply criticised the decision of Lord Eldon in *Southey v. Sherwood*, and also that in *Wolcott v. Walker*. See Chap. III., note.

² In *Prince Albert v. Strange*, Vice-Chancellor Bruce held, that to publish a descriptive catalogue of etchings or drawings amounts to a publication of them. 2 De G. & Sm. 652, 694. In *Turner v. Robinson*, it was held that printing in a magazine an engraving of a painting was a publication of the engraving, but not of the painting.

"It is by publication of the thing itself," said the court, "that the common-law right is lost, and not by the publication of something else." 10 Ir. Ch. 121, 133. And so the court said that the publication of a bust would not be a publication of the statue itself. *Ibid.*

If publication of an engraving of a picture is not a publication of the picture itself, publication of a descriptive catalogue of etchings cannot be a publication of the etchings. What the court meant in *Prince Albert v.*

word publication may be used in this large sense; but it has a more restricted signification when used with reference to the statutes conferring copyright. The latter meaning will be considered after it has been shown that the common-law rights in a work are forfeited only when it is published within the meaning of the statute.

Author's Rights after Publication not lost by Common Law, but taken away by Statute. — At common law, the ownership of literary property is not lost by any publication of the work. A literary composition may be published in print or read to the public, a dramatic or musical composition may be publicly performed, a work of art may be publicly exhibited, without prejudice to the owner's rights or the remedies for the protection of those rights. The rights and the remedies are the same after as before publication. When these rights are lost by publication, it is not by force of the common law, but by operation of the statute, as it has been judicially construed. This principle is put beyond doubt by the judgment pronounced by the House of Lords in 1774 in *Donaldson v. Becket*.¹ Before this decision was rendered, the courts of chancery had uniformly recognized and protected common-law copyright in printed books;² and the court of King's Bench, after an exhaustive examination of the question, had affirmed, in *Millar v. Taylor*,³ that the exclusive rights of an author in his work were not lost by publication, either by operation of the common law or of the statute. In *Donaldson v. Becket*, the House of Lords held that there was no copyright in a printed book, except that given by the statute. But this judgment was based on the ground that the common-law right had been taken away by the statute. To this extent it overruled *Millar v. Taylor*. But it left undis-

Strange was, that the plaintiff's common-law property in the etchings was violated by a publication of a descriptive catalogue. What the court meant in *Turner v. Robinson* was, that the owner's common-law rights in the painting were not lost when he published an engraving of it. It was further argued in the latter case that the sale of the painting by the owner amounted to a publication destruc-

tive of the common-law property in the painting. The Master of the Rolls said that this theory was "destitute of all color of foundation." 10 Ir. Ch. 143.

¹ 4 Burr. 2408.

² *Eyre v. Walker*, *Motte v. Falkner*, *Walthoe v. Walker*, *Tonson v. Walker*, cited 4 Burr. 2325; *Tonson v. Walker*, 3 Swans. 672.

³ 4 Burr. 2303.

turbed the principle affirmed in the latter case, that publication does not, by force of the common law, work an abandonment of the owner's rights. Nine of the twelve judges summoned in *Donaldson v. Becket* were of opinion that, by the common law, the copyright in a book is not lost by its publication in print. The decision of the House of Lords was not against this doctrine, and may fairly be assumed to have been in harmony with it.¹ This judgment of the highest judicial tribunal of England has since continued to be the controlling authority on the law and the principles involved in the question under consideration.

It is true that the Supreme Court of the United States held, in *Wheaton v. Peters*, that the statute of 1790 did not sanction an existing right, but created one.² The reason given for this conclusion was, that the common law of England relating to literary property did not prevail in the United States. This doctrine, if it ever had any support, may now be regarded as exploded.³ The court further held that, even if the common law did prevail in this country, as the statute of Anne had been construed in England to have taken away the common-law property in published works, the same construction should be given to the act of Congress. This is the only ground which can support the decision of the court, and this rests solely on the precedent of *Donaldson v. Becket*. The law, as declared by the House of Lords in that case, was followed with approval by the Supreme Court in *Wheaton v. Peters*, and it has been followed in every English and American decision which affirms the doctrine, that there can be no copyright after publication, except under the statute. Hence, the doctrine may be regarded as well grounded, both in England and the United States, that, when an author loses his rights by publishing his work, it is by operation of the statute, and not of the common law. This principle has an important bearing in determining the common-law rights of authors in their productions, and will serve to make the law clear in some cases whose adjudication might otherwise be attended with doubt and difficulty, and perhaps injustice.

¹ See *ante*, pp. 37, 42.

² 8 Pet. 591, 654.

³ See *ante*, p. 47.

When Common-Law Rights are Lost by Publication.— In determining whether the author's rights are forfeited by a publication of his work, two tests are to be applied: 1, whether there is any statute relating to the species of production for which protection is sought, or governing the kind of right which is claimed; 2, whether the work has been published within the meaning of the statute. The former inquiry will be first considered.

As the owner of any work has by the common law an exclusive right to publish it, and that right is not lost after publication by virtue of the common law, but is taken away solely by operation of the statute, it is obvious that, if no statute has been passed, the force of the common law will not be annulled. It is equally true that, when a statute is passed to regulate copyright in a certain class of works, it may destroy the common-law right after publication in any work embraced within its operation, but not in one of a different class to which the statute does not apply. Thus, the statute of Anne related exclusively to books. It did not apply to works of art, and hence could not take away or change the owner's common-law rights in such works. But the statutes since passed regulating the copyright in paintings and works of sculpture will doubtless be held to have the same effect on the common-law property in such productions as the statute of Anne had in the case of books. So, also, the act of Anne regulated only the right of printing books. Hence, it could not properly be construed to take away the exclusive right of the author at common law publicly to perform his unprinted plays. But the 3 & 4 Will. IV. c. 15, which regulates playright, may be held to annul the corresponding common-law right.

The second test to be applied in determining whether the common-law right is destroyed by publication is, whether the work has been published within the meaning of the statute. The statute does not apply to a work not so published, and hence can have no effect on the common-law rights therein.

What, then, is a publication within the meaning of the statute? This question is more fully considered in treating the same topic in another connection.¹ It is there shown that

¹ See Chap. V., Publication.

no English or American statute regulating copyright in a literary composition takes effect until the composition is published in print, or by the public circulation of copies. Until such publication takes place, the common-law rights continue in full force. Hence, the owner of a literary composition which has not been published in print or by the circulation of copies may read it or permit it to be read in public, without any prejudice to his common-law rights therein.¹

This statement must be qualified in the case of dramatic compositions under the English, but not the American, law. In the United States, there is no statute governing the right of representing or performing a manuscript dramatic or musical composition. Hence, the common-law rule applies, and the owner's rights are not lost by the public representation or performance of such composition.² The law was the same in England³ until the 3 & 4 Will. IV. c. 15, was passed, which, as extended and amended by the 5 & 6 Vict. c. 45, s. 20, now regulates the exclusive right of representing and performing dramatic and musical compositions. These statutes apply to manuscript as well as to printed productions, and, within their meaning, the public representation or performance of a manuscript composition is a publication. On the principle that common-law copyright in a book is lost by publishing it in print, the common-law playwright in a manuscript dramatic or musical composition must be forfeited by its public representation or performance.⁴

Before the existence of statutory copyright in paintings, it was properly held by the Irish Chancery Court that the owner's common-law rights in a painting were not prejudiced by his public exhibition of it, or by the publication in a magazine of an engraving and a description of the painting.⁵ But, since

¹ *Abernethy v. Hutchinson*, 1 Hall & Tw. 28; *Bartlett v. Crittenden*, 4 McLean, 300, 5 Id. 32; *Keene v. Kimball*, 16 Gray (82 Mass.), 545; *Boucicault v. Fox*, 5 Blatchf. 87.

² See Chap. XIII.

³ *Coleman v. Wathen*, 5 T. R. 245; *Morris v. Kelly*, 1 Jac. & W. 461. See also *Macklin v. Richardson*, Amb. 694.

⁴ See Chap. XIII.

⁵ *Turner v. Robinson*, 10 Ir. Ch. 121, 510. "If there was no statute protecting copyright in literary works," said the Master of the Rolls, "and Sir Walter Scott had read out *Waverley* to a large party of friends, it is idle to say that such would have amounted to a publication, so as to have deprived him of his common-law right; and the painter or the owner of a painting,

this decision was rendered, a statute has been passed regulating the copyright in paintings.¹ Copyright in works of sculpture is likewise governed by statute.² In the United States, also, paintings and sculpture are subjects of statutory protection. Whether the common-law property in such works is lost by the public exhibition of the original, or by the circulation of engravings, photographs, or other copies, will depend on what is a publication of the work within the meaning of the statute. This is a difficult question, which is considered elsewhere in this work.³

The conclusion, then, to which we are brought is, that no common-law rights in a work are lost by publication, unless there be a statute to take away these rights, and unless the work be published within the meaning of the statute. This principle, as has been seen, was in effect affirmed in *Donaldson v. Becket*,⁴ and in *Wheaton v. Peters*,⁵ by the highest judicial tribunals of England and of the United States, whose judgments are still supreme.

But, inferior courts have in some cases lost sight of it, and hence have given weight to considerations which were clearly irrelevant. Thus, in *Turner v. Robinson*, it was held that the owner's common-law rights in a painting were not lost by its public exhibition.⁶ This was sound, because there was then no statute to take away these rights. But the court attached much importance to the fact that the painting was exhibited for the special purpose of securing subscribers for an engraving of it, and to the fact that the public had been warned, by notice, against taking photographic or other copies of the work. Neither of these considerations had any true bearing on the question. So, also, in the United States, there is no statute

who exhibits it at such exhibitions as those of London, Dublin, and Manchester, and, having regard to the object of such exhibitions, should be considered as allowing it to be viewed by the public, on a tacit understanding that an improper advantage would not be taken of the privilege thus granted; and I am disposed to think, without reference to the letters I have read, that such an exhibition would not be

a publication so as to deprive a painter, or the owner of a painting of his common-law right." *Ibid.* 140.

¹ 25 & 26 Viet. c. 68.

² 54 Geo. III. c. 56. See also 13 & 14 Viet. c. 104, s. 6.

³ See Chap. V., Publication.

⁴ 4 Burr. 2108.

⁵ 8 Pet. 591, 654.

⁶ 10 Ir. Ch. 121, 510.

regulating the right of representing manuscript plays. This right is governed solely by the common law, and hence is not lost or prejudiced by the public performance of the play. But, in several cases involving this question, the courts have elaborately discussed every principle which could be brought to bear on the subject but the right one, and have gravely affirmed or recognized theories which are as absurd as they were irrelevant. Such, for instance, are the notions that a "restrictive notice" to the audience is necessary to save the property in a manuscript drama from being lost by public representation, and that the right of representing a play against the will of the owner may be acquired by means of the memory of any person who has witnessed its public performance.¹

The owner's common-law rights are not lost by a publication which is made without his authority. In that case, the act is not his, and he cannot rightly be held responsible for what is done without his knowledge or consent.² But long acquiescence may amount to abandonment.³

Private Circulation of Copies not a Publication.—It may sometimes be difficult to determine whether the use which the owner makes of his production does or does not amount to a publication within the meaning of the statute. There is no doubt that the general unrestricted circulation of printed copies is such a publication, and the principle would seem to be the same when manuscript copies are so circulated.⁴ But it is clear that a private circulation for a restricted purpose is not a publication. Thus, in *Prince Albert v. Strange*,⁵ it appeared that Queen Victoria and her husband had given to their intimate friends lithographic copies of drawings and etchings, which they had made for their own amusement. This was held to be a private circulation of copies, and hence not a publication.⁶

In *Bartlett v. Crittenden*⁷ it appeared that the plaintiff, who was a teacher of book-keeping, had written his system of

¹ See Chap. XIII.

² *Boucicault v. Wood*, 2 Biss. 34, 39; *Crowe v. Aiken*, 2 Biss. 208; *Palmer v. De Witt*, 2 Sweeny (N. Y.), 530, 551; on ap. 47 N. Y. 532; *Shook v. Neuendorf*, 11 Daily Reg. (N. Y.) 985.

³ See acquiescence considered in Chaps. XI., XIII.

⁴ See Chap. V., Publication.

⁵ 2 De G. & Sm. 652; on ap. 1 Mac. & G. 25.

⁶ See also *Keene v. Wheatley*, 9 Am. Law Reg. 33.

⁷ 4 McLean, 300, 5 Id. 32.

instruction on separate cards, for the convenience of giving instruction to his pupils. He had permitted them to copy these cards for their own convenience, and to enable them to instruct others. The defendant published copies of the cards which he had obtained while a pupil in the school; and maintained that the complainant, by permitting his manuscripts to be so copied, had abandoned them to the public. The Circuit Court of the United States held this to be a private circulation of copies, which did not prejudice the owner's common-law rights. "The students of Bartlett who made these copies," said Mr. Justice McLean, "have a right to them and their use as originally intended. But they have no right to a use which was not in the contemplation of the complainant and of themselves when the consent was first given. . . . The lecturer designed to instruct his hearers, and not the public at large. Any use, therefore, of the lectures, which should operate injuriously to the lecturer, would be a fraud upon him for which the law would give him redress."¹ This action was brought under section 9 of the act of 1831; but it could not have been maintained if the use which the owner had permitted to be made of his manuscript had amounted to a publication within the meaning of the statute.

A recent case in the Supreme Court of New York presents a question as difficult as it is novel.² It appeared that the plaintiff, Kiernan, had bought from the Stock and Gold Telegraph Company the exclusive right to use their foreign financial news in a certain part of the city of New York, for the period of fifteen minutes after its receipt. This news was collected in Europe, and transmitted by cable to this country by the Associated Press, from whom the Stock and Gold Company had acquired the exclusive right of use, in New York City, for the period of thirty minutes after its receipt. As soon as received, the news was telegraphed by Kiernan and the Stock and Gold Company to their respective customers, and in all parts of the city was exposed to public gaze by means of printed tapes connected with stock indicators. The Manhattan Quotation Telegraph Company, which was also engaged in

¹ 4 McLean, 393, 394. See also *Abernethy v. Hutchinson*, 1 Hall & Tw. 28. ² *Kiernan v. Manhattan Quotation Telegraph Co.*, 50 How. Pr. (N. Y.) 194.

the business of supplying foreign financial news to its customers, had copied telegrams from Kiernan's bulletins and tapes, as well as from those of the Stock and Gold Company. On the ground of an invasion of his common-law property, Kiernan applied for an injunction to restrain the Manhattan Company from supplying to their customers the information thus obtained.

It is clear that, before it is forfeited by publication, there is a common-law property in valuable facts and information which have been collected and utilized by skill, diligence, and expense. The pivotal question here was, whether there had been a publication in the statutory meaning of that word. It is well settled in this country, as has been seen, that a literary composition is published, within the meaning of the statute, when printed copies are publicly circulated; and that the owner's rights are thereby lost, unless protected by statute. On the other hand, it is equally clear that publicly to represent a drama, or to communicate any literary composition to the public by word of mouth, is not such a publication as will prejudice the owner's common-law rights. But which of these rules governs when the communication to the public is by means of bulletins and printed tapes exposed in public places? If this is a publication analogous to the ordinary public circulation of printed copies, it is destructive of the owner's common-law rights. If it is not, those rights are not thereby prejudiced. The court was of opinion that this case was governed by the same principle as that which applies in the case of dramatic performances and the delivery of lectures, and held that giving news to the public in the manner described is not such a publication as will destroy the owner's common-law rights.

Whether this decision can be successfully defended on established legal principles, is a question attended with much doubt. The difficulty is in satisfactorily determining a question of fact. If such news had been published in a newspaper, or if it had been given to subscribers on printed sheets, there is little doubt that this would have amounted to a publication within the meaning of the statute. And yet it may be pertinently asked, Wherein is the principle different, whether the information be communicated to the public in this way or by means

of telegraphic copies printed on bulletins? In both cases the matter is printed, and copies are circulated. In neither is the communication private, or restricted as to persons. In both it may be and is read by the general public as soon as it is printed. It is true that the news is intended primarily for the benefit of those who pay for its use; but, nevertheless, it is communicated to the general public. The matter in a newspaper or book is primarily for the benefit of buyers; but a general circulation of copies is none the less a publication. It would seem, therefore, that a communication of the kind under consideration is more nearly analogous to an ordinary publication in print than it is to a publication by word of mouth. But it is a doubtful and difficult question, whose solution will not be attempted here.

The common-law property in dramatic and musical compositions is more fully treated under the head of Playright.¹

STATUTORY PROTECTION FOR MANUSCRIPTS.

There can be no statutory copyright in an unpublished work. But in the United States a remedy for the unauthorized publication of a manuscript is specially given by the statute. Section 4967 of the existing law² declares, that "every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, if such author or proprietor is a citizen of the United States, or resident therein, shall be liable to the author or proprietor for all damages occasioned by such injury." Section 9 of the act of 1831 gave similar redress for damages, and also a remedy by injunction to prevent or restrain the unauthorized publication.³ The latter remedy is not expressly given by the subsisting statute; but it has been held that the owner is entitled, under the statute, to an injunction restraining the unlicensed publication of his manuscript.⁴

To entitle a person to the benefit of this provision, it is not necessary that the whole of his manuscript shall be published

¹ Chap. XIII.

² U. S. Rev. St.

³ 4 U. S. St. at L. 438.

⁴ *Boucicault v. Hart*, 13 Blatchf. 47.

without his consent. The question is whether a substantial part has been published.¹

There is no reason to doubt that the section under consideration embraces any manuscript for which a copyright may be obtained.² But it has been questioned whether it applies to a manuscript which is not a proper subject of copyright.³ It is hardly reasonable to suppose that Congress intended to legislate for the protection of writings utterly worthless to the public, or wanting in the qualities of originality and innocence essential to sustain copyright. Ordinary private letters which have any value for publication are undoubtedly within the scope of this section;⁴ but this is hardly true of letters which have no such value.⁵

A more difficult question is, whether this section operates in favor of a resident assignee of a foreign author. There is nothing in its language to prevent this construction, and the opinion has been judicially expressed that such is its effect.⁶

¹ *Bartlett v. Crittenden*, 4 McLean, 300, 5 Id. 32.

² *Bartlett v. Crittenden*, *supra*; *Little v. Hall*, 18 How. 165, 170; *Parton v. Prang*, 3 Cliff. 537.

³ *Palmer v. DeWitt*, 47 N. Y. 535. "It may be doubtful," said Allen, J., "whether the act of Congress of 1831, c. 16, s. 9, 4 U. S. St. at L. 438, gives an action in respect to manuscripts, other than such as may be the subject of a copyright, under the laws of the United States."

In *Bartlett v. Crittenden*, 4 McLean, 301, McLean, J., said: "It is contended that the manuscripts are incomplete, and if published in their present state, could not be protected by a copyright; that an unfinished manuscript or book, which gives only a part of the thing intended to be written or published, can be of no value, and if printed no relief could be given, as no damage would be done. . . . But such is not the character of complainant's manuscripts. They may not be complete for publication. . . . But the cards contain the framework of the system."

⁴ After maintaining that a person

has property in the letters which he has written, Mr. Justice Story said: "It appears to me that the copyright act of 1831, c. 16, s. 9, fully recognizes the doctrine for which I contend. It gives by implication to the author, or legal proprietor of any manuscript whatever, the sole right to print and publish the same, and expressly authorizes the courts of equity of the United States to grant injunctions to restrain the publication thereof, by any person or persons, without his consent." *Folsom v. Marsh*, 2 Story, 113.

⁵ In *Woolsey v. Judd*, 4 Duer (N. Y.), 379, it was held, that at common law the writer was entitled to prevent the publication of a letter which had no literary value whatever. But, said Duer, J.: "We think it a doubtful question, whether the act of Congress of 1831, broad as its terms certainly are, was intended to apply, and ought, therefore, to be construed as applying to cases like the present; but it is to the courts of the United States that the decision of the question properly belongs." *Ibid.* 382.

⁶ *Keene v. Wheatley*, 9 Am. Law Reg. 45.

But copyright will not vest in a book written by a foreign author; and, if section 4967 applies only to productions for which copyright may be obtained, it follows that it gives no redress for the unauthorized publication of a manuscript which a citizen or resident has bought from a foreigner. As Congress, in granting copyright, expressly legislated for the protection of the literary productions of native authors, it is reasonable to suppose that the protection extended to manuscripts was intended only for those of citizen or resident authors. But, as has been said, the statute is not express on this point; and its meaning remains for judicial determination.

Section 4967 does not prohibit the public representation of an unpublished drama.¹

A painting is not a manuscript within this provision of the statute.²

Section 9 of the statute of 1831 prohibited the publication of a manuscript "without the consent of the author or legal proprietor first obtained as aforesaid." The words "as aforesaid" evidently referred to a preceding section,³ which declared it to be unlawful to publish a copyrighted book without the written consent of the owner, signed by two or more witnesses. Section 4967 of the Revised Statutes does not prescribe that the consent to publish a manuscript shall be in writing, and

¹ Keene v. Wheatley, 9 Am. Law Reg. 33; Boucicault v. Hart, 13 Blatchf. 47.

² Parton v. Prang, 3 Cliff. 557. Considering section 9 of the act of 1831, Mr. Justice Clifford said: "Manuscripts of every kind are embraced in that section; but pictures are not named in the provision, and cannot be regarded as entitled to that special protection, unless it be held that the word manuscript includes pictures, which is affirmed by the complainant and denied by the respondent; and that issue presents the principal question in the case." Ibid. 544. After showing that an unpublished painting could not be considered a manuscript within the meaning of the law, he continued: "Unsupported as the proposition of the complainant is by any legal adjudication, the argument of the respon-

dent is a forcible one, that the construction of section 9 of the copyright act must be controlled by the well-established rule that the words of a statute, if of common use, are to be taken in their natural, plain, obvious and ordinary signification and import, unless it clearly appears from the context or other parts of the enactment that the words were intended to be applied differently from their ordinary or their legal acceptance.

"Nothing is shown in the context of the enactment to favor the theory of the complainant; and, inasmuch as the usual and ordinary signification and import of the two words is opposed to such a theory, it is difficult to see how it can be adopted without doing violence to the most approved canons of construction." Ibid. 546.

³ s. 6; also, s. 7.

makes no reference to any part of the statute which requires a written consent. Nor does there appear to be any reason why a person may not be fully authorized to publish a manuscript by the oral consent of the owner.

The English statutes contain no provision similar to the one under consideration, for the protection of manuscripts.

LETTERS.

Property in Writer after Transmission.—The same general principles which underlie and govern the property of an author in his manuscript or other unpublished work apply also to letters written in the course of an ordinary correspondence. The law recognizes in these literary property which belongs to the writer, and continues in him after the letters have passed into the hands of the receiver. The theory of this is, that, in making a written communication to another, the writer does not consent to part with any right of property therein; but simply gives to the receiver the privilege of reading the letter for his own benefit, without the right to make any public use of its contents. The principle in this case is the same as when the owner of a manuscript permits another to read it, or to take a copy. The former does not lose, and the latter does not acquire, any right of literary property therein.¹ Even where the writer declined to accept the letters when the receiver offered to return them and said that the latter might keep them, it was held that he did not intend to abandon his literary property in them, or to give to the receiver the right to publish them.²

Whatever remedies the owner of a manuscript is entitled to, for the protection of his property, may be rightly claimed by the writer of a letter after its transmission. He may prevent the receiver from publishing it without authority, or making of it any other use not within his implied privileges as receiver. This doctrine was judicially recognized as early as 1741, when Curl, the London bookseller, was enjoined from selling a volume containing the private correspondence between Pope and Swift, which had been published in Ireland

¹ *Duke of Queensbury v. Shebbeare*, 2 Eden, 329.

² *Thompson v. Stanhope*, Amb. 737.

and reprinted in England without authority. When the case came before Lord Hardwicke on a motion to dissolve the injunction, it was contended on the part of the defendant, first, that ordinary private letters, written without any intention of publication, are not entitled to protection; and, second, that a letter sent by one person to another is a gift to the receiver, who thereby becomes vested with the entire property in it. Lord Hardwicke pronounced these theories unsound, and held that it was immaterial whether the letters had or had not been written for publication; that before transmission there was an absolute property in the writer; that the receiver acquired only a special or qualified property, extending, perhaps, to the paper, but not to the contents of the letter, and that this gave him no right of publication. The injunction, therefore, was continued as to the letters written by Pope, but dissolved as to those which he had received, and over which he clearly had no control.¹ The general principles laid down in this case have become the recognized law in England² and in the United States.³

It is well settled that the right of the author to restrain the unlicensed publication of his letters is not based on considerations of policy or social ethics. Publication may cause broken friendship, wounded feelings, humiliation, or distress; it may be for dishonorable purposes, and indicate on the part of the wrong-doer a baseness that should be held up to universal scorn. But these are matters of which no judicial cognizance has been taken in the adjudicated cases on this point. Where the right has been recognized, it has been on the principle of property; where the existence of the right has been denied, it has been on the ground that the writer failed to show a proprietary title. "The question will be," said Lord Eldon, "whether the bill has stated facts of which the court can take

¹ Pope *v.* Curl, 2 Atk. 342.

² Thompson *v.* Stanhope, Amb. 737; Cadell *v.* Stewart, 10 Mor. Diet. of Dec. Lit. Prop. App. p. 13; Granard *v.* Dunkin, 1 Ball & B. 207; Perceval *v.* Phipps, 2 Ves. & B. 19; Gee *v.* Pritchard, 2 Swans. 402; Palin *v.* Gathercole, 1 Coll. 565; Oliver *v.* Oliver, 11 C. B. n. s. 139; Howard *v.* Gunn, 32 Beav. 462.

³ Denis *v.* Leclere, 1 Martin (Orleans T.) 297; Folsom *v.* Marsh, 2 Story, 100; Wetmore *v.* Scovell, 3 Edw. Ch. (N. Y.) 515; Hoyt *v.* Mackenzie, 3 Barb. Ch. (N. Y.) 320; United States *v.* Towner, 6 McLean, 128; Woolsey *v.* Judd, 4 Duer (N. Y.), 379; Eyre *v.* Higbee, 22 How. Pr. (N. Y.) 198; Grigsby *v.* Breckinridge, 2 Bush (Ky.), 480.

notice as a case of civil property which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of that friendship affords a reason for the interference of the court.”¹ “We must be satisfied,” said the court in *Woolsey v. Judd*, “that the publication of private letters without the consent of the writer, is an invasion of an exclusive right of property which remains in the writer, even when the letters have been sent to and are still in the possession of his correspondent.”² Whether publication may be restrained as a breach of private confidence or contract, is a question which it is not important to discuss here; for the doctrine is sound in principle, and is well settled by authority, that the writer may control his letters on the ground of property.³

¹ *Gee v. Pritchard*, 2 Swans. 413.

² 4 Duer (N. Y.), 384; see also *Grigsby v. Breckinridge*, 2 Bush (Ky.), 486.

“An injunction restraining the publication of private letters must stand upon this foundation, that letters, whether of a private nature or upon general subjects, may be considered as the subject of literary property.” Plumer, V. C., *Perceval v. Phipps*, 2 Ves. & B. 24.

³ In *Folsom v. Marsh*, 2 Story, 111, Mr. Justice Story said, that, if the receiver “attempt to publish such letter or letters on other occasions not justifiable, a court of equity will prevent the publication by an injunction, as a breach of private confidence, or contract, or of the rights of the author.” This, however, was not one of the grounds on which the decision in the case was based; and, moreover, Judge Story recognized fully the principle of property in the writer. In *Gee v. Pritchard*, Lord Eldon held that an injunction could not be maintained on the principle of wounded feelings or broken friendship. In *Wetmore v. Scovell* and in *Hoyt v. Mackenzie*, the threatened publication was a clear breach of honor. But the court, while deprecating the act of the defendant, held that

it was not a ground for judicial interference. In *Woolsey v. Judd*, Judge Duer emphatically asserted that the jurisdiction of the court could not be placed on the ground of morals. His views of the law on this point were expressed in the following language:—

“We believe that few, who reflect upon the mischievous consequences which would certainly result from the unrestrained and frequent publication of private and confidential letters, will dissent from the opinion that it is highly desirable, looking to the best interests of society, that courts of equity should possess and firmly exercise the jurisdiction which is questioned. Our own views and feelings, we do not hesitate to declare, correspond entirely with those which Mr. Justice Story, in the most elaborate and useful of his works, has very forcibly expressed. We agree with him, that the unauthorized publication of such letters, unless in cases where it is necessary to the vindication of the rights or conduct of the party against unjust claims or imputations, is, perhaps, one of the most odious breaches of private confidence, of social duty, and of honorable feelings which can well be imagined. It strikes at the root of that free interchange of advice,

The ownership of the property gives the writer not only the exclusive right of publishing the letter, but also entitles him to withhold it from publication. The very act of unlicensed publication, without regard to the purposes for which it is done or its consequences, is an invasion of the property of the writer; since he has a right to say that what he has written shall not be published without his consent. Therefore, in seeking to prevent a threatened publication, or to restrain a publication which has been made against his will, it is immaterial whether the writer does or does not intend to publish the letter. Nor is it necessary for him to allege or show that the unlicensed

opinions and sentiments, which seem essential to the well-being of society, and may involve whole families in great distress from the public display of facts and circumstances which were reposed in the bosom of others, in the fullest and most affecting confidence that they should remain for ever inviolable secrets. 2 Eq. Jur. § 946.

"But, although, with Mr. Justice Story, we cannot do otherwise than condemn a practice which springs from the motives, and leads to the consequences which he has depicted, and which, from the feelings of resentment it is calculated to provoke, is dangerous to the peace as well as the morals of the community, we must not be understood to assert, that these considerations are alone sufficient to justify the interposition of a court of equity.

"It is not necessary to deny, that upon these grounds alone the jurisdiction of the court cannot safely be placed. A court of equity is not the general guardian of the morals of society. It has not an unlimited authority to enforce the performance, or prevent the violation, of every moral duty. It would be extravagant to say that it may restrain, by an injunction, the perpetration of every act which it may judge to be corrupt in its motives, or demoralizing, or dangerous in its tendency. We advance no such doctrine, and we fully admit that an injunction can never be granted, unless it appears that the personal legal rights of the

party who seeks the aid of the court, are in danger of violation; and as a general rule, that the injury to result to him from such violation, if not prevented, will be irreparable. It must be shown that a right is endangered which the law defines and is bound to protect, and that the mandate of the court is its only adequate protection; but when, by proof of these facts, the jurisdiction is established, we cannot doubt that considerations of public good and public policy may furnish motives, and powerful motives, for its prompt and effectual exercise. They may invest the legal right with an importance and dignity that would not otherwise belong to it, and convert the protection of a single individual into an extensive public benefit.

"It being conceded that reasons of expediency and public policy can never be made the sole basis of civil jurisdiction, the question whether upon any ground the plaintiff can be entitled to the relief which he claims remains to be answered; and it appears to us that there is only one ground upon which his title to claim and our jurisdiction to grant, the relief can be placed. We must be satisfied that the publication of private letters, without the consent of the writer, is an invasion of an exclusive right of property which remains in the writer, even when the letters have been sent to, and are still in the possession of his correspondent." 4 Duer (N. Y.), 383.

publication is for the purpose of gain, or that he will thereby sustain pecuniary damage, or suffer in his reputation or feelings. His right to withhold his expressed thoughts from publication is as inviolable as his right to publish them.¹

Nor is the right of the author limited to preventing or restraining a publication in print. At the common law, as has been shown, the unauthorized representation of a manuscript drama, the public reading of an unpublished literary composition, the exhibition of copies of a painting or statue, is a publication which invades the owner's rights of property. To make any public use of the production is to publish it. Hence a letter may be published not only by printing it, but also by reading it in public, or by circulating copies of it, though such copies be in manuscript. Any such public use of the letter, without the consent of the writer, is a violation of his rights.²

In all the cases which have been reported, the writer has sought merely to restrain the publication of his letters, or to recover possession of them.³ In none has he claimed damages. Hence the question whether the writer is entitled to recover damages for the unlicensed publication of his letters by the

¹ "It is immaterial whether the publication is for the purpose of profit or not. If for profit the party is then selling, if not for profit, he is giving that, a portion of which belongs to the writer." Lord Eldon, *Gee v. Pritchard*, 2 Swans. 415.

"Not only is the right of property in the author not subject to the limitation which some have supposed to exist, but it is absolute as well as unlimited. When he applies for an injunction, it is not necessary that he should aver that he desires to take from the defendants, or to secure to himself the profits of publication. As owner, he has an absolute right to suppress as well as to publish; and he is as fully entitled to the protection and aid of the court, when suppression is his sole and avowed object as when he intends to publish." Duer, J., *Woolsey v. Judd*, 4 Duer (N. Y.), 387. See also *Denis v. Leclere*, *infra*.

² In *Denis v. Leclere*, 1 Martin (Orleans T.), 297, it appeared that the defendant, after he had been enjoined from publishing a letter, notified the public that a copy of the letter had been annexed to his answer in the suit, and might be seen at the clerk's office. It was also proved that he had permitted two persons to read the letter at his office. It was held that annexing a copy to the answer would have been justifiable, had it been necessary or done with a good motive; but the court found that the letter was irrelevant to the pleadings, and had not been annexed for any legitimate purpose of the suit. For publishing the letter by this means, and by showing it to two persons, the defendant was fined fifty dollars for contempt of the injunction which had been granted.

³ See *Grigsby v. Breckinridge*, 2 Bush (Ky.), 480.

receiver, or by a third person, has not been adjudicated. But there can be no reasonable doubt that, when damages have been sustained, a remedy at common law exists, on the principle that every author is entitled to recover for the damages caused by the unauthorized publication of his work.

When Property is not in Writer. — Cases may arise in which the writer will not be considered as the owner of the property in the letters which he has written, and hence will not be entitled to restrain their publication. Thus, letters written by one person employed by another, and relating to the business affairs of the latter, will rightly be considered as the property of the employer who pays the writer for such services. In a recent English case, it was held that the letters which an officer of an insurance company had written in the discharge of his official duties became the property of the company.¹ The same principle applies to letters written by officers of the government. Mr. Justice Story based the right of the government to publish, or to prevent the publication of, such official correspondence, on the ground of public policy.² This principle is not here disputed; but it is clear that the government is the rightful owner of the literary property in the letters which its servants have written in the discharge of their official duties.

Letters without Literary Value. — The question has been much discussed, whether the principle that a writer has a property in his letters after transmission, which the law will protect,

¹ Howard v. Gunn, 32 Beav. 462.

² "In respect to official letters addressed to the government or any of its departments by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful whether any public officer is at liberty to publish them, at least in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right and even

the duty of the government to give them publicity, even against the will of the writers. But this is an exception in favor of the government, and stands upon principles allied to, or nearly similar to, the rights of private individuals, to whom letters are addressed by their agents to use them and publish them upon fit and justifiable occasions. But assuming the right of the government to publish such official letters and papers under its own sanction and for public purposes, I am not prepared to admit that any private persons have a right to publish the same letters and papers, without the sanction of the government, for their own profit and advantage." Folsom v. Marsh, 2 Story, 113.

is limited to those having literary merit, or is equally applicable to ordinary letters of business or friendship, and which have no value for purposes of publication. We have seen that, in *Pope v. Curl*,¹ Lord Hardwicke overruled the objection that private letters, written without any view to publication, were not entitled to protection. But the literary value of the letters in this case appears not to have been questioned. The theory that a letter without any literary value is not entitled to protection is traced to an *obiter dictum* of Sir Thomas Plumer, in *Perceval v. Phipps*.² It has received no other support from any English judge. In the subsequent case of *Gee v. Pritchard*, Lord Eldon remarked, that it would be "extremely difficult to say where the distinction is to be found between private letters of one nature and private letters of another nature."³ In the United States Circuit Court in 1841, Mr. Justice Story declared, "that the author of any letter or letters (and his representatives), whether they are literary compositions or familiar letters, or letters of business, possess the sole and exclusive copyright therein; and that no persons, neither those to whom they are addressed nor other persons, have any right or authority to publish the same, upon their own account or for their own benefit."⁴ The theory announced by Sir Thomas Plumer was expressly affirmed by the New York Court of Chancery, in *Wetmore v. Scovell*,⁵ decided in 1842, and in *Hoyt v. Mackenzie*,⁶ decided in 1848; in each of which the court refused to grant an injunction in favor of the writer, restraining an unlicensed publication of his letters for dishonorable purposes. The refusal was on the sole ground that the letters were without literary merit, and had no value for purposes of publication. These decisions were sharply criticised, and overruled by the full bench of the Superior Court, in 1855, in *Woolsey v. Judd*.⁷ The complainant in this case sought to restrain the publication of a single letter. He did not claim

¹ 2 Atk. 342.

² "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 pro-

ected upon the principle of copyright."

³ 2 Ves. & B. 28.

⁴ 2 Swans. 426.

⁵ *Folsom v. Marsh*, 2 Story, 110.

⁶ 3 Edw. Ch. (N. Y.) 515.

⁷ 3 Barb. Ch. (N. Y.) 320.

⁸ 4 Duer (N. Y.), 379.

that it had any literary value, or that, by its threatened publication, he would sustain pecuniary damage, or any injury to his reputation or feelings. The issue, therefore, was simply whether his property in what he had written gave him a right to say that no one should publish it without his consent. In a thorough discussion of the subject, the court maintained that there was no ground for any distinction in law between letters having and those not having literary merit, and affirming the doctrine so clearly expounded by Judge Story, held, that "every letter is, in the general and proper sense of the term, a literary composition," which cannot lawfully be published by the receiver, or any third person, without the consent of the writer, except for purposes of vindication. This doctrine has been approved by the Kentucky Court of Appeals,¹ and is supported by the weight of authority. It is also based on sound principles.

The theory that property exists only in letters of literary value has no foundation in reason or principle. Is a letter written by an author to have the benefit of protection, because it will command a price in the publisher's market, while that of the merchant is outlawed, although the information it contains may be of the highest pecuniary value in the marts of trade? The correspondence of merchants, bankers, and other business men is frequently freighted with information of great value. Its untimely publication may be a serious loss to the owner, its possession a prized gain to the possessor. Is protection to be denied to such letters because they lack literary value? It is not true that the contents of a letter, in order to possess the attributes of property, must have a value, either in literary or commercial markets, or that a letter is valuable to the writer only as far as it may be useful to others. The value of the composition for purposes of publication will enter into the question of damages, when the writer seeks to recover for a loss of profits which he has suffered by unlicensed publication. But, when it is sought to prevent or to restrain publication, the court cannot rightly require the owner to prove that his property is valuable to the community. His

¹ Grigsby v. Breckinridge, 2 Bush (Ky.), 480. See also Denis v. Leclerc, 1 Martin (Orleans T.), 297.

ownership entitles him to say that his composition shall not be published. What value it may have to society, or how far it may be useful to the public, is immaterial. A letter may be without literary value, and destitute of any quality to render it useful to the community, and yet it may be valuable to the writer. A brief business note may play an important part in commercial transactions. A communication relating to domestic matters, though void of general interest, may be valued by a circle of relatives and treasured by their descendants. Publication may bring upon the writer financial embarrassment, humiliation, or substantial injury. Whatever may be the nature of the letter, its merit, or its value, the law gives to the writer the right to determine what use, not within the implied purposes for which it is sent, shall be made of its contents. It has never been doubted that this right exists before the letter has gone from the writer; and it is equally clear that the right is not lost by the transmission of the letter.

Rights of Receiver. — What rights the receiver has in a letter has not been clearly defined. It is conceded that the material on which it is written becomes his property. In *Pope v. Curl*, Lord Hardwicke expressed the opinion that “possibly the property in the paper may belong to him.”¹ This doctrine was expressly affirmed in the recent English case of *Oliver v. Oliver*,² where it was held that the receiver becomes the owner of the material property in the letter, and may maintain an action for detinue against any person into whose possession the letters have passed. In this case the action was brought against the writer, to whom the letters had been voluntarily returned by the receiver. The question of fact was submitted to the jury, whether the letters had been returned with the understanding that the writer might keep them as his own property, or whether they had been merely deposited with him as a bailee. The jury found the latter to be the fact, and the court held that the material property in the letters belonged to the receiver. In harmony with this doctrine, it has been held by the Kentucky Court of Appeals that the writer has no legal remedy for recovering his letters after they have passed into the posses-

¹ 2 Atk. 342.

² 11 C. B. N. S. 139.

sion of the receiver.¹ Hence the receiver is not bound to preserve the letters for the benefit of the writer. He may destroy them as soon as received. There seems to be no principle of property to prevent him from giving them to another; but such person would thereby acquire no rights of publication.² It has never been claimed that the receiver, with an exception which will be considered further on, acquires any property in the contents of the letter, or any right to publish it without the consent of the writer.³ In *Pope v. Curl* it was expressly held that Pope had no right to interfere with the publication of the letters which had been written to him by Swift, for the good reason that they were the literary property of the latter.⁴ The privileges of the receiver are restricted to a private use of the letter. He may have a right to read it to others, or to let others read it, when such reading does not amount to a publication. But, without the express or implied consent of the writer, he is not entitled to make of the letter any use which may be properly considered as a publication.

In *Eyre v. Higbee*, it was held by the New York Supreme Court, that letters written by Washington to his secretary, Colonel Tobias Lear, were not salable assets in the hands of the administrator of the latter, but that they belonged to the widow and next of kin.⁵

May Receiver Publish for Purposes of Vindication? — The doctrine has gained currency that the receiver of a letter acquires in its contents a special or qualified property or right, which entitles him to publish it for the purpose of vindicating his reputation from false charges or unjust imputations made by the writer. This theory was first announced in 1813, by Sir Thomas Plumer, who on this ground dissolved an injunction,

¹ *Grigsby v. Breckinridge*, 2 Bush (Ky.), 480. See also *Granard v. Dunkin*, *infra*.

² *Grigsby v. Breckinridge*, *supra*.

³ This statement must be qualified by a reference to *Granard v. Dunkin*, 1 Ball & B. 207, wherein the Irish Chancery Court, in 1809, granted an injunction in favor of the executrix of Lady Tyrawley, enjoining the threatened publication of letters which had been written to the latter, and ordering

them to be delivered to the former. The decree for such delivery was proper, because the property in the paper had belonged to Lady Tyrawley; but she had acquired no title to the literary property in the letters which had been received by her, and hence there was no ground on which the injunction against publication could rest.

⁴ 2 Atk. 342.

⁵ 22 How. Pr. (N. Y.) 198.

which had been granted by Lord Eldon, restraining the defendant in *Perceval v. Phipps* from publishing letters written by the plaintiff.¹ This question has not been a direct issue in any other reported case; but the views of Sir Thomas Plumer are supported by *dicta* in two American cases.² In one of these, Mr. Justice Story declared in emphatic, but extrajudicial, language that the receiver is entitled to publish a letter for purposes of vindication; but, in his treatise on Equity Jurisprudence, he has expounded the law to the contrary.³

¹ 2 Ves. & B. 19.

² *Folsom v. Marsh*, 2 Story, 111; *Woolsey v. Judd*, 4 Duer (N. Y.), 407. Lord Eldon would not deny that there might be a case, such as that of *Perceval v. Phipps*, "where the acts of the parties supply reasons for not interfering;" but in the case before him he found that publication was not necessary to vindicate the receiver, and held that whatever right to publish the latter might have had he renounced by returning the letters to the writer, although he retained copies. *Gee v. Pritchard*, 2 Swans. 402, 426. In *Palin v. Gathercole*, 1 Coll. 565, the defendant, on motion to dissolve the injunction which had been granted restraining him from publishing certain letters written by the plaintiff, pleaded that their publication was for the purpose of vindicating his reputation. Vice-Chancellor Bruce, without passing on the merits of the question, held that the defendant was barred from making this defence, and refused to dissolve the injunction.

³ In *Folsom v. Marsh*, Mr. Justice Story, after declaring that the writer has a right to restrain the unauthorized publication of his letters, said: "But, consistently with this right, the persons to whom they are addressed, may have, nay, must by implication possess, the right to publish any letter or letters addressed to them, upon such occasions as require or justify the publication or public use of them; but this right is strictly limited to such occasions. Thus, a person may justifi-

ably use and publish, in a suit at law or in equity, such letter or letters as are necessary and proper to establish his right to maintain the suit or defend the same. So if he be aspersed or misrepresented by the writer, or accused of improper conduct, in a public manner, he may publish such parts of such letter or letters, but no more, as may be necessary to vindicate his character and reputation, or free him from unjust obloquy and reproach. If he attempt to publish such letter or letters on other occasions, not justifiable, a court of equity will prevent the publication by an injunction, as a breach of private confidence or contract, or of the rights of the author; and *a fortiori* if he attempt to publish them for profit; for then it is not a mere breach of confidence or contract, but it is a violation of the exclusive copyright of the writer. In short, the person to whom letters are addressed has but a limited right or special property, if I may so call it, in such letters as a trustee or bailee, for particular purposes, either of information or of protection, or of support of his own rights and character. The general property and the general rights incident to property belong to the writer, whether the letters are literary compositions, or familiar letters, or details of facts or letters of business. The general property in the manuscripts remains in the writer and his representatives, as well as the general copyright. *A fortiori* third persons standing in no privity with either party, are not entitled to publish them

It seems to be conceded that the privilege of publication for vindicatory purposes is personal to the receiver, and cannot be exercised by a third person, either with or without the consent of the receiver.¹

The doctrine that the receiver acquires the right to publish a letter for the purpose of vindicating himself against charges or imputations made by the writer, although it has received strong extrajudicial approval, is in conflict with the fundamental principles on which all the cases relating to property in letters have been decided. These cases have been, and all similar cases must be, determined on principles of property. Protection has been extended to the writer, because he has literary property in the letter which he has written, and because his rights are not lost by the transmission of the letter. Unlicensed publication by the receiver of a letter has been declared unlawful, on the sole ground that it is a violation of the literary property therein. The receiver can acquire no right to make a public use of the literary property in a letter, unless he has the consent of the writer, or has become vested with a right of ownership. His right to publish is to be determined exclusively on principles of property. But the privilege of publication for purposes of vindication is not a right of property, and cannot be defended on any principles of

to subserve their own private purposes of interest or curiosity or possession." 2 Story, 110.

In his *Equity Jurisprudence*, the same authority says: "For the purposes of public justice, publicly administered, according to the established institutions of the country, in the ordinary modes of proceeding, private letters may be required to be produced and published. But it by no means follows, that private persons have a right to make such publications on other occasions, upon their own notion of taking the administration of justice into their own hands, or for the purpose of vindicating their own conduct, or of gratifying their own enmity, or of indulging a gross and diseased public curiosity, by the circulation of private anecdotes, or family se-

crets, or personal concerns." Vol. ii. § 948.

This doctrine is manifestly contrary to the views above quoted from the opinion in *Folsom v. Marsh*. The decision in this case was rendered in 1841. The first edition of the *Equity Jurisprudence* appeared in 1836. But it cannot be said that the latest or the modified views of Judge Story on this question were expressed in the judicial opinion cited; for the exposition of the law given in the first edition of the *Equity Jurisprudence* was retained unchanged in the following editions, of which the third was published in 1843, — two years before the author's death, and two years after *Folsom v. Marsh* had been decided.

¹ *Folsom v. Marsh*, 2 Story, 111; *Woolsey v. Judd*, 4 Duer (N. Y.), 379, 407.

property. To give to the receiver this privilege is to empower him to publish valuable literary compositions, for the purpose of redressing a real or supposed injury to himself, and thus to destroy a safeguard which the law has guaranteed to the property of the writer. It makes the receiver the sole judge of whether the wrong is real or fancied, and empowers him, in order to redress an alleged injury to himself, to inflict a greater one upon the writer. The law specially provides remedies for injuries done to the reputation. If the receiver of a letter has suffered in reputation or feelings by any thing said, written, or done by the writer, he is left to seek redress by the means usual and proper in such cases. He has no right to take the law into his own hands, as it were, and to appropriate the property of another, in order to remedy a wrong for which the law has specially provided.

CHAPTER II.

WHAT MAY BE COPYRIGHTED.

IN the United States, statutory copyright may be obtained for a book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or negative thereof, painting, drawing, chromo, statue, statuary, and a model or design intended to be perfected as a work of the fine arts.¹ The copyright in all these productions is governed by the same statute, and is secured for the same term and on the same conditions. Substantially the same things may be copyrighted in England; but protection is provided by different statutes, and the copyright granted is not the same for all kinds of productions.

BOOKS.

The word "book" has been used in the English and American copyright statutes since the first one was passed, in the reign of Queen Anne. In England, its meaning was not defined by Parliament till 1842. In the United States it has been left entirely to judicial determination.

Great Britain. — As used in this connection, the word has received a far more comprehensive signification than it has in ordinary use. In England, it is defined by statute "to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published."² Long before the meaning of the word had been thus defined by the legislature, a construction, not less liberal, had been given to it by the judiciary. As early as 1777, the Court of King's Bench held a sonata to be a book or writing, within the meaning of the statute of Anne,³ and all

¹ U. S. Rev. St. s. 4952.

² 5 & 6 Vict. c. 45, s. 2.

³ *Bach v. Longman*, Cowp. 623.

"The words of the act of Parliament,"

musical compositions were treated as books before they were mentioned in the statute of Victoria.¹ In 1803, Lord Ellenborough was inclined to think that the words of a song called Abraham Newland, published on a single sheet of paper, could not be considered a book. He therefore nonsuited the plaintiff, but reserved the question for the opinion of the court. The Court of King's Bench afterward set aside the nonsuit, and ordered a new trial. The case does not appear to have been brought to trial again.² In 1788, the copyright in "a certain

said Lord Mansfield, "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 copy by playing it; but he has no right to rob the author of the profit, by multiplying copies and disposing of them to his own use. If the narrow interpretation contended for in the argument were to hold, it would apply to algebra, mathematics, arithmetic, hieroglyphics. All these are conveyed by signs and figures. There is no color for saying that music is not within the act."

"Books and other writings" were mentioned in the preamble of the act; but in the enacting clause the word book alone was used.

¹ See authorities cited *post*, p. 175, note 3. In *D'Almaine v. Boosey*, 1 Y. & C. Exch. 299, Lord Abinger said: "I spent three or four days at Stationers' Hall in order to ascertain what entries were made under the act of Parliament, and I found not only that short publications on single sheets of paper were entered as books, but also a great deal of music. There is no doubt, therefore, that printed music, in whatever form it may be published, is to be considered in reference to proceedings of this nature, as a book."

² *Hime v. Dale*, 2 Camp. 27, note b. Mr. Erskine at the bar maintained that a broad meaning should be given to the word book as used in the statute. He contended "that the legislature could never have meant to

make the operation of the statute depend upon the type in which any composition is printed, or the form in which it is bound up. This song might easily have been extended over several sheets, and rendered a duodecimo volume. In *Bach v. Longman*, Cowp. 623, it was decided that music is within the act, and musical compositions most generally appear in this fugitive form. It never occurred to the Lord Chancellor who directed the issue, or to Lord Mansfield, or any of the judges who decided the case, that the form of the publication could make any difference; and therefore it is not stated. If a different construction were 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 Elogy 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 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 enclose 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, on 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

musical air, tune, and writing," on one sheet, was protected;¹ and, in 1809, a single sheet of music was held to be a book within the meaning of 8 Anne, c. 19. In the latter case, "the judges seemed unanimously of opinion that it could not depend upon the form of the publication whether it were entitled to the privileges of the statute or not; that a composition on a single sheet might well be a book within the meaning of the legislature."² In a later case, wherein copyright was claimed under 54 Geo. III. c. 156, in a piece of instrumental music, Chief Justice Abbott, in delivering the judgment of the King's Bench, expressed the opinion that "any composition, whether large or small, is a book within the meaning of this act of Parliament."³

United States.—The comprehensive meaning given to the word book, in England, has been adopted in this country.⁴ "A book within the statute need not be a book in the common and ordinary acceptation of the word; viz., a volume made up of several sheets bound together; it may be printed only on one sheet, as the words of a song or the music accompanying it. . . . The literary property intended to be protected by the act is not to be determined by the size, form, or shape in which it makes its appearance, but by the subject-matter of the work. Nor is this question to be determined by reference to lexicog-

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 a 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 Edward 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."

¹ *Storace v. Longman*, 2 Camp. 27, note a.

² *Clementi v. Golding*, 2 Camp. 32.

³ *White v. Geroch*, 2 Barn. & Ald. 298.

⁴ *Clayton v. Stone*, 2 Paine, 382; *Scoville v. Toland*, 6 West. Law Jour. 84; *Drury v. Ewing*, 1 Bond, 540.

raphers to ascertain the origin and meaning of the word book. It will be more satisfactory to inquire into the general scope and object of the legislature, for the purpose of ascertaining the sense in which the word book was intended to be used in the statute." ¹ In a recent case, the Circuit Court of the United States held that a diagram with directions for cutting garments printed on a single sheet was a book within the meaning of the statute. ²

A mere label ³ capable of no other use than to be pasted on

¹ Thompson, J., Clayton v. Stone, 2 Paine, 383, 386.

² Drury v. Ewing, 1 Bond, 540. The plaintiff claimed copyright in a chart entitled, "The ladies' chart for cutting dresses and basques for ladies, and coats, jackets, &c., for boys." Mr. Justice Leavitt gave the following reasons why this should be entitled to protection as a book: —

"As a first impression from an inspection of the chart, the mind repudiates the conclusion that it is a book; and when the point was first suggested it occurred to me it would require a forced construction of the statute to bring it fairly within the meaning of that term. The chart, as printed and published for use, is contained on one large sheet, representing a series of diagrams interspersed with printed instructions as to the mode of using them in taking measurements for and cutting certain parts of ladies' dresses. As necessary to the practical use of the diagrams, they are pasted on thick paper or paste-board, corresponding with and showing precisely the forms of the diagrams. The exact dimension and form of every part of the garment intended to be cut is indicated by a series of numerals placed along the outer edges of the diagrams thus arranged and by means of dots or marks at the proper figures, the exact size and course of each section of the garment is ascertained with mathematical precision. Now it may well be conceded, that the chart as printed on the sheet, or as pasted in parts for practical use, is not a book, according

to the more popular sense of the word. But in giving effect to the statute according to its obvious design and spirit I can see no necessity for restricting the word to a volume. . . . I am therefore inclined to adopt the liberal construction given by the English courts to their statute, and to hold that Mrs. Drury's chart is within the protection of our statute. She could doubtless have given it to the world in a succession of sheets bound together and constituting a volume, but it is obvious that the chart for practical purposes is more easily understood, and therefore more useful, printed on a single sheet large enough to exhibit all the diagrams at one view. I cannot perceive why her rights as an authoress or inventress should be prejudiced by this form of publication. If the chart, as the court is bound, for reasons before intimated, to presume is original with her, — the product of thought and mental toil, — her claim is by no means destitute of merit and she is justly entitled to all the benefits which the law confers.

". . . Adopting this view of the law it is not necessary to decide whether Mrs. Drury's copyright can be sustained as a chart or print. These words are used in the statute as legitimate subjects of a copyright, and it would not imply a very forced construction to hold that the copyrighted work of Mrs. Drury's is included in one or both of these terms. The authorities, I think, would fully sustain such a conclusion." Ibid. 545-548.

³ Scoville v. Toland, 6 West. Law

a bottle, and a scoring-sheet or "tablet,"¹ used in the game of cricket, have been held not to be books within the law.

While, then, the legislature has passed laws for the protection of literary property in "books," without specifying more definitely the kinds of compositions intended to be included, the courts have construed those laws so as to embrace within their protection the entire field of honest literary labor. Hence, the literary productions in which valid copyright will subsist are almost, if not quite, as unlimited in variety as are the productions themselves. Books entitled to the protection of copyright embrace the profoundest work on the universe and the simplest rhyme for the nursery; the most fascinating production of the imagination and the dryest catalogue of names.

All Contents of Book covered by Copyright.—The copyright protects the whole and all the parts and contents of a book. When the book comprises a number of independent compositions, each of the latter is as fully protected as the whole.² And so the copyright protects not only the text, but also any engravings, illustrations, figures, &c., contained in the book.³ The copyright will not extend to any part which is not a proper subject of copyright. But the fact that a part may not be entitled to protection does not affect the copyright in the rest. The copyright is valid to the extent of the matter which will stand all the tests of the law.⁴ "The courts of justice," said Lord Kenyon, "have been long laboring under an error, if an author have no copyright in any part of a work unless he have an exclusive right to the whole book."⁵

Jour. 84; *Coffeen v. Brunton*, 4 McLean, 516. The act of June 18, 1874, provides for the registration of labels in the patent-office. See *post*, p. 178.

¹ *Page v. Wisden*, 20 L. T. N. s. 435.

² *White v. Geroch*, 2 Barn. & Ald. 298; *D'Almaine v. Boosey*, 1 Y. & C. Exch. 288.

³ *Roworth v. Wilkes*, 1 Camp. 94; *Wilkins v. Aikin*, 17 Ves. 422; *Bradbury v. Hotten*, Law Rep. 8 Exch. 1; *Cobbett v. Woodward*, Law Rep. 14 Eq. 407. "It appears to me that a book must include every part of the book: it must include every print, de-

sign or engraving which forms part of the book, as well as the letter-press therein; which is another part of it." *Parker, V. C., Bogue v. Houlston*, 5 De G. & Sm. 275.

⁴ *Barfield v. Nicholson*, 2 Sim. & St. 1; *Lawrence v. Dana*, 2 Am. L. T. R. N. s. 402. "There are numerous cases showing that where the parts of a work can be separated, there may be copyright in any distinct part of it. . . . It matters not whether the copyright is for the entire work or for a part only." *Giffard, V. C., Low v. Ward*, Law Rep. 6 Eq. 418.

⁵ *Cary v. Longman*, 1 East, 360.

Title Alone not Subject of Copyright. — The mere title of a book, magazine, newspaper, or other publication, is not a subject of copyright.¹ A title is treated as a trade-mark, in which the owner's rights are recognized and protected on general principles of equity.² In the United States, the title of any publication may doubtless be registered under the statute relating to trade-marks.³ In such case, the owner may become entitled to the statutory remedies; provided, of course, the title registered has the requisites of a valid trade-mark.

NEW EDITIONS.

Successive editions of a work which do not differ from the first are covered by the original copyright. This will not

¹ *Am. Osgood v. Allen*, 1 Holmes, 185; *Jollie v. Jaques*, 1 Blatchf. 618, 627; *Benn v. Leclerq*, 18 Int. Rev. Rec. 94; *Isaacs v. Daly*, 7 Jones & Sp. (39 N. Y. Superior Ct.) 511. *Br. Correspondent Newspaper Co. v. Saunders*, 12 L. T. n. s. 540; *Maxwell v. Hogg*, Law Rep. 2 Ch. 307; *Kelly v. Hutton*, 3 Id. 708. In *Osgood v. Allen*, Mr. Justice Shepley said:—

“By the plain terms of the statute, the copyright protected is the copyright in ‘the book,’ the word book being used to describe any literary composition. Although a printed copy of the title of such book is required before the publication to be sent to the librarian of Congress, yet this is only as a designation of the book to be copyrighted, and the right is not perfected under the statute until the required copies of such copyright book are, after publication, also sent. It is only as part of the book and as the title to that particular literary composition, that the title is embraced within the provision of the act. It may possibly be necessary in some cases, in order to protect the copyrighted literary composition, for courts to secure the title from piracy, as well as the other productions of the mind of the author in the book. The right secured by the act, however, is the property in the literary composition, the product of the mind and genius of the author, and

not in the name or title given to it. The title does not necessarily involve any literary composition; it may not be, and certainly the statute does not require, that it should be the product of the author's mind: It is not necessary that it should be novel or original. It is a mere appendage which only identifies and frequently does not in any way describe the literary composition itself or represent its character. By publishing, in accordance with the requirements of the copyright law, a book under the title of the life of any distinguished statesman, jurist, or author, the publisher could not prevent any other author from publishing an entirely different and original biography under the same title. When the title itself is original and the product of the author's own mind, and is appropriated by the infringement, as well as the whole or a part of the literary composition itself, in protecting the other portions of the literary composition courts would probably also protect the title. But no case can be found either in England or this country in which, under the law of copyright, courts have protected the title alone separate from the book which it is used to designate.” *Supra*, 192.

² See authorities cited in considering titles in latter part of Chap. XI.

³ U. S. Rev. St. ss. 4937–4947.

protect any new matter in a subsequent edition, for the obvious reason that such matter was not in existence when the copyright vested.¹ Another copyright, however, may be obtained for any edition which is substantially different from the preceding ones. Such edition is regarded by the law as a new and original work.

Whether an independent copyright will vest in any subsequent edition will depend on the amount of new matter which it contains, or the extent and character of the revision which has been made in the preceding edition. A simple reprint of the original, or other previous edition, will be entitled to no other protection than is given to the preceding edition. In such case, there is nothing new on which to found a valid claim for copyright. On the other hand, a subsequent edition may contain much new matter, or a thorough recast of the old. It may be so enlarged or condensed, or otherwise revised, as to become substantially a new work. As such, it will be entitled to copyright. But between these two extremes of a simple reprint and a substantially new work may arise cases of so-called new editions, which will present questions of extreme nicety and great difficulty in determining whether there is a basis for a new copyright. The main question is to be determined by the facts in each case. The general rule is that each successive edition, which is substantially different from the preceding ones, or which contains new matter of substantial amount or value, becomes entitled to copyright as a new work.² It is immaterial whether the new edition is produced by condensing, expanding, correcting, rewriting, or otherwise altering the original; or by adding notes, citations, &c. Nor is it

¹ *Farmer v. Calvert Lithographing, Engraving, and Map-Publishing Co.*, 5 Am. L. T. R. 168, 173; *Lawrence v. Dana*, 2 Am. L. T. R. n. s. 402, 415.

² *Br. Tonson v. Walker*, 3 Swans. 672; *Cary v. Faden*, 5 Ves. 24; *Cary v. Longman*, 1 East, 358; *Hedderwick v. Griffin*, 3 Sc. Sess. Cas. 2d ser. 383; *Black v. Murray*, 9 Id. 3d ser. 341. *Am. Gray v. Russell*, 1 Story, 11; *Lawrence v. Dana*, 2 Am. L. T. R. n. s. 402; *Banks v. McDivitt*, 13 Blatchf. 163.

In *Black v. Murray*, Lord Ardmillan

said: "A new edition is not necessarily a subject of copyright, but it may be so. There must be some originality in it; it may be in new thought, or in new illustration, or in new explanatory and illustrative annotation, or even, in some peculiar instances, in simply new arrangement. If, in any of these respects, there is independent mental effort, then, in the result of that mental effort, there may be copyright." *Supra*, 358.

essential that the new edition shall be an improvement on the old. The question is simply whether it is substantially different.

The requirements of the law with respect to the extent and value of the new or revised matter are not exacting. But, while the changes and additions may be very limited in extent and importance, they must be substantial in both of these respects. A few merely colorable alterations in the text, or the addition of a few unimportant notes, will not be enough to sustain copyright.¹ In *Hedderwick v. Griffin*, in the Scotch Court of Session, the plaintiff claimed copyright in a revised edition of Dr. Chalmers's works.² The revision, which had been made by the author himself, consisted chiefly in a change of titles of certain articles, a few corrections in language and typography, and the omission of some passages which had appeared in former editions. There was no British copyright in the original works. The court was of opinion that the

¹ In *Black v. Murray*, Lord Kinlock said: "I think it clear that it will not create copyright in a new edition of a work, of which the copyright has expired, merely to make a few emendations of the text, or to add a few unimportant notes. To create a copyright by alterations of the text, these must be extensive and substantial, practically making a new book. With regard to notes, in like manner, they must exhibit an addition to the work which is not superficial or colorable, but imparts to the book a true and real value, over and above that belonging to the text. This value may perhaps be rightly expressed by saying that the book will procure purchasers in the market on special account of these notes. When notes to this extent and of this value are added, I cannot doubt that they attach to the addition the privilege of copyright. The principle of the law of copyright directly applies. There is involved in such annotation, and often in a very eminent degree, an exercise of intellect and an application of learning, which place the annotator in the posi-

tion and character of author, in the most proper sense of the word. The skill and labor of such an annotator have often been procured at a price which cries shame on the miserable dole which formed to the author of the text his only remuneration. In every view, the addition of such notes as I have figured puts the stamp of copyright on the edition to which they are attached. It will still of course remain open to publish the text, which *ex hypothesi* is the same as in the original edition. But to take and publish the notes will be a clear infringement of copyright." 9 Sc. Sess. Cas. 3d ser. 355.

² 3 Sc. Sess. Cas. 2d ser. 383.

"The extent of the alterations in which the copyright was claimed," says the report, "might be judged of from the fact that the whole of the alleged piracies, amounting to seventy-four in number, and scattered over five hundred and sixty-eight closely printed octavo pages, in very small type, when collected together, would not occupy half a page out of the five hundred and sixty-eight." *Ibid.* 386.

alterations were insufficient to sustain copyright, and further-held that the plaintiff's title was not good.

The copyright in each edition will extend from the date of that edition, and will be wholly independent of the copyright in any preceding one.¹

There is no limit to the number of editions of the same work for which copyrights may thus be obtained. It is immaterial whether the copyright in the original, or any preceding, edition has or has not expired. In the latter case, no one but the author, or some one with his authority, has a right to publish a new edition.² But any one may revise or annotate and republish a book not protected by copyright, and obtain a valid copyright for the new edition.³

As early as 1801, in a case where the plaintiff had republished Patterson's Road Book, with extensive corrections and alterations made by himself, Lord Kenyon, in delivering the opinion of the King's Bench, said that "certainly the plaintiff had no title on which he could found an action to that part of his book which he had taken from Mr. Patterson's; but it is as clear that he had a right to his own additions and alterations, many of which were very material and valuable; and the defendants are answerable at least for copying those parts in their book."⁴

Questions may arise as to whether the copyright in any edition covers simply the revised parts and the new matter, or extends equally to the entire work, including the parts reprinted from a former edition. This also must be determined by the character of the revision. If the entire work is rewritten, copyright will attach to the whole. And this may be true when the text has been generally amended and revised. But if the

¹ *Lawrence v. Dana*, 2 Am. L. T. R. n. s. 402, 416; *Murray v. Bogue*, 1 Drew. 353.

² *Sweet v. Cater*, 11 Sim. 572.

³ *Tonson v. Walker*, 3 Swans. 672; *Gray v. Russell*, 1 Story, 11.

⁴ *Cary v. Longman*, 1 East, 358. See also *Cary v. Faden*, 5 Ves. 24, in which the same work was in controversy. It appeared that Patterson's Road Book was copyrighted, and that

the plaintiff had no authority to revise and publish it. Hence the remark of the Lord Chancellor, in *Cary v. Faden*: "What right had the plaintiff to the original work? If I was to do strict justice, I should order the defendants to strike out of their book all they have taken from the plaintiff, and reciprocally the plaintiff to take out of his all he has taken from Patterson."

new edition is simply a reprint of the text of a preceding one, with additions in the form of new chapters, or paragraphs, or foot-notes; in other words, if the new matter is wholly distinct and separable from the old, although being a continuation of or an addition to it, the new copyright, as a general rule, will cover only what is new.¹ So, also, if only a separable part of a book has been revised, — as, for instance, one or two chapters, — the new copyright, in general, will not extend to the unchanged parts. No one without authority will be entitled to publish this new or revised matter, either separately or in connection with the original. But when the copyright in the original has expired, its unauthorized publication will not infringe any revised edition.

Any person will be entitled to copyright in his annotated edition of the work of another, provided he has a right so to use the original. In such case, the copyright will protect the annotations as combined with the text.²

Is Change of one Word enough to create Title to Copyright in New Edition. — In the Scotch case of *Black v. Murray*,³ the interesting question was discussed, whether an edition of a poem of eleven stanzas, which differed from the original in but a single word, became thereby entitled to copyright. The poem was Sir Walter Scott's *Glenallan's Earl*. As originally published, it contained these lines: —

“ Were I Glenallan's Earl this tide,
And ye were Roland Cheyne,
The spear should be in my horse's side,
And the bridle upon his mane.”

In preparing the ballad for a new edition of the *Antiquary*, Scott made a marked improvement by substituting “spur” for “spear” in the third line of the stanza here quoted. With this exception, the second edition of the ballad was a reprint of the original in which the copyright had expired. Lord Deas contended that the question of copyright was to be determined in this case, not by the extent of the revision, but by the change

¹ *Cary v. Longman*, 1 East, 358; *Black v. Murray*, *supra*; *Lawrence v. Black v. Murray*, 9 Sc. Sess. Cas. 3d ser. 341; *Dana*, 4 Am. L. T. R. n. s. 402; *Banks v. McDivitt*, 13 Blatchf. 163.

² *Tonson v. Walker*, 3 Swans. 672; ³ *Supra*.

wrought in the author's meaning. "I cannot think," he said, "that merely because the alteration consists in one word, that is necessarily conclusive against its being of sufficient importance to create copyright in the new edition. A word may often be of very great importance. I suggested, in the course of the discussion, the supposition that, in a new edition of the Bible, the first verse in Genesis, instead of bearing, 'In the *beginning* God created the heaven and the earth,' were made to run, 'In the *end* God created the heaven and the earth,' this would not the less alter or affect the whole book, because the alteration consisted in a single word. . . . We must look to what the poem is about. It is simply this: The knight says in substance to his squire Roland Cheyne, 'Here is this hostile chieftain coming upon us with twenty thousand men, and we are only two hundred. It would be disgraceful to run, and yet to fight would be wondrous peril. What would you do if you were in my place?' The squire's answer is:—

'Were I Glenallan's Earl this tide,
And ye were Roland Cheyne,
The spur should be in my horse's side,
And the bridle upon his mane.'

That is to say, that if he were the earl he would slacken the bridle, put spurs to his horse, and ride straight at the foe. Can anybody read that verse with the context, and suppose the meaning to be that he would lay the bridle on the horse's mane, and thrust his spear into the horse's side? It would not make such nonsense, if you were to hold him to have been made to say that the spear would be *at* his horse's side, or *on* his horse's side. Still it would be weak. The spear may be supposed to have been previously in its proper place like the rest of the accoutrements; and what the squire is speaking about is the alteration he would make for rushing at the enemy full speed. He would lay the bridle on the horse's mane, and strike the spur into his side. The sense is destroyed if you make it any thing else. The whole edition was published with that blot. I would not keep a copy of that edition in my library if the other could be had, or without correcting it, if it could not. It would unquestionably be a blot of a most disagreeable kind. The alteration

was, in my opinion, a material alteration ; and I am, therefore, of opinion that the second edition of the poem was copyrighted.”¹

Lord Kinlock expressed a decided opinion that the change of a single word was not enough to create a title to copyright. The other two judges, the Lord President and Lord Ardmillan, considered it unnecessary to determine this question ; because the defendant, in republishing the poem, while copying the plaintiff's revised reading, had also changed a word in one of the stanzas, which introduced a reading different from that found in either the original or the revised edition of the ballad. The court regarded this as evidence that the defendant was not guilty of “ a slavish adherence to the copyright edition,” and

¹ 9 Sc. Sess. Cas. 3d ser. 351-352. Lord Deas further said : “ The case before us is the case of a poem of eleven verses only, which no one can read without seeing that it is a beautifully finished composition, the alteration of a single word of which may be sufficient to mar the whole. The alteration of a word in any one verse might be material. Suppose, for instance, that in the second verse, where it says, —

‘ The cronachs cried on Bennachie,
And down the Don and a’, ”

it had been written, —

‘ The *children* cried on Bennachie,
And down the Don and a’, ”

that would have made the whole thing ludicrous. Or, suppose in the next verse, where it is said, —

‘ They saddled a hundred milk-white steeds,
They hae bridled a hundred black,
With a chafron of steel on each horse's head
And a good knight upon his back, ’

it had been said in the last line, ‘ and a woman upon his back, ’ what kind of an effect would that have had ? Again, take the last verse : —

‘ My horse shall ride through ranks sae rude,
As through the moorland fern, ’

meaning that he would ride as easily through the hostile ranks as he would through the moorland fern. But suppose the word ‘ and ’ had been substi-

tuted for ‘ as, ’ so that he was made to say, —

‘ My horse shall ride through ranks sae rude
And through the moorland fern, ’

that would not have been ludicrous like the above examples, but it would have been so weak and meaningless as to have destroyed the vigor of the whole poem. It is impossible to say, therefore, that the alteration of a word may not be of great importance. Mention was made, a little ago, of the song we are all familiar with, ‘ The Flowers of the Forest. Now, suppose that the first line of that song, as published, had been, ‘ The fowls of the forest, ’ or perhaps, ‘ The fools of the forest. ’ The last, for any thing I know, might have been defended by those who defend ‘ spear ’ in the present instance ; for, Shakespeare has made classical ‘ a fool i’ the forest, ’ and Sir Walter was fond of introducing a sylvan character of that kind into his novels. But I think few people would doubt that the author who corrected the word ‘ fowls ’ or ‘ fools, ’ in the only edition he found in circulation of his song, into ‘ flowers, ’ would have had copyright in the new edition, although he had none in the old.

“ The question, therefore, comes to be, not the extent of the alteration in the present instance, but whether it was material.” Ibid. 351-353.

held, in the language of the Lord President, that "the proprietors of the copyright must just console themselves with the reflection that while the pirate has here stole a very little bit of their property, he has spoiled the poem otherwise by an emendation of his own."¹

While this decision does not determine the question whether in any case the change of a single word may be sufficient to create a title to copyright in a new edition, the discussion is important as showing that when a material change has been wrought in the substance of a composition by very slight alterations in its form, the court will consider the effect produced, — the improved meaning, rather than the extent of the verbal changes.

COMPILATIONS.

The doctrine is well settled in England and the United States, that existing materials selected from common sources, and arranged and combined in an original and useful form, become a proper subject of copyright. This is equally true whether the compilation consist wholly of selected matter, or of such matter combined with original composition; and, in either case, it is immaterial whether the materials are obtained from published or unpublished sources, or whether the selections are used bodily, or their substance is given in the language of the compiler. Such works are often the result of industry, learning, and good judgment, and are useful and valuable contributions to knowledge. They are entitled to, and will receive, the same protection extended to productions wholly original.²

¹ 9 Sc. Sess. Cas. 3d ser. 350.

² "Copyright may justly be claimed by an author of a book who has taken existing materials from sources common to all writers, and arranged and combined them in a new form, and given them an application unknown before, for the reason that in so doing he has exercised skill and discretion in making the selections, arrangement, and combination, and having presented something that is new and useful, he is entitled to the exclusive enjoyment of his improvement as provided in the

copyright act. Books 'made and composed' in that manner are the proper subjects of copyright; and the author of such a book has as much right in his plan, arrangement, and combination of the materials collected and presented, as he has in his thoughts, sentiments, reflections, and opinions, or in the modes in which they are therein expressed and illustrated; but he cannot prevent others from using the old material for a different purpose. All he acquires by virtue of the copyright is 'the sole right and liberty of

These principles have been judicially recognized in the case of the following productions: general miscellaneous compilations;¹ annotations consisting of common materials;² dictionaries;³ books of chronology;⁴ gazetteers;⁵ itineraries, road and guide books;⁶ directories;⁷ maps and charts;⁸ calendars;⁹ catalogues;¹⁰ mathematical tables;¹¹ a list of hounds;¹² abstracts of titles to lands;¹³ and collections of statistics,¹⁴ statutory forms,¹⁵ recipes,¹⁶ and designs.¹⁷

The compilation may consist of common facts and information which the compiler himself has reduced to writing, as in the case of a catalogue or a directory; of materials obtained from manuscripts, as a collection of statistics taken from unpublished official records;¹⁸ or of selections made from

printing, reprinting, publishing, and vending such book' for the period prescribed by law. Others may use the old materials for a different purpose, but they cannot copy and use his improvement, which includes his plan, arrangement, and combination of the materials, as well as the materials themselves, of which the book is made and composed." Clifford, J., *Lawrence v. Dana*, 2 Am. L. T. R. n. s. 423.

¹ *Br. Jarrold v. Houlston*, 3 Kay & J. 708; *Pike v. Nicholas*, 20 L. T. n. s. 906, on ap. *Law Rep. 5 Ch. 251*; *Mack v. Petter*, *Law Rep. 14 Eq. 431*; *Hogg v. Scott*, 18 Id. 444. *Am. Gray v. Russell*, 1 Story, 11; *Emerson v. Davies*, 3 Id. 768; *Webb v. Powers*, 2 Woodb. & M. 497; *Greene v. Bishop*, 1 Cliff. 186; *Lawrence v. Cupples*, 9 U. S. Pat. Off. Gaz. 254.

² *Story's Executors v. Holcombe*, 4 McLean, 306; *Lawrence v. Dana*, 2 Am. Law T. R. n. s. 402; *Banks v. McDivitt*, 13 Blatchf. 163; *Black v. Murray*, 9 Sc. Sess. Cas. 3d ser. 341.

³ *Barfield v. Nicholson*, 2 Sim. & St. 1; *Spiers v. Brown*, 6 W. R. 352.

⁴ *Trusler v. Murray*, 1 East, 362, note.

⁵ *Lewis v. Fullarton*, 2 Beav. 6.

⁶ *Cary v. Faden*, 5 Ves. 24; *Cary v. Longman*, 1 East, 358; *Murray v. Bogue*, 1 Drew. 353.

⁷ *Kelly v. Hooper*, 4 Jur. 21; *Kelly v. Morris*, *Law Rep. 1 Eq. 697*; *Morris*

v. Ashbee, 7 Id. 34; *Mathieson v. Harrod*, *Ibid.* 270; *Morris v. Wright*, *Law Rep. 5 Ch. 279*; *Kelly v. Hodge*, 29 L. T. n. s. 387.

⁸ *Blunt v. Patten*, 2 Paine, 393, 397; *Stevens v. Cady*, 14 How. 528; *Stevens v. Gladding*, 17 Id. 447; *Farmer v. Calvert Lithographing, Engraving, & Map-Publishing Co.*, 5 Am. L. T. R. 168; *Rees v. Peltzer*, 75 Ill. 475; *Stannard v. Lee*, *Law Rep. 6 Ch. 346*.

⁹ *Matthewson v. Stockdale*, 12 Ves. 270; *Longman v. Winchester*, 16 Id. 269.

¹⁰ *Wilkins v. Aikin*, 17 Ves. 422; *Hotten v. Arthur*, 1 Hem. & M. 603; *Hogg v. Scott*, *Law Rep. 18 Eq. 444*.

¹¹ *M'Neill v. Williams*, 11 Jur. 344; *King v. Reed*, 8 Ves. 223, note; *Baily v. Taylor*, 3 L. J. (Ch.) 66, 1 Russ. & My. 73.

¹² *Cox v. Land & Water Journal Co.*, *Law Rep. 9 Eq. 324*.

¹³ *Banker v. Caldwell*, 3 Mann. 94.

¹⁴ *Scott v. Stanford*, *Law Rep. 3 Eq. 718*; *Maclean v. Moody*, 20 Sc. Sess. Cas. 2d ser. 1154; *Walford v. Johnston*, *Ibid.* 1160, note.

¹⁵ *Alexander v. Mackenzie*, 9 Sess. Cas. 2d ser. 748.

¹⁶ *Rundell v. Murray*, *Jac.* 311.

¹⁷ *Grace v. Newman*, *Law Rep. 19 Eq. 623*.

¹⁸ *Scott v. Stanford*, *Law Rep. 3 Eq. 718*; *Maclean v. Moody*, 20 Sc. Sess. Cas. 2d ser. 1154.

published works. But in all cases the compiler must have a right to use the materials constituting his compilation. They must be gathered from common sources; or, if they are not, he must have authority to appropriate them, unless the use made of them be such as not to amount to piracy. He cannot make other than a "fair use" of a copyrighted publication, without the consent of the owner.

Materials need not be new. — It is no objection to the copyright in a compilation that the compiler is not the author of its component parts; that all the materials used may be found in other publications. Selecting, arranging, and combining existing materials in a useful form is recognized by the law as an act of authorship, and as creating a title to exclusive ownership.¹ In *Lawrence v. Dana*, where the plaintiff claimed

¹ "It is a great mistake to suppose, because all the materials of a work or some parts of its plan and arrangements and modes of illustration, may be found separately, or in a different form, or in a different arrangement, in other distinct works, that therefore, if the plan or arrangement or combination of these materials in another work is new, or for the first time made, the author, or compiler, or framer of it, (call him which you please,) is not entitled to a copyright. The reverse is the truth in law, and, as I think, in common sense also. It is not, for example, in the present case, of any importance that the illustrating of lessons in *Arithmetic* by attaching unit marks representing the numbers embraced in the example, may be found by dots in *Wallis's Opera Mathematica*, (p. 28); or in *Colburn's Arithmetic* in the form of upright linear marks, in a pamphlet detached from the main work. That is not what the plaintiff purports to found his copyright upon. He does not claim the first use or invention of unit marks for the purpose above mentioned. The use of these is a part of and included in his plan; but it is not the whole of his plan. What he does claim is: 1, the plan of the lessons in his book; 2, the execution of that plan in a certain arrangement of a set of

tables in the form of lessons to illustrate those lessons; 3, the gradation of examples to precede each table in such manner as to form with the table a peculiar and symmetrical appearance of each page; 4, the illustration of his lessons by attaching to each example unit marks representing the numbers embraced in the example. It is, therefore, this method of illustration in the aggregate that he claims as his invention; each page constituting of itself a complete lesson; and he alleges that the defendants have adopted the same plan, arrangement, tables, gradation of examples and illustrations by unit marks, in the same page, in imitation of the plaintiff's book, and in infringement of his copyright, and, in confirmation of this statement, he refers to divers pages of his own book in comparison with divers pages of the book of the defendants.

"Now I say that it is wholly immaterial whether each of these particulars, the arrangement of the tables and forms of the lessons, the gradation of the examples to precede the tables, the illustration of the examples by unit marks, had each existed in a separate form in different and separate works before the plaintiff's work, if they had never been before united in one combination or in one work, or on one page

copyright in his annotations to Wheaton's International Law, the notes consisted chiefly of materials taken from common sources. But to gather this matter from other works on international law, public documents, pamphlets, newspapers, magazines, &c., arrange, digest, and combine it with Wheaton's text, required research, expense, learning, and judgment. The result was a work of great value, due to the labors of the editor, and as such was entitled to copyright not less than is a production wholly original.¹ So in *Black v. Murray*, protection was claimed for Lockhart's annotated edition of Scott's *Minstrelsy of the Scottish Border*. The copyright in the text had expired. Of the two hundred notes added by the editor, it appeared that only fifteen were original, while the rest were quotations. But the court placed a high value on the work of the editor, who with great literary research and judgment had made apt selections, and skilfully applied them to illustrate Scott's ballads.² So, in *Banks v. McDivitt*,³ the compilation consisted of notes and citations of authorities appended to statutes. The statutes were public property, and the use of the authorities cited was open to all persons. But the com-

in the manner in which the plaintiff has united and connected them. No person had a right to borrow the same plan and arrangement and illustrations and servilely to copy them into any other work. The same materials were certainly open to be used by any other author, and he would be at liberty to use unit marks and gradations of examples and tables and illustrations of the lessons and to place them in the same page. But he could not be at liberty to transcribe the very lessons and pages and examples and illustrations of the plaintiff, and thus to rob him of the fruits of his industry, his skill, and his expenditures of time and money." *Story, J., Emerson v. Davies*, 3 Story, 782.

¹ 2 Am. L. T. R. n. s. 402.

² 9 Sc. Sess. Cas. 3d ser. 341.

Lord President Inglis said: "It seems to me that notes of this kind are almost chiefly valuable in bringing together and in combination, the

thoughts of the same author in different places, or the thoughts of other authors, or of critics, bearing upon the point that is under consideration; and nothing could better illustrate it than a number of the notes which we see in these very volumes, and which are exceedingly interesting and valuable as matter of literary and critical taste and judgment. The quotations are in many places most apposite, and highly illustrative of the text, and exceedingly interesting to the reader; and certainly the selection and application of such quotations from other books may exercise as high literary faculties as the composition of original matter. They may be the result both of skill and of labor and of great literary taste; and therefore I think the circumstance that the notes consist to a great extent of quotations is any thing but a disparagement of their value." *Ibid.* 345.

³ 13 Blatchf. 163.

bination of the citations with the statutes was a valuable and useful work, in which copyright was held to vest.

But a mere copy or reprint of common materials, without novelty or value in their arrangement or combination, is not entitled to copyright as a compilation; for in such case there is nothing to represent authorship on the part of the compiler.¹

Copyright is in Arrangement and Combination of Materials.— No protection is given to the component parts of a compilation independently of their arrangement and combination. Of these, the compiler is not the author, and he can have no exclusive property in what is common and open to all. Nor is the arrangement and combination, independently of the materials themselves, a proper subject of copyright.² It would be a monopoly harmful to learning, and therefore opposed to the purpose of copyright laws, to give to any one the right to say that his mode of using common materials, his arrangement or combination or plan of treatment, shall not be followed in any subsequent publication. The copyright vests in the materials as combined and arranged; in the union of form and substance. Any one may use the same materials in a different combination, or adopt a similar arrangement for different selections. But no person can copy both the substance and the arrangement of a compilation, and use the same materials in the same form, without committing piracy.³

¹ Hedderwick v. Griffin, 3 Sc. Sess. Cas. 2d ser. 383. See also Rundell v. Murray, Jac. 311; Jollie v. Jaques, 1 Blatchf. 318.

² Pike v. Nicholas, Law Rep. 5 Ch. 251; Mack v. Petter, Law Rep. 14 Eq. 431; Webb v. Powers, 2 Woodb. & M. 497; Farmer v. Calvert Lithographing, Engraving, & Map-Publishing Co., 5 Am. L. T. R. 168; Lawrence v. Cupples, 9 U. S. Pat. Off. Gaz. 254.

³ Br. Barfield v. Nicholson, 2 Sim. & St. 1; Murray v. Bogue, 1 Drew. 353; Jarrold v. Houlston, 3 Kay & J. 708; Spiers v. Brown, 6 W. R. 352. Am. Gray v. Russell, 1 Story, 11; Emerson v. Davies, 3 Id. 768; Greene v. Bishop, 1 Cliff. 186; Lawrence v. Dana, 2 Am. L. T. R. n. s.

402; Banks v. McDivitt, 13 Blatchf. 163.

In Lawrence v. Dana, *supra*, 429, Mr. Justice Clifford said:—

“Judge Story held, in the case of Emerson v. Davies, 3 Story, 780, that every author had a copyright in the plan, arrangement, and combination of his materials, and in his mode of illustrating his subject, if it be new and original; and it was also held, in Greene v. Bishop, 1 Cliff. 199, that there may be a valid copyright in the plan of a book, as connected with the arrangement and combination of the materials; and no doubt is entertained that both those decisions were correct; but it is a mistake to suppose that a subsequent writer can be held to have

But when the compiler does not use the common matter in the exact form in which he finds it, but gives its substance in his own language, — translates, abridges, revises, or otherwise changes its form, — he performs an act of authorship which gives to the matter so used the character of an original composition. Thus, in *Lawrence v. Dana*,¹ it appeared that some of the notes in which copyright was claimed consisted of *verbatim* quotations; and in these the compiler had no exclusive property apart from their arrangement and combination with Wheaton's text. But, in preparing others, he had rewritten, digested, or abridged the original; and, in some instances, he had made translations from foreign languages. Such notes were his own productions, within the meaning of the law; and no one had a right to appropriate them, with or without their arrangement and combination.

In the cases wherein copyright has been recognized in compilations of matter taken from published works, such matter has been more or less elaborated by the compiler, so as to create in him some title to authorship; or it has been combined with some other composition in the form of annotations. But the principle which has governed in these cases must extend to a compilation of literary selections whose language is not changed by the compiler, and which are not used for purposes of annotation. Thus, valuable selections of poems, or prose compositions, are sometimes made and arranged with reference to their subject-matter; proverbs, quotations, &c., may be compiled so as to form useful collections; hymns may be selected and classified with a view to their use on appropriate occasions.² Compilations of this kind may have a material value,

infringed a book where he has not borrowed any of the materials of which the book is composed. New materials are certainly the proper objects of copyright; and old materials, when subsequently collected, arranged, and combined in a new and original form, are equally so; and in either case the plan, arrangement, and combination of the materials are as fully protected by the copyright as the materials embodied in the plan, arrangement, and combination. Damages may be recovered in either of the supposed cases for the in-

fringement of the property protected by the copyright; but the property in the latter case consists chiefly, if not entirely, in the plan, arrangement, and combination of the materials collected and presented in the book, as any other person may collect from the original sources the same materials, and arrange and combine them in any other manner not substantially the same as that of the antecedent author."

¹ 2 Am. L. T. R. N. S. 402.

² *Marzials v. Gibbons*, Law Rep. 9 Ch. 518.

due to the choice and arrangement of the selections; and, in such case, there seems to be no reason why they may not be proper subjects of copyright.¹

ABRIDGMENTS, DIGESTS, TRANSLATIONS, AND DRAMATIZATIONS.

The law is well settled that productions of these kinds are proper subjects of copyright, and all are governed by the same principle. He who honestly abridges, translates, or dramatizes, reproduces a work in a new and useful form; and for the results of his labor, skill, and learning he will be entitled to the same protection extended to original compositions. But, to be entitled to copyright, the production must be something more than a mere copy of the whole or parts of the original. It must be the result of independent labor other than that of copying, and there must be substantial and valuable fruits of authorship on the part of the maker.

A genuine abridgment is a reproduction of the matter or substance of a larger work in a condensed form, and in language which is not a mere transcript of that of the original. But to reduce the size of a work by copying some of its parts and omitting others creates no title to authorship; and the result will not be an abridgment entitled to protection, within the meaning of the law.² A digest is governed by the same principle.³ The title of a translator is founded on the simple fact that he has made the translation. He is not required to make any other change in the original than to reproduce it in other language.⁴

Whether the translation or abridgment has been made with learning and skill, or otherwise, is a matter of which the law

¹ In *Rundell v. Murray*, where a collection of recipes for cookery and other domestic purposes was in controversy, Lord Eldon said: "If the plaintiff had composed these receipts, or embodied and arranged them in a book she would have a copyright in it; but if she had only collected them and handed them over to Mr. Murray, I do not apprehend that they would be the subject of copyright." Jac. 314.

² *Gray v. Russell*, 1 Story, 11; Fol-

som v. Marsh, 2 Id. 100; *Story's Executors v. Holcombe*, 4 McLean, 306; *Lawrence v. Dana*, 2 Am. L. T. R. n. s. 402. Other cases relating to abridgments are cited in Chap. IX.

³ *Sweet v. Benning*, 16 C. B. 459.

⁴ *Wyatt v. Barnard*, 3 Ves. & B. 77; *Rooney v. Kelly*, 14 Ir. Law Rep. n. s. 158; *Emerson v. Davies*, 3 Story, 768; *Shook v. Rankin*, 6 Biss. 477; *Shook v. Rankin*, 3 Cent. Law Jour. 210.

takes no cognizance. The question is, whether there has been real abridging or translating, or mere copying. Nor is it material how closely two rival productions may resemble each other, provided each is the result of independent labor. Protection may be secured for an abridgment or translation of any work not protected by copyright. Any number of persons may make a similar use of a common original, and each will be entitled to copyright in his own production. So any one may acquire copyright for an abridgment or translation of a copyrighted work, provided he has the consent of the owner so to use it. But it is maintained elsewhere that, to make such use of a copyrighted work, without due authority, is piracy.¹

The above principles apply equally to dramatizations, which are considered in another part of this work.²

LAW REPORTS.

The report of a law case generally consists of two parts: 1, the opinion delivered by the court; 2, the matter prepared by the reporter. The latter usually comprises the head-notes, giving a digest of the decision, a statement of the facts of the case, a synopsis of the arguments of the counsel, and such other matters as are sometimes added to make the report complete.

Matter Prepared by Reporter. — It is settled, both in England and in the United States, that valid copyright may be acquired by a reporter for those parts of a report of which he is the author or compiler.³ The head-notes, additional citations in

¹ See Chap. IX.

² See dramatizations considered in Chap. XIV.; also, Chap. IX.

³ *Br. Butterworth v. Robinson*, 5 Ves. 709; *Saunders v. Smith*, 3 My. & Cr. 711; *Sweet v. Shaw*, 3 Jur. 217; *Sweet v. Maugham*, 11 Sim. 51; *Hodges v. Welsh*, 2 Ir. Eq. 266; *Sweet v. Benning*, 16 C. B. 459. **Am.** *Wheaton v. Peters*, 8 Pet. 591, 654; *Backus v. Gould*, 7 How. 798; *Little v. Gould*, 2 Blatchf. 165, 362; *Little v. Hall*, 18 How. 165; *Cowen v. Banks*, 24 How. Pr. 72; *Paige v. Banks*, 7 Blatchf. 152, on ap. 18 Wall. 608; *Chase v. Sanborn*, 6 U. S. Pat. Off. Gaz. 932; *Banks v. McDivitt*, 13 Blatchf. 163.

Referring to the decision in *Wheaton v. Peters*, Mr. Justice Story, who was one of the judges who concurred in it, said: "It was held that the opinions of the court, being published under the authority of Congress, were not the proper subject of private copyright. But it was as little doubted by the court that Mr. Wheaton had a copyright in his own marginal notes, and in the arguments of counsel as prepared and arranged in his work. The cause went back to the Circuit Court for the purpose of further inquiries as to the fact, whether the requisites of the act of Congress had been complied with or not by Mr. Wheaton.

the form of foot-notes, the statement of facts and abstract of arguments of counsel, represent the results of the labor and the authorship of the reporter; but, in reporting the opinion delivered by the court, he gives a mere copy of what he is not the author. In this he can have no exclusive rights, although he may have written a *verbatim* report of it from the lips of the judges. So, when the head-notes are prepared by the judge, as they sometimes are, the reporter has no rightful claim to copyright in them; for, in such case, he is the mere copyist of what another is the author.¹ Nor is the reporter entitled to any copyright when he is employed on the condition that the exclusive property in the results of his labor shall belong to the State; for then he has voluntarily parted with his rights.² But, in such case, he does not lose his title to reports prepared by him after the expiration of his term of office, and when he is no longer employed or paid by the State.³

Abridgments, Digests, and Selections of Cases.—There is no principle to prevent a person from acquiring a valid copyright for a *bona fide* abridgment, digest, or synopsis of any judicial decision, whether it be obtained from oral delivery in court or from any published report; provided, of course, that the decision is common property, or, if not, that the reporter has authority so to use it. Indeed the head-notes, in which the exclusive property of the reporter has been recognized, are but a digest of the decision. So, a selection and arrangement of cases relating to a particular branch or subject of the law may have a material value as a compilation due to the labor, judgment, and learning of the compiler. Exclusive property in such a work may be acquired on the principle that a compilation consisting wholly of old materials is recognized as a proper subject of copyright.

Opinions of the Court.—I have seen no sound, clear exposition of the law governing copyright in judicial decisions. In the

This would have been wholly useless and nugatory, unless Mr. Wheaton's marginal notes and abstracts of arguments could have been the subject of a copyright, for that was all the work, which could be the subject of copyright; so that if Mr. Peters had violated that right, Mr. Wheaton was

entitled to redress." *Gray v. Russell*, 1 Story, 21.

¹ *Chase v. Sanborn*, 6 U. S. Pat. Off. Gaz. 932.

² *Little v. Gould*, 2 Blatchf. 165, 362.

³ *Little v. Hall*, 18 How. 165. See this case considered in Chap. VII.

English cases, wherein protection has been given to legal reports, the courts have not expressly declared whether the copyright claimed by or through the reporter vested only in the matter prepared by him, or extended also to the opinion itself.¹ In the United States, it has been held that neither the reporter nor the judge can acquire copyright in the judgment pronounced by the court; and the opinion seems to have been entertained that such production is not a proper subject of copyright.² In *Wheaton v. Peters*, the Supreme Court of the United States was “unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.”³ It has not been expressly declared in any modern case that copyright will vest in a judicial decision; but the law on this point may be easily determined.

May be Copyrighted by Government.—Property in judicial decisions is governed by the same general principles that apply to all literary compositions. They are a proper subject of copyright; and when the provisions of the law are complied with, as in the case of other productions, they will be entitled to the same protection accorded to any copyrighted work. Where such protection has been denied, the decision of the court could not rightly have been otherwise; for the reason that the copyright had not been properly secured, or the plaintiff's title was defective. It is obvious that the copyright in an opinion written or delivered by a judge cannot be acquired by a reporter or the first publisher on the ground of authorship, for the reason that he is not the author. It is not less clear that the judge who pronounces the decision is not entitled to the copyright therein, because he is not the owner of the property. Hence, neither in the judge nor in the reporter will a valid copyright vest, except by a derivative title. The copyright must be secured by the owner of the property; and all difficulty disappears when it is determined who is the owner. Elsewhere it is shown that any person who employs another to prepare a work may, by virtue of the contract of

¹ See the English cases cited, *ante*, p. 159, note 3. other American cases cited, *ante*, p. 159, note 3.

² *Wheaton v. Peters*, 8 Pet. 591, 654; ³ 8 Pet. 668. See remarks of Mr. Little *v. Gould*, 2 Blatchf. 165, 362. See Justice Story, *ante*, p. 159, note 3.

employment, become the owner of the literary property therein.¹ On this principle, the people who employ and pay judges are the rightful owners of the literary property in the opinions written by them. Hence, the United States government may secure to itself the copyright in the decisions pronounced in the federal courts, and each State may do the same with the opinions of its own judges. And the government may confer upon any person the right of securing, or the copyright after it has been secured. Of course the State, as in the case of an individual, may lose its exclusive right of property, and it usually does, by permitting the work to be published without being copyrighted; or, it may declare by its constitution or by statute that such decisions shall be public property.² But, if the government chooses to retain its property, and takes the steps required in the case of every literary composition for its protection, a valid copyright may be secured.

The doctrine that the State may have an exclusive property in the decisions of its judges, although the courts appear to have lost sight of it in more recent times, was advanced in England more than two centuries ago. In 1666, the House of Lords, affirming the judgment of the Lord Chancellor who had granted an injunction against members of the Stationers' Company, held that Atkins had acquired from the king the exclusive right of printing Rolle's Abridgment.³ So, in 1672, the same tribunal reversed the decision of the Common Pleas, that the property in the third part of Croke's reports was in Roper, who had derived his title from the executors of the reporter,

¹ See Chap. IV.

² The constitution of New York adopted in 1846, art. vi. s. 22, declared that "the legislature shall provide for the speedy publication of all statute laws, and of such judicial decisions as it may deem expedient. And all laws and judicial decisions shall be free for publication by any person." The language of this section is somewhat varied in the constitution as amended in 1867. See art. vi. s. 23. In *Little v. Gould*, 2 Blatchf. 165, 302, it was held that the provision in the constitution of 1846 did not affect the exclusive property claimed by the State, in

the parts of the reports of the Court of Appeals consisting of the notes and references prepared by the State reporter who had been appointed pursuant to the statute of 1850, c. 245. Section two of this act provided that "the copyright of any notes or references made by the State reporter to any of said reports shall be vested in the Secretary of State for the benefit of the people of this State." See also *Chase v. Sanborn*, 6 U. S. Pat. Off. Gaz. 932.

³ *Atkin's Case*, cited 4 Burr. 2315, reported Carter, 89; Bac. Abr. Prerog. F. 5.

and held that "the copy belonged to the king," by whom the defendant Streater had been licensed to print.¹ Whether the king's rights were affirmed on the principle of property or prerogative does not appear from the reports of the cases. One of the grounds on which Atkin's case was argued was that of property in the king, who paid the judges. Lord Mansfield emphatically maintained that the judgment of the Lords rested solely on this ground, and that it could be defended on no other.²

¹ *Roper v. Streater*, cited 4 Burr. 2316; s. c. *Skin.* 234; 1 Mod. 257; Bac. Abr. Prerog. F. 5.

² *Millar v. Taylor*, 4 Burr. 2401 *et seq.* See *ante*, p. 63, note 5. The doctrine of the king's exclusive right to publish the acts of Parliament was recognized in *Baskett v. University of Cambridge*, decided in 1758, by the King's Bench, of which Lord Mansfield was Chief Justice. 1 W. Bl. 105; s. c. 2 Burr. 661. Of this judgment, Lord Mansfield, in *Millar v. Taylor*, 4 Burr. 2404, said: "We had no idea of any prerogative in the crown over the press; or of any power to restrain it by exclusive privileges, or of any power to control the subject-matter on which a man might write or the manner in which he might treat it. We rested upon property from the king's right of original publication. Acts of Parliament are the works of the legislature; and the publication of them has always belonged to the king as the executive part and as the head and sovereign."

Others have contended that the right claimed by the king was founded on prerogative, and not property. See *ante*, p. 63.

For a long time, it was considered unlawful to publish reports of judicial matters without a license. In the preface to Douglas's Reports, vol. i. p. ix, the reporter says: "Soon after the Restoration, an act of Parliament having prohibited the printing of law-books without the license of the Lord Chancellor, the two Chief Justices and the Chief Baron, it became the practice to prefix such a license to all reports published after that period in which it

was usual for the rest of the judges to concur, and to add to the *imprimatur* a testimonial of the great judgment and learning of the author. The act was renewed from time to time, but finally expired in the reign of King William. But the same form of license and testimonial continued in use till not many years ago; when, as one had become unnecessary, and the other was only a general commendation of the writer, and no voucher for the merit of the work, the judges, I believe, came to a resolution not to grant them any longer; and accordingly the more recent reports have appeared without them."

Sir James Burrow apologized for publishing his reports without license and the usual *imprimatur*, and said: "I know it is a contempt of this court to publish their proceedings; it is against a standing order of the House of Lords to publish proceedings there upon appeals or writs of error. They ought to be published under authoritative care and inspection; but since the Year Books, no judicial proceedings have been so published, either by the House of Lords, or by any court in Westminster Hall, except State trials." 1 Burr. preface, p. vii.

More recently, the courts have exercised the right of restraining the publication of their proceedings, on the ground that it is an interference with the administration of justice. *The King v. Clement*, 4 Barn. & Ald. 218. See also *Tichborne v. Mostyn*, Law Rep. 7 Eq. 55, note. So, also, the House of Lords has claimed the exclusive right of publishing the proceedings of trials had before it. *Gurney v. Longman*, 13 Ves. 493.

STATUTES AND PUBLIC DOCUMENTS.

Statutes are within the same principle that governs judicial decisions.¹ They are the property of the government, which employs and pays those who make them. The government, if it chooses, may have them copyrighted; and only the government, or some person deriving title from it, has this right. But any person may acquire copyright in notes and citations appended to a statute.² So, copyright was held to vest in certain forms which had been prepared by following the directions given by the statute.³

The same general rule applies to public documents, official correspondence of the government, reports made by government officers, &c. Copyright may be secured for such productions, if the proper steps are taken by the rightful owner.⁴ The property in public documents usually belongs to the government by virtue of the fact that it employs and pays the persons who write them. But, when the ownership is claimed by the writer, there may be considerations of public policy to prevent him from publishing without the consent of the government.

Statutes and public documents are usually published by the government without being copyrighted. Hence they become common property; and, as far as copyright is concerned, may be reprinted by any person.

PUBLICATIONS USED FOR ADVERTISING.

Whether a composition of this kind is a proper subject of copyright will depend on its character, and not the purpose for which it is used. An advertisement which has no other use or value than to make known the place and kind of business of the advertiser is not within the scope of the copyright law. But information, and the results of learning, valuable to others than the advertiser, may be, and often are, contained in an advertising publication. That valid copyright will vest in such a publication does not admit of reasonable doubt. In advertising the works which he wishes to sell, a bookseller may

¹ See *Baskett v. University of Cambridge*, referred to in note 2, p. 163; also, *Baskett v. Cunningham*, 1 W. Bl. 370; s. c. 2 Eden, 137.

² *Banks v. McDivitt*, 13 Blatchf. 163.

³ *Alexander v. Mackenzie*, 9 Sc. Sess. Cas. 2d ser. 748. See *post*, p. 204.

⁴ See *Folsom v. Marsh*, 2 Story, 100.

communicate information which will be a substantial contribution to bibliography; another dealer may give interesting facts concerning bronzes, pottery, furniture, or other articles. This information may be designed and published by the author expressly to advertise his wares, and be circulated gratuitously in the form of a circular, catalogue, pamphlet, or otherwise, for the sole purpose of promoting his business interests. Such productions may have a value aside from that for which they are primarily intended, and which would give them a title to copyright if published as literary productions; and there is no good reason why this title should be defeated by the fact that the author has designed and uses them to advertise his business. There is nothing in the letter or the spirit of the law of copyright to prevent him from making this use of his work, and at the same time enjoying the protection of the statute. The question depends not on the intention of the author, or the use made of the production, but on its inherent qualities. Publications used for advertising must be governed by the same principles that apply to other works. When they lack the inherent qualities essential to copyright, they are not entitled to protection; when they have such qualities, they are within the scope of the law. Whether a particular publication belongs to one or the other of these classes, will, of course, depend on its character. The controlling inquiry will be, whether it has any value as a contribution to knowledge, or is a mere advertisement, useless for any other purpose than to make known the business of the advertiser.

The question under consideration was in direct issue in the recent English case of *Cobbett v. Woodward*;¹ but it is difficult to determine, from the reported opinion of Lord Romilly, on what principles the case was decided. The plaintiff, an extensive dealer in upholstery and house furniture, had published and copyrighted an illustrated guide for furnishing houses, and circulated it as an advertisement of his business. The defendant, who was engaged in the same business, copied fifty-five of the illustrations and a large part of the text. In defence, it was contended that the plaintiff's book was a mere advertisement; and was, therefore, not within the copyright act.

¹ Law Rep. 14 Eq. 407.

The court held that the drawings in the complainant's book were not entitled to protection, on the ground, as far as can be gathered from the language of the opinion, that they were mere advertisements. With regard to the text, a distinction was drawn between that part which "bears the trace of original composition," and that which "simply describes the contents of a warehouse, the exertions of the proprietor, or the common mode of using familiar articles." The court held that matter of the latter kind was not entitled to protection; but that the plaintiff was entitled to an injunction restraining the defendant from publishing about sixty words of "original composition," which had been copied.

If this decision rests on the ground that the illustrations had no merit as productions of art, and no value except as a mere advertising medium, and that parts of the text were not entitled to protection because they lacked originality, it is in harmony with the doctrines above presented. But if the court held that the drawings were not proper subjects of copyright, simply because they were used as advertisements, or, in other words, that advertisements are not within the scope of the copyright law, the decision is inconsistent with itself; for the small part of the text protected by the court was designed and used by the complainant as an advertisement. As the same general principles must be applied to both text and illustrations, the only rational construction to be put on the decision is, that there may be copyright in matter, whether pictorial or literary, designed and used as an advertisement, provided it be original, and have a value aside from its function as a mere advertising medium.¹

¹ It is to be regretted that the principles discussed by the court are not given in the opinion with clearness and precision. The entire work in controversy, the text as well as the illustrations, was designed and used to advertise the complainant's business. The court refused to protect the fifty-five illustrations that had been copied, because they were advertisements; but held that about sixty words of text, which was also designed and used as an advertisement, were entitled to protec-

tion. If the illustrations were useless except as mere advertisements, the grounds for the distinction are manifest. There is much in the reported opinion that is confusing; and parts of it are destined to be often cited, as showing that there can be no copyright in any advertisement, whatever may be its character.

After referring to directories, concordances, dictionaries, &c., Lord Romilly said:—

"But the distinction between those

This doctrine was recognized in *Hotten v. Arthur*,¹ where an advertising catalogue was protected, and in *Grace v. Newman*.² The plaintiff in the latter case was a "cemetery stone

works and the present is this: those works are compiled and published for the information and use of the public, and are bought by the public without any reference to individual benefit—nothing in the shape of advertisement of articles specified in the work forming a part of the work. But this is a mere advertisement for the sale of particular articles which any one might imitate, and any one might advertise for sale.

"To draw the distinction more clearly: if a man not being a vendor of any of the articles in question were to publish a work for the purpose of informing the public of what was the most convenient species of articles of house furniture, or the most graceful species of decorations for articles of house furniture, what they ought to cost, and where they might be bought, and were to illustrate his work with designs and with drawings of each article he described—such a work as this could not be pirated with impunity, and the attempt to do so would be stopped by the injunction of the Court of Chancery; yet, if it were done with no such object, but solely for the purpose of advertising particular articles for sale, and promoting the private trade of the publisher by the sale of articles which any other person might sell as well as the first advertiser, and if in fact it contained little more than an illustrated inventory of the contents of a warehouse, I know of no law which, while it would not prevent the second advertiser from selling the same articles, would prevent him from using the same advertisement, provided he did not in such advertisement by any device suggest that he was selling the works and designs of the first advertiser. At the same time, I am bound to say that where it is shown that the second advertiser has been making use literally of the drawings of the first ad-

vertiser, and copying them precisely, I think that the court, though it could not stop him from taking that course, must feel that a use has been made of the works of the first advertiser which would not be considered fair amongst gentlemen, nor (for the rules are the same as regards the usual intercourse of life) amongst fair traders, and would not give costs to the man who deliberately endeavored to profit by the exertions of his fellow-tradesman. But at the last it always comes round to this, that in fact there is no copyright in an advertisement. If you copy the advertisement of another, you do him no wrong, unless in so doing you lead the public to believe that you sell the articles of the person whose advertisement you copy.

"A different rule applies to the letterpress which is said to be copied. Wherever this letterpress bears the trace of original composition it is entitled to protection, but not where it simply describes the contents of a warehouse, the exertions of the proprietor, or the common mode of using familiar articles." *Law Rep. 14 Eq. 413.*

According to this theory, a bibliography having the highest value as an addition to the store of knowledge would be entitled to copyright if the author be not a bookseller, but would have no claim to protection if prepared by a dealer in books, for the purpose of promoting his business interests. The absurdity of such a distinction is apparent. The question whether copyright will vest depends on the character, the inherent qualities, of the production, and not on the vocation of the author, or the purpose for which he has designed or uses it.

¹ 1 Hem. & M. 603.

² *Law Rep. 19 Eq. 623.* See also *Hogg v. Scott*, 18 Id. 444; *Lawrence v. Cupples*, 9 U. S. Pat. Off. Gaz. 254.

and marble mason," and had published a book containing, with some letterpress, lithographic sketches of monumental designs taken from tombstones in cemeteries. The publication was intended to serve as an advertisement of the plaintiff's business, and to enable customers to whom it was given to select designs to be executed by the plaintiff. The court did not hesitate to declare it a proper subject of copyright.¹

In *Collender v. Griffith*, it appeared that the plaintiff, who was a maker of billiard tables, had copyrighted an engraving of a design for a billiard table, and used it to advertise his business. The court held that it was not entitled to copyright, on the ground, chiefly, that it was "not a work of art, print, lithograph, or engraving having any value or use as such. It is a mere copy of what the complainant has patented as a design, and constitutes the mode in which complainant advertises his tables."²

NEWSPAPERS, MAGAZINES, AND OTHER PERIODICALS.

In the United States, no express statutory provision has been made concerning copyright in publications of this kind. But the question whether they are proper subjects of copyright is easily determined by the application of well-known principles. The purpose and effect of the copyright statutes, as construed by the courts both in England and the United States, are to protect all literary productions worthy of protection. It

¹ Sir Charles Hall, V. C., said: "It was also contended that this work is not entitled to any protection having regard to its character — that it is, in fact, a mere advertisement, and that an advertisement is not, on the authority of *Cobbett v. Woodward*, entitled to protection. The decision in that case turned entirely upon the circumstances which existed in it — it was a catalogue of articles which were being offered for sale. But it does not appear that the case of *Hotten v. Arthur* was mentioned to the Master of the Rolls, and whether, if it had been, his lordship's decision would have been different, it is difficult to say, but certainly it was decided in *Hotten v. Ar-*

thur, that a catalogue may, under certain circumstances, be protected by injunction." *Law Rep. 19 Eq. 626.*

² 11 *Blatchf. 212.*

The court added: "The defendant having the right to make his own tables as he does make them, has an equal right to advertise them by showing the public their appearance by engraving, lithograph, or photograph." This is true; but he would have no right to copy the complainant's engraving in case it possessed the qualities essential to copyright. He might publish and use as an advertisement a similar engraving; but it must have been prepared by himself.

may be material to inquire whether the composition is of sufficient importance to be entitled to protection, or has the inherent qualities, as to originality, innocence, &c., essential to copyright; but in the comprehensive meaning given to the word book is found no requirement as to the size, form, manner, or frequency of the publication containing the copyrighted matter. The question, therefore, whether any composition is entitled to copyright is properly determined by its character, and not the form or manner in which it is published.

The fitness of magazine articles as subjects of copyright is manifest; and publications of this kind, as well as many weeklies, are usually copyrighted. But it may be said that the contents of a daily newspaper are too ephemeral and often too insignificant to be worthy of statutory protection. This is doubtless true of much that appears in a newspaper; but, on the other hand, among the contents of such publications are frequently found productions of great value and permanent literary merit.

There is, then, nothing in the law of copyright, as made by the legislature or as expounded by the courts, to prevent valid copyright from vesting in a magazine or a newspaper, as a whole, or in any of its contents that may be worthy of protection.¹ The same principles apply to such publications as

¹ *Cox v. Land & Water Journal Co.*, Law Rep. 9 Eq. 324.

In *Platt v. Walter*, 17 L. T. N. S. 159, Lord Chelmsford expressed the opinion *obiter* that the contents of a newspaper when published become a proper subject of copyright. He said: "I do not exactly comprehend the meaning of the word copyright in its application to a newspaper. That protection given by common and statute law called copyright is only in respect of some published or unpublished literary production, and therefore there can be no copyright in the prospective series of a newspaper. The copyright may attach upon each successive publication; but that which has no present existence cannot be the subject of this species of property."

Lord Justice Turner was of opinion

that copyright in a newspaper "undoubtedly exists." *Ex parte Foss*, 2 De G. & J. 239.

In *Clayton v. Stone*, 2 Paine, 392, Mr. Justice Thompson expressed the opinion that a newspaper was not within the scope of the copyright law. His judgment appears to rest on the grounds of the ephemeral character of the publication, and the impracticability of complying with the then statutory requisites, one of which was that a copy of the record of entry should be published for four weeks in one or more newspapers. A more liberal doctrine, however, now prevails. The statutory requirement just mentioned has been long obsolete. Within the half century that has elapsed since that judgment was rendered, the character of American newspapers has been wholly

govern in the case of books. Of course, there must be a compliance with the statutory requisites ; and, in the United States, it will be necessary to obtain a separate copyright for each issue of the publication. In the case of a daily newspaper, this will be found inconvenient and perhaps impracticable. In practice, it is not done. But, if it were done in any case, there is no valid reason why the contents of that issue should not be protected. In like manner, copyright may be obtained for any article published in a newspaper, by a compliance in the case of such article with the statutory provisions.

If any uncopyrighted composition be published in an uncopyrighted newspaper or periodical, it becomes common property, and may be republished by any one.¹

In England, Special Provision for Magazines and Periodicals.—In England, newspapers are not expressly mentioned in the statute ; but there is a provision relating to copyright in magazines, reviews, and other periodicals. Section 18 of 5 & 6 Vict. c. 45, enacts that when the owner of “any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever,” shall have employed and paid any persons to write the same, or any part thereof, or any articles therein, on the condition that the copyright shall belong to the owner, “the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor.” But the author may publish his production in a separate form, and will be entitled to the copyright therein, provided he has reserved to himself that right, “by any contract, express or implied.” In the case of “essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works

changed. Much that now appears in them has a permanent literary or scientific value, and as such is entitled to protection.

¹ This question was raised but not decided in the United States Court in 1839, on an application for an injunction in *Miller v. McElroy*, 1 Am. Law Reg. 198. The injunction was refused,

and the question reserved till the final hearing. No further report of the case appears ; but the theory that the publication of an uncopyrighted article in an uncopyrighted newspaper or magazine is not an abandonment of the author's exclusive rights therein, is contrary to a fundamental principle of the law of copyright.

of a like nature," it is provided that the exclusive right of publication in a separate form shall, after twenty-eight years, revert to the author, for the remainder of the term of forty-two years; and that the owner shall not, during the twenty-eight years, publish the composition, "separately or singly," without the consent of the author. The purpose and effect of this provision are clearly not to create copyright in the class of works mentioned. To maintain that doctrine is to assert that there was no copyright in cyclopædias, magazines, and other periodicals, prior to the statute of Victoria; whereas, before that statute was passed, copyright in such publications was repeatedly recognized by the courts.¹ The comprehensive meaning given to the word book, by both Parliament and the courts, clearly embraces all literary compositions, whether published as books or in cyclopædias, magazines, or other periodicals. The same clause, therefore, which vests copyright in books, vests it also in cyclopædias, magazines, and periodicals. An additional provision for this purpose would be superfluous.

But section 18 has a distinct and useful object. By section 3, copyright is granted only to the author or his assigns. But a cyclopædia or magazine is composed of many articles, which the owner or editor has employed others to write, and of which he is neither the author, nor usually the formal assignee. Moreover, magazine articles are often republished in separate form; and it is important to remove all doubt as to who is the lawful owner of the copyright, and whether the author of the article, or the owner of the magazine in which it has appeared, is entitled to the benefit of republication. These objects are met by section 18. First, it enables any person to acquire, without formal assignment, copyright in a composition which he has employed another to write.² Second, in the case of an article published in a magazine or like periodical, it defines the respective rights of the author and the publisher. In this case, the right of the latter is often

¹ *Mawman v. Tegg*, 2 Russ. 385; *Hogg v. Kirby*, 8 Ves. 215; *Wyatt v. Barnard*, 33 Ves. & B. 77; *Bell v. Whitehead*, 3 Jur. 68; *Sweet v. Maugham*, 11 Sim. 51. ² *Brown v. Cooke*, 11 Jur. 77; *Richardson v. Gilbert*, 1 Sim. n. s. 336; *Sweet v. Benning*, 16 C. B. 459.

little more than a license to use the article for a specified purpose.¹

Section 19 of the statute provides that the owner of the copyright in any cyclopædia, review, magazine, or periodical shall be entitled to all the benefits of registration, by registering in the manner prescribed the first volume or number of the publication.

Newspapers in England.—The question whether copyright will vest in a newspaper was a direct issue in the recent English case of *Cox v. The Land and Water Journal Company*, in which it was held that the owner of such a publication has copyright therein, and the articles which it contains, and may maintain an action or suit for piracy, although neither the newspaper nor any of the articles have been registered.² To the extent that a newspaper, as a whole, or any of its contents, may be the proper subject of copyright, the doctrine of this decision is sound; but, as far as it holds that matter published in a newspaper is protected by copyright when there has been no compliance with the statute, the judgment is supported by no authority, and is contrary to established principles of the law of copyright.³ Vice-Chancellor Malins held that a news-

¹ *Bishop of Hereford v. Griffin*, 16 Sim. 190; *Mayhew v. Maxwell*, 1 Johns. & H. 312; *Smith v. Johnson*, 4 Giff. 632; *Strahan v. Graham*, 16 L. T. N. s. 87, on ap. 17 Id. 457.

In *Smith v. Johnson*, Vice-Chancellor Stuart said: "The proviso in the act of Parliament which prohibits a publication 'separately or singly,' is a proviso intended for the benefit and protection of authors. This court in previous cases has, and I think wisely, construed the language of the act so as to afford that protection which was clearly intended by the legislature, and that protection being intended, it is the duty of this court to give the relief now asked.

"In the case cited before the Vice-Chancellor of England (the *Bishop of Hereford v. Griffin*), it was said in argument that the meaning of the proviso taken with the whole clause is not to

vest a copyright in the proprietors or publishers of a periodical work, but simply to give them a license to use the matter for a particular purpose. That view was adopted by the Vice-Chancellor of England; that was the view subsequently adopted by Vice-Chancellor Wood [in *Mayhew v. Maxwell*,] and that is the view which, upon the construction of the language of the act, fortified by those authorities, I feel myself bound to take."

² Law Rep. 9 Eq. 324.

³ Vice-Chancellor Malins cited *Mayhew v. Maxwell*, 1 Johns. & H. 312, and *Strahan v. Graham*, 16 L. T. N. s. 87, on ap. 17 Id. 457, as sustaining the position that a newspaper is protected by copyright, though not registered. These authorities lend no support whatever to this theory. In each case, the issue was whether the owner of a magazine had a right, without the consent of the author, to republish in

paper is not entitled to copyright under section 3 of the statute, which vests copyright in "any book," because a newspaper is not expressly mentioned there, and cannot be brought within the definition of a book given in section 2. He held, however, that a newspaper is within the scope of section 18, though not mentioned there. He admitted that the registration of a book or periodical is essential to copyright, but maintained that section 19, which relates to the registration of magazines, does not apply to newspapers, because they are not specifically designated.

The grounds on which this decision is based are palpably erroneous and inconsistent. To exclude newspapers from the third and nineteenth sections because they are not named there, may be plausible; but, at the same time, to include them under the eighteenth section, when its language is not more favorable to that construction, is, to say the least, inconsistent. With one exception, the classes of publications named in sections 18 and 19 are the same.¹ If newspapers

separate form an article which had been accepted for publication in the magazine. The question was governed by section 18, which, as we have seen, expressly prohibits the owner of a magazine from republishing an article in separate form, without the express consent of the author. In such case, the author sues not for infringement of copyright, in the ordinary meaning of that expression, but for violation of a special contract, — for an unauthorized use of the article, and a use expressly forbidden by the statute. Clearly the author's right of action under such circumstances is wholly independent of the ordinary statutory copyright, and is therefore in no wise affected by the question of registration. His remedy is special. His right to prevent republication under the circumstances named is analogous to the right of an author to prevent the unauthorized publication of his manuscript.

This doctrine was clearly expressed in *Mayhew v. Maxwell*, 1 Johns. & H. 815, by Vice-Chancellor Wood, who said: "The plaintiff is not taking pro-

ceedings to restrain an infringement of his copyright, but claims to be entitled under the proviso of the 18th section to a right distinct from copyright, viz., that of preventing during twenty-eight years the separate publication of his article by the proprietor to whom the copyright belongs. He may or may not be disposed at the end of twenty-eight years, when his own copyright is to commence, to enter the work at Stationers' Hall. In the mean time he retains the right to protect his future interests by preventing a separate publication without his consent. I am of opinion therefore that this is not a proceeding in respect of any infringement of copyright, and that the provisions of the 24th section do not apply."

In *Strahan v. Graham*, 16 L. T. N. S. 87, on ap. 17 Id. 457, the decision rests on the same principle. The facts were similar, except that the controversy related to the republication of copies of photographs.

¹ The language of section 18 is, "any encyclopædia, review, magazine, periodical work, or work published in a

are included in one, they are included in both; if excluded from one, they cannot be brought within the provisions of the other. There can be no copyright in a newspaper, or any other printed matter, except under the statute; and there can be no copyright under the statute without compliance with its conditions.

The sound construction of the statute under consideration is that a newspaper is clearly within the meaning of a book, as that word is defined in section 2, and as it has been construed by the English courts. There can be no reasonable doubt that it is a "periodical work" within the scope of section 18.¹ But it is not less governed by sections 19 and 24, and must therefore be registered.

As the requirements of the statute as to registration of magazines and other periodicals may be complied with by registration of the first number alone, the same rule would doubtless be held to apply to newspapers. This would render the securing of copyright in journals in England extremely convenient and practicable. But in the United States, where there is no special statutory provision in favor of newspapers or other periodicals, copyright for such publications can be secured only by observing the statutory requisites in the case of each issue.

MAPS, CHARTS, AND PLANS.

In England, the copyright in these productions was formerly controlled by the statutes relating to engravings;² but it is now governed by 5 & 6 Vict. c. 45.³ In the American statute,

series of books or parts, *or any book whatsoever.*" Excepting those italicized, the same words are used in section 19.

¹ Lord Chelmsford expressed a doubt whether section 18 extends to newspapers. *Platt v. Walter*, 17 L. T. n. s. 159.

² See 7 Geo. III. c. 38, s. 1; 17 Geo. III. c. 57, s. 1.

³ *Stannard v. Lee*, Law Rep. 6 Ch. 346; overruling the decision of Vice-Chancellor Bacon, 23 L. T. n. s. 306, that maps were within the provisions of the statutes relating to engravings. The Vice-Chancellor adhered to his

view of the law in *Stannard v. Harrison*, 24 L. T. n. s. 570, which was decided after the Lords Justices had given their judgment in *Stannard v. Lee*. In the latter case, Lord Justice James said: "In this case, if the argument of Mr. Cotton were to prevail, it would lead at once to one of these two results: either there would be two kinds of maps,—maps published separately and maps forming part of a book, with respect to which there would be two distinct laws of copyright,—or else as to all maps there would be two distinct laws of copy-

maps and charts are included, with other enumerated subjects of copyright; plans are not mentioned.¹

DRAMATIC AND MUSICAL COMPOSITIONS.

These are capable of two distinct uses: 1, publication in print; 2, public representation or performance. With respect to the right of publication, they are treated as books, and the copyright is governed by the same principles that apply to literary productions. Protection is extended not only to original productions, but also to dramatizations, translations, and adaptations. The right of publicly representing or performing a dramatic or musical composition is treated under the head of playwright.²

Musical compositions were not mentioned in the early English statutes; but the word book in those statutes was judicially construed to embrace any piece of music.³ It is now expressly

right, one giving a conditional right of property with an unconditional right of action or suit, the other giving an unconditional right of property with a conditional right of action or suit. Either of these states of the law would be strangely inconvenient.

"The 5 & 6 Vict. c. 45, s. 2, says that a 'book' shall 'mean and include every map, chart, or plan separately published;' and in the 24th section it proceeds to say that no proprietor of copyright in any 'book,' that is, of a 'map, chart, or plan separately published,' according to the definition given of a book, shall maintain an action or suit in respect of any infringement of such copyright, unless he shall have previously registered such 'map, chart, or plan' in the way prescribed by the act. No very heavy *onus* on the proprietor — no very difficult step to take before he commences his suit. The words are plain and simple, and there is no reason for saying that the intention of the legislature was different from that which is expressed by the words. The object of the enactment is very clear. Formerly maps had been considered artistic works; now they were

to be brought into their proper place as literary works. And rightly so, in my opinion, for maps are intended to give information in the same way as a book does. A chart, for instance, gives similar information to sailing rules; maps give instruction as to the statistics and history of the country portrayed; they point out the amount of population, the places where battles were fought, the dates when provinces were annexed, as in maps of India, and give other geographical and historical details. It was quite reasonable, therefore, to take them out of the law of artistic works, and to give them greater protection by bringing them under the law of copyright of literary works. There is no inconvenience in giving the natural meaning to the words of the statute, and there would be great inconvenience in the contrary construction. I think, therefore, the plea was well pleaded, and that the plaintiffs are not entitled to maintain their suit until they have registered their map." Law Rep. 6 Ch. 348.

¹ U. S. Rev. St. s. 4952.

² Chaps. XIII.—XVI.

³ *Bach v. Longman*, Cowp. 623;

declared by 5 & 6 Vict. c. 45, s. 2, that the word book shall be construed to include every "sheet of music." Musical compositions are included in the subjects of copyright enumerated in the existing American statute,¹ as they were in that of 1831.

Not only an original composition, but any substantially new arrangement or adaptation of an old piece of music, is a proper subject of copyright.² In a recent English case, it was unanimously held by the judges of the Queen's Bench, that an arrangement for the piano of an opera is a work substantially new and distinct from the original; and as such is entitled to protection, provided the arranger had a right so to use the original.³ So also the arrangement for the piano of quadrilles,

Clementi v. Golding, 2 Camp. 25; *Storace v. Longman*, 2 Camp., note *a*; *Platt v. Button*, 19 Ves. 447; *White v. Geroch*, 2 Barn. & Ald. 298; *D'Almaine v. Boosey*, 1 Y. & C. Exch. 288; *Chappell v. Purday*, 4 Id. 485; *Chappell v. Purday*, 14 Mees. & W. 303; *Jefferys v. Boosey*, 4 H. L. C. 815. See *ante*, p. 140.

¹ U. S. Rev. St. s. 4952.

² *Reed v. Carusi*, Tan. Dec. 72.

³ *Wood v. Boosey*, Law Rep. 2 Q. B. 340, on ap. 3 Id. 223. See also *Boosey v. Fairlie*, 7 Ch. D. 301, 309. In the former case, Kelly, C. B., said:—

"But what is the pianoforte arrangement? It is an arrangement of the whole of the music of this opera for the pianoforte, a part of which is the ordinary pianoforte accompaniment, the bass and the treble played with both hands, and which is independent of the melody. There may be, as it appears, the line of music for one voice, or two or three voices, as the case may be; and there are separate and distinct lines for the accompaniment for the pianoforte; and, no doubt, here and there throughout this accompaniment, and by going line by line through the score of the original opera, there may be found the same notes; but there are other parts of the accompaniment which are merely the pianoforte accompaniment, the notes

forming which are nowhere to be found in the score at all.

"The accompaniment for the pianoforte is a work of greater or less skill. In some cases, perhaps in many cases—it may be in this for aught I know—the operation of adaptation is little more than mechanical, and what any one acquainted with the science of music, any composer of experience, might have been able to do without difficulty; but it may be, and often is, as in the case of the six operas of Mozart by Mazzinghi, a work—I would hardly use the term of great genius, but a work—of great merit and skill of that eminent poet and pianist, Mazzinghi. If such a work be published as the adaptation to the pianoforte by a composer other than the composer of the original opera, no doubt it is a piracy of the opera, and the composer may maintain an action against the adapter or the publisher of the adaptation; but whenever the copyright in the original opera has expired, if after that, and for the first time, another composer composes another adaptation of that opera to the pianoforte, it is a new substantive work, in respect of which he is just as much entitled to the benefit of the copyright in this country as the original composer of the opera; and if any one had, by an adaptation pirated that arrangement, he would be liable to an action

waltzes, &c., selected from an opera, is entitled to protection.¹ So copyright has been held to vest in a song consisting of new words and a new accompaniment written to an old air.²

ENGRAVINGS, PRINTS, AND CUTS.

Great Britain.—The 8 Geo. II. c. 13, provides that “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 sole right and liberty of printing and reprinting the same” for fourteen years from first publication. This statute gives copyright only when the subject or design of the engraving is original with the engraver. It does not protect engravings made from paintings, sculpture, and other works of art of which the engraver is not the author. This defect was remedied by the 7 Geo. III. c. 38, which extends protection to “any print taken from any picture, drawing, model, or sculpture, either ancient or modern . . . in like manner as if such print had been graven or drawn from the original design of such graver, etcher, or draftsman.” It also enlarged the duration of copyright from fourteen to twenty-eight years. Penalties and forfeitures for piracy are imposed by these acts. An action for damages is given by 17 Geo. III. c. 57. The provisions of the acts above cited were extended to Ireland by the 6 & 7 Will. IV. c. 59; and by the 15 & 16 Vict. c. 12, s. 14, they are made to include “prints taken by lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely.”

for that piracy. I consider that an infallible test to show the difference between the one work and the other; between the original opera and the arrangement of it for the pianoforte. It is perfectly clear, therefore, that in point of fact — for it is rather a matter of fact than any thing else — the adaptation to the pianoforte, or the arrangement for the pianoforte, of an opera already published, is itself a new and

separate work, and is not one and the same with the original opera.” Law Rep. 3 Q. B. 229.

¹ *Atwill v. Ferrett*, 2 Blatchf. 39; see also *Jollie v. Jaques*, 1 Id. 618, where the decision concerning an injunction was suspended on the ground of doubt whether the arrangement was any thing more than a copy of the original.

² *Leader v. Purday*, 7 C. B. 4.

Engravings, illustrations, &c., published in a book, are treated as part of the book, and are protected by the copyright in the book.¹

United States. — In this country, engravings and prints have been protected by statute since 1802. By the existing law, copyright is extended to the inventor, designer, or owner of any engraving, cut, or print.² No distinction is prescribed between works of this kind and books, except in relation to penalties and forfeitures in cases of piracy. By the act of June 18, 1874, it is provided that the words engraving, cut, and print “shall be applied only to pictorial illustrations, or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office.”³

In a recent case, playing cards were protected as prints.⁴ In another case, a diagram with directions for cutting garments was held to be a book; but the court expressed the opinion that it might be a print or chart within the meaning of the law.⁵ A mere label is not entitled to protection under the copyright law;⁶ nor is the engraved design of a billiard table, having no other value than that of a mere advertisement.⁷

PAINTINGS, PHOTOGRAPHS, CHROMOS, SCULPTURE, &c.

Great Britain. — Before 1862, there was no statutory copyright in paintings, drawings, and photographs; and, though an engraving of a painting was protected by statute, the copyright in the former was not violated by copying from the latter.⁸ The exclusive right of copying paintings, or any other work of art, was, however, recognized by the common law.⁹

¹ *Bogue v. Houlston*, 5 De G. & Sm. 267; *Bradbury v. Hotten*, Law Rep. 8 Exch. 1; *Grace v. Newman*, Law Rep. 19 Eq. 623. See also *Wilkins v. Aikin*, 17 Ves. 422; *Barfield v. Nicholson*, 2 Sim. & St. 1; *Cobbett v. Woodward*, Law Rep. 14 Eq. 407.

² U. S. Rev. St. s. 4952.

³ 18 U. S. St. at L. 78. See *Marsh v. Warren*, 9 Chic. Leg. News, 395; s. c. 4 Am. L. T. N. s. 126.

⁴ *Richardson v. Miller*, 3 L. & Eq. Reporter, 614.

⁵ *Drury v. Ewing*, 1 Bond, 540, 548.

⁶ *Scoville v. Toland*, 6 West. Law Jour. 84; *Coffeen v. Brunton*, 4 McLean, 516.

⁷ *Collender v. Griffiths*, 11 Blatchf. 212. See *ante*, p. 168.

⁸ *De Berenger v. Wheble*, 2 Stark. 548.

⁹ *Turner v. Robinson*, 10 Ir. Ch.

The 25 & 26 Vict. c. 68, passed in 1862, now gives to the author of every original painting, drawing, or photograph, and his assigns, "the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death."¹

A photograph of an engraving is an original production within the meaning of this statute.²

The provisions of the International Copyright Act, 7 & 8 Vict. c. 12, are extended to paintings, drawings, and photographs, by section 12 of 25 & 26 Vict. c. 68.

The first statute for the protection of sculpture was 38 Geo. III. c. 71, passed in 1798; but this was so ineffective that, in the language of Lord Ellenborough, it "seems to have been framed with a view to defeat its own object."³ It was amended by 54 Geo. III. c. 56, passed in 1814, and was repealed by 24 & 25 Vict. c. 101.

The 54 Geo. III. c. 56, secures the "sole right and property" therein to "every person or persons who shall make or cause to be made any new and original sculpture, or model, or copy, or cast of the human figure or human figures, or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals, or of any part or parts of any animal combined with the human figure or otherwise, or of any subject being matter of invention in sculpture, or of any alto or basso-relievo representing any of the matters or things hereinbefore mentioned, or any cast from nature of the human figure, or of any part or parts of the human figure, or of any cast from nature of any animal, or of any part or parts of any animal, or of any such subject containing or representing any of the matters and things hereinbefore mentioned, whether separated or combined."

121, 510; *Prince Albert v. Strange*, 2 De G. & Sm. 652, on ap. 1 Mac. & G. 25.

¹ s. 1.

² *Graves's Case*, Law Rep. 4 Q. B. 715.

³ *Gahagan v. Cooper*, 3 Camp. 111. "These artists," said Lord Ellenborough, "must again apply to Parliament for protection; and they had better not *model* the new act themselves as they seem to have done the former."

The term of protection is fourteen years,¹ with provision for an additional term of the same length.²

United States.—A photograph was held not to be a print, cut, or engraving, under section 1 of the act of 1831;³ and there was no statutory protection for photographs until 1865, when a law was passed for that purpose.⁴ Photographs and negatives thereof are now included with books and other articles for which copyright is provided by section 4952 of the Revised Statutes.

Copyright in paintings, drawings, chromos, statues, statuary, and models or designs intended to be perfected as works of the fine arts, is secured by the same statute which provides protection for books and other works. The articles above enumerated were first brought within the provisions of the copyright law by the act of 1870. They are subject to the same general rules and principles which govern the copyright in other works.⁵

Designs.—In England, copyright is granted by statute for ornamental designs applied to articles of manufacture, &c., such as paper hangings, carpets, calicoes, silks, laces, pottery, glass, &c.;⁶ and also designs having reference to some purpose of utility for “the shape or configuration” of articles of manufacture.⁷ The copyright in productions of this kind will not be treated in this work.

¹ s. 1.

² s. 2. As to registration and penalties, see 13 & 14 Vict. c. 104, ss. 6, 7.

³ *Wood v. Abbott*, 5 Blatchf. 325; see also *Rossiter v. Hall*, *Ibid.* 362.

⁴ 13 U. S. St. at L. 540.

⁵ But see *post*, p. 231, as to the rights of foreign artists.

⁶ 5 & 6 Vict. c. 100.

⁷ 6 & 7 Vict. c. 65. The following statutes also relate to copyright in designs: 13 & 14 Vict. c. 104; 21 & 22 Vict. c. 70; 24 & 25 Vict. c. 73; 38 & 39 Vict. c. 93.

CHAPTER III.

QUALITIES ESSENTIAL TO COPYRIGHT.

NEITHER the English nor the American statutes have prescribed any conditions or requirements as to the character of a literary production entitled to copyright. The only statutory condition relating to the nature or quality of the composition is that implied in the avowed purpose of the legislature, which is the encouragement of learning and the increase of useful knowledge. What qualities are essential to bring a literary work within the general scope and spirit of the law is a question which has been left to judicial determination. It is clearly immaterial in what language, native or foreign, a composition may be printed, or in what style or form of publication it appears. The chief inquiries which have fallen within the cognizance of the courts in determining the qualities essential to copyright are: 1, whether the production is innocent, or is injurious to the public peace or morals; 2, whether it is original, or a mere copy; 3, whether, in amount and character, it is a material contribution to useful knowledge, or is too insignificant and valueless to be worthy of protection as a literary composition.

SEDITIONOUS AND LIBELLOUS PUBLICATIONS.

In determining whether a work is entitled to copyright, the courts take cognizance of the question whether it tends to disturb the public peace, corrupt morals, or libel individuals. A published work, to be entitled to protection, must in the eyes of the law be innocent. In refusing protection to publications having an injurious moral or political tendency, the court does not act as the guardian of public morals, or as a censor of the press. On the contrary, in declining to interfere with the piratical publication and sale of an obnoxious book, it removes an obstacle to its wider circulation. For this evil

there are other remedies. In cases relating to literary property, only the civil interests of the parties and their rights of property are considered. The publication of a seditious, blasphemous, immoral, or libellous production is a violation of law, and therefore such a work is not entitled to protection as property. The court simply refuses to grant remedies to which the author is not entitled by reason of the objectionable nature of his property. On the same principle, there can be no copyright in a publication whose effect is to encourage the commission of crime;¹ or one whose sale, by reason of fraudulent representations as to its character or authorship, is a case of *crimen falsi*, or an attempt to obtain money under false pretences.² It is maintained elsewhere, that the rule that productions not innocent are entitled to no protection as property rightly applies only to published works.³

A published work whose seditious or libellous tendency is justly dangerous to the public peace, or exposes the government to peril or serious embarrassment, is clearly not entitled to the protection of the copyright laws. This doctrine was recognized by Lord Ellenborough, in 1803, in an action for the piracy of a song called Abraham Newland. The defence claimed that, while the song professed to be a panegyric on money, it was "a gross and nefarious libel upon the solemn administration of British justice." Lord Ellenborough said: "If the composition appeared, on the face of it, to be a libel so gross as to affect the public morals, I should advise the jury to give no damages. I know the Court of Chancery on such an occasion would grant no injunction. But I think the present case is not to be considered one of that kind."⁴ In *Wolcott v. Walker*, wherein the plaintiff sought

¹ *Martinetti v. Maguire*, 1 Deady, 223. See *post*, p. 186, note 2.

² *Wright v. Tallis*, 1 C. B. 893. See also *Stannard v. Harrison*, 24 L. T. N. S. 570.

³ See *ante*, pp. 112-114.

⁴ *Hime v. Dale*, 2 Camp. 27, note *b*. The most "nefarious" part of the song was the following stanza:—

"The world is inclined,
To think Justice blind;
Yet what of all that?
She will blink like a bat

At the sight of friend Abraham Newland!
Oh, Abraham Newland! Magical Abraham
Newland!

Though Justice, 'tis known,
Can see through a millstone,
She can't see through Abraham Newland!"

"The argument used by Mr. Garrow," said Lawrence, J., "on this fugitive piece as being a libel would as forcibly apply to *The Beggar's Opera* where the language and allusions are sufficiently derogatory to the administration of public justice."

to restrain the defendant from publishing an edition of his works, in violation of an agreement which had been made by them, Lord Eldon refused to continue the temporary injunction which had been granted, until he should satisfy himself that the writings in controversy were not libellous. "It is not the business of this court," he said, "even upon the submission in the answer, to decree either an injunction, or an account of the profits of works of such a nature that the author can maintain no action at law for the invasion of that which he calls his property, but which the policy of the law will not permit him to consider his property."¹

See also *Du Bost v. Beresford*, 2 Camp. 511, where, in an action for the malicious destruction of a libellous picture on exhibition, Lord Ellenborough said that the plaintiff was both civilly and criminally liable for having exhibited it; and held that the jury in assessing the damages "must not consider this as a work of art, but must award the plaintiff merely the value of the canvas and paint which formed its component parts." In *Clay v. Yates*, 1 Hurl. & N. 73, it was held that a printer was not bound to continue the printing of a book after he discovered that it contained libellous matter, and was entitled to recover for what had been printed before such discovery was made. See also *Gale v. Leckie*, 2 Stark. 107.

¹ 7 Ves. 1. No question concerning the character of the publication in controversy appears to have been raised at the bar, and the Chancellor admitted that he was "in total ignorance of the nature of this work." Lord Eldon's course in this case has been severely criticised by Lord Campbell:—

"But the decisions of Lord Eldon which I most object to, are those by which he erected himself into a censor of the press, and gave himself the power to protect or to extinguish all literary property at his pleasure. From the time when copyright was vested in authors by the statute of Queen Anne, till Lord Eldon received the Great Seal, equity judges had guarded

it from piracy by injunction; and without this remedy the right would be a mockery, as actions at law to recover damages from hawkers and pedlers, who may sell pirated editions of any work in city or country, would only add to the author's loss. The authorship and the piracy being established, the injunction had always gone as a matter of course, without any question being made respecting the nature of the publication; for under Lord Cowper, Lord Macclesfield, Lord King, Lord Hardwicke, Lord Camden, Lord Thurlow, and Lord Loughborough, it never had been imagined that the defendant could be permitted to allege, as a justification of his piracy, that he had been committing a crime by publishing something for which he was liable to be punished, as injurious to private character, or dangerous to religion, morality, or the good government of the State. Accordingly injunctions had been granted against the piracy of the *Dunciad*, of Swift's *Miscellanies*, of the *Beggar's Opera*, of the *Life of George Anne Bellamy*, and of other works containing passages which if strictly examined might be considered very censurable—no one suggesting that these should be culled as a repast for the Lord Chancellor, or that he should be required to waste his valuable time in trying to find them out,—and all who thought upon the subject being convinced, that if the work pirated were

To defeat copyright on the ground that the work is seditious or libellous on the public, it is not enough to show that the

in any degree exceptionable, a benefit was conferred upon the community by restraining the circulation of it, instead of proclaiming to all the world that it might be published with impunity, in any form, and at any price.

“But within a year after Lord Eldon’s appointment as Chancellor, Dr. Wolcott, better known as Peter Pindar, having a dispute with his booksellers respecting the construction of an agreement for publishing two editions of his works, and these editions being published,—as he contended, contrary to the agreement,—filed a bill, and prayed an injunction which was granted in the first instance, till answer. The defendants by their answer admitted that they had published in one of these editions some of the plaintiff’s works *contrary* to the agreement, and as to that edition therefore they submitted. With respect to the other edition they insisted that they were justified by the agreement. The pleading at the bar being finished, the conduct of the Lord Chancellor appears to me, I confess, to be most extraordinary and unaccountable. No charge is made by answer or affidavit, or *viva voce* statement, that the work in question contained any thing exceptionable, and the judge had no judicial knowledge of its contents, nor was he (as far as I can discover) judicially called upon to form any opinion upon its merits, for it was at any rate to be presumed to be innocent. But he, privately knowing that Timothy Wolcott was Peter Pindar, and that Peter Pindar had written some ribald verses ~~respecting~~ his ‘royal master,’—upon the authority of a *nisi prius dictum* of Lord Chief Justice Eyre at the trial of Dr. Priestley against the hundred for the value of his furniture and books burnt in the Birmingham riots,—‘that if any of the books were seditious, the plaintiff was not entitled to recover for them,’—of his own mere motion refused to decree an injunction or an account of profits, even with respect to that edi-

tion as to which there was a submission in the answer, saying,—‘It is the duty of the court to know whether an action at law would lie; for if not, the court ought not to give an account of unhallowed profits of libellous publications. At present, I am in total ignorance of the nature of this work, and whether the plaintiff can have a property in it or not.’ After showing how with respect to the disputed edition there must be an action, he continued: ‘But even as to the other edition, before I uphold any injunction, I will see these publications and determine upon the nature of them; whether there is question enough to send to law as to the property in those copies; for if not, I will not act upon the submission in the answer. If upon inspection the work appears innocent, I will act upon that submission; if criminal, I will not act at all; and if doubtful, I will send that question to law.’ As to the disputed edition, the injunction was very properly dissolved; but as to the other edition, contrary in my opinion to all propriety, an order was made to dissolve the injunction, unless in a week the books should be brought into court for the perusal of the Lord Chancellor.

“Such is the foundation of the Eldonian doctrine, that the judge before granting an injunction against literary piracy is himself *ex mero motu* to read through the whole of the work, that he may see whether it contains any thing which in his opinion may possibly be construed into a libel—a doctrine which must apply equally to an encyclopædia of fifty folios as to a collection of fugitive poems in one duodecimo. I know not whether there may be a reference to the master to report on the character of the work, but one master may be wholly insufficient for the undertaking; and at any rate in analogy to the proceeding upon a question of title he must be allowed to avail himself of the opinions of divines, philosophers, and politicians,

facts set forth or the opinions expressed are merely objectionable or obnoxious, that public measures or men in their public capacity are censured, satirized, or ridiculed. The publication must be such as justly to cause or to threaten a breach of the peace, or to interfere with the functions of the government, or in some way to work positive harm to the Commonwealth. Then is shown an injury to society which comes within the cognizance of the law. In the United States, the largest freedom of speech and of the press consistent with the public welfare is allowed and guaranteed. Until that privilege is justly forfeited by its abuse, no one is held amenable to the laws for the punishment of sedition and libel on the public. The same enlightened liberality should govern in determining rights of literary property.

There is no reported case in which has been expressly considered the question of copyright in a publication which is a libel on an individual, but not directly on the public. But, in law, a libellous attack on a citizen is looked upon as an offence against society, and one which, in the absence of legal remedies for redress, would lead to a breach of the peace. On this theory, and on the ground that, to publish a libel is a violation of the law, the courts may refuse protection to a publication in which an individual, though not the public expressly, is grossly libelled.

IMMORAL PRODUCTIONS.

The protection of the law will not be extended to a publication which is obscene, or has a positive immoral tendency. In *Stockdale v. Onwhyn*, the plaintiff claimed damages for the unauthorized publication of the *Memoirs of Harriette*

and exceptions may be taken to his report to be argued before the court. More astounding it is that in this case the Lord Chancellor, professing 'total ignorance of the nature of the work,' should, without any impeachment of it, have imposed upon himself the necessity of reading the whole of it before granting the injunction. The bill and answer showed it to have been printed and published at least six years — during the greater part of which he had himself filled the office of Attor-

ney-General, so that if it were libellous it would have been his duty to prosecute it. For my own part I cannot help suspecting that he was well acquainted with its contents, — that notwithstanding his propensity to prosecute libels, he had been afraid to bring the author before a jury, and that he now thought it a more convenient course to unite in his own person the functions of prosecutor and of judge." *10 Lives of the Chancellors* (5th English ed.), 254.

Wilson, which professed to be a history of the amours of a courtesan, and contained "in some parts matter highly indecent, and in others matter of a slanderous nature upon persons named in the work." It was held that the publication of such a book was an offence against the law, and therefore the plaintiff could have no property in it.¹ The same doctrine was applied in a recent American case, wherein the court decided that the dramatic spectacle called the Black Crook was not entitled to protection, on the ground that it "only attracts attention as it panders to a prurient curiosity or an obscene imagination by very questionable exhibitions and attitudes of the female person."² Where it was contended that cards for playing were not entitled to protection, because they are often used for unlawful purposes, Mr. Justice Shepley said: "Courts of justice will not lend their aid to protect the authors of immoral

¹ 5 Barn. & Cr. 173. "I am certain," said Chief Justice Abbott, "no lawyer can say that the sale of each copy of this work is not an offence against the law. How then can we hold that by the first publication of such a work, a right of action can be given against any person who afterwards publishes it? It is said that there is no decision of a court of law against the plaintiff's claim. But upon the plainest principles of the common law, founded as it is, where there are no authorities, upon common sense and justice, this action cannot be maintained. It would be a disgrace to the common law could a doubt be entertained upon the subject; but I think that no doubt can be entertained, and I want no authority for pronouncing such a judicial opinion."

In *Poplett v. Stockdale, Ryan & M.* 337, it was held that the printer was not entitled to recover money due from the publisher for printing this book. In a case before Vice-Chancellor Leach, in 1823, an injunction which had been obtained to restrain the publication of a pirated edition of a part of *Don Juan* was dissolved; but the defendant was ordered to keep an account. Jac. 474, note.

In *Fores v. Johnes*, 4 Esp. 97,

it was held that the defendant who had given an order to the plaintiff for "all the caricature prints that had ever been published" was not bound to receive those which were immoral or obscene.

² *Martinetti v. Maguire*, 1 Deady, 216. "Congress," said Deady, J., "is not empowered by the Constitution to pass laws for the protection or benefit of authors and inventors, except as a means of promoting the progress of 'science and useful arts.' For this reason an invention expressly designed to facilitate the commission of crime, as murder, burglary, forgery or counterfeiting, however novel or ingenious, could not be patented. So with a dramatic composition which is grossly indecent, and calculated to corrupt the morals of the people. The exhibition of such a drama neither promotes the progress of science or useful arts, but the contrary. The Constitution does not authorize the protection of such productions, and it is not to be presumed that Congress intended to go beyond its power in this respect to secure their authors and inventors the exclusive right to the use of them." *Ibid.* 223. See also *Keene v. Kimball*, 16 Gray (82 Mass.), 548; *Shook v. Daly*, 49 How. Pr. 366.

works. But, where there is nothing immoral or improper in the prints themselves, the fact that they may be used by persons to violate the laws against gambling does not of itself deprive them of the protection of the law. To do this, it must appear either that there is something immoral, pernicious, or indecent in the things *per se*, or that they are incapable of any use except in connection with some illegal or immoral act. It is not contended that the playing cards of the complainant are subject to either of these imputations.”¹ Whether the work in controversy is positively indecent, or has an objectionable, immoral tendency, will be in some cases a question on which well-meaning persons may honestly differ. But, when the fact is found that the publication in this respect is obnoxious to society, it is not a proper subject of copyright.

BLASPHEMOUS PUBLICATIONS.

Great Britain. — Blasphemous writings cannot be the subject of copyright, because blasphemy is a crime against society, punishable by law. But what is blasphemy, and what liberty an author may exercise in treating religious subjects, without forfeiting the right to protection for his literary property, are questions not decisively or satisfactorily answered by the decisions. The doctrine that no work injurious to religion is entitled to protection was advanced by Lord Eldon, and rests on two equity decisions pronounced by him in 1822. When application was made to restrain the publication of a pirated edition of Byron’s *Cain*, the Chancellor doubted whether the poem was not “intended to vilify and bring into discredit that portion of Scripture history to which it relates,” and refused the injunction until it should be shown that an action at law could be maintained.² On similar grounds, the

¹ *Richardson v. Miller*, 3 L. & Eq. Reporter, 614.

² *Murray v. Benbow*, 6 Petersd. Abr. 558. “Now this publication,” said Lord Eldon, “if it is one intended to vilify and bring into discredit that portion of Scripture history to which it relates, is a publication, with reference to which, if the principles on which that case at Warwick (Dr. Priestley’s case) was decided, be just principles of

law, the party could not recover any damages in respect of a piracy of it. This court has no criminal jurisdiction; it cannot look on any thing as an offence; but in those cases it only administers justice for the protection of the civil rights of those who possess them, in consequence of being able to maintain an action. You have alluded to Milton’s immortal work; it did happen in the course of last long vacation,

same judge refused to continue an injunction against the piratical publication of Sir William Lawrence's Lectures on Physiology, Zoölogy, and the Natural History of Man. These lectures had been delivered by that eminent surgeon at the College of Surgeons, in London, and by him they were afterward published. On a motion to dissolve the *ex parte* injunction which had been granted against the publication of a pirated edition, the defendant pleaded "that the nature and

amongst the *solicite jucunda oblivia vite*, I read that work from beginning to end; it is therefore quite fresh in my memory, and it appears to me that the great object of its author was to promote the cause of Christianity; there are, undoubtedly, a great many passages in it, of which, if that were not its object, it would be very improper by law to vindicate the publication; but, taking it altogether, it is clear that the object and effect were not to bring into disrepute. but to promote, the reverence of our religion. Now, the real question is, looking at the work before me, its preface, the poem, its manner of treating the subject, particularly with reference to the fall and the atonement; whether its intent be innocent as that of the other with which you have compared it; or whether it be to traduce and bring into discredit that part of sacred history. This question I have no right to try, because it has been settled, after great difference of opinion among the learned, that it is for a jury to determine that point; and where, therefore, a reasonable doubt is entertained as to the character of the work, (and it is impossible for me to say I have not a doubt, I hope it is a reasonable one), another course must be taken for determining what is its true nature and character."

In criticising Lord Eldon's decision in this case, Lord Campbell said:—

"In this 'mystery,' which Lord Jeffrey says, 'abounds in beautiful passages, and shows more *power* than any of the author's dramatic compositions,' there are sentiments very much to be condemned; but so there are in

the speeches of Paradise Lost, and it must have been a strange occupation for a judge who for many years had meddled with nothing more imaginative than an act of Parliament, to determine in what sense the speculations of Adam, Eve, Cain, and Lucifer are to be understood, and whether the tendency of the whole poem be favorable or injurious to religion." 10 Lives of the Chancellors (5th English ed.), 257.

The scrupulous doubts of Lord Eldon concerning the religious tendency of Byron's work seem not to have been shared by Sir Walter Scott, who, in accepting the dedication of Cain, wrote, in 1821, to the publisher, Mr. John Murray: "I accept with feelings of great obligation the flattering proposal of Lord Byron to prefix my name to the very grand and tremendous drama of Cain. I may be partial to it, and you will allow I have cause; but I do not know that his muse has ever taken so lofty a flight amid her former soarings. He has certainly matched Milton on his own ground. Some part of the language is bold, and may shock one class of readers, whose tone will be adopted by others out of affectation or envy. But then they must condemn the Paradise Lost, if they have a mind to be consistent. The fiend-like reasoning and bold blasphemy of the fiend and of his pupil lead exactly to the point which was to be expected, the commission of the first murder and the ruin and despair of the perpetrator." 6 Lockhart's Life of Sir Walter Scott (10 vols., Edinburgh), 424.

general tendency of the work in question were such that it could not be the subject of copyright," and referred to passages in it which were claimed to be "hostile to natural and revealed religion, and impugned the doctrines of the immateriality and immortality of the soul." For the plaintiff, it was claimed that the passages did not bear this construction. In passing judgment, Lord Eldon said: "Looking at the general tenor of the work, and at many particulars of it, recollecting that the immortality of the soul is one of the doctrines of the Scriptures, considering that the law does not give protection to those who contradict the Scriptures, and entertaining a doubt, I think a rational doubt, whether this book does not violate that law, I cannot continue the injunction."¹

If the doctrine propounded by Lord Eldon, more than half a century ago, shall be followed by the English courts of to-day, protection will be refused to all publications in which are denied the fundamental principles of the Bible: as the existence of the Deity, the Divinity of Christ, the inspiration of the Scriptures, the immortality of the soul, and even less important truths. The question, however, has not since been adjudicated in any reported copyright case. Whether the court, when again called upon to declare the law, will adopt the narrow theories of Lord Eldon, or will proclaim a better and more

¹ Lawrence v. Smith, Jac. 471.

"I take it for granted," said the Lord Chancellor, "that when the motion for the injunction was made, it was opened as quite of course; nothing probably was said as to the general nature of the work, or of any part of it; for we must look not only at the general tenor, but at the different parts; and the question is to be decided, not merely by seeing what is said of materialism, of the immortality of the soul, and of the Scriptures, but by looking at the different parts and inquiring whether there be any which deny or which appear to deny the truth of Scripture, or which raise a fair question for a court of law to determine whether they do or do not deny it. . . . But if I feel a rational doubt whether an action would lie, it will not be necessary to go into the

grounds of that doubt; it might perhaps prejudice the trial if I did."

The doctrine here applied by Lord Eldon was foreshadowed in 1720 by Lord Chancellor Macclesfield, who in granting an injunction to restrain the publication of a piratical English translation of Burnett's *Archæologia Philosophica*, on the ground that while the original "contained strange notions intended by the author to be concealed from the vulgar in the Latin language, in which language it could not do much hurt," the dissemination of its doctrines in English would be harmful to religion, said that he "looked upon it that this court had a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality." Burnett v. Chetwood, 2 Meriv. 441.

liberal doctrine, and, if so, what advance toward a wise tolerance will be made, is a matter of conjecture. There is no good reason why even in England, where religion is still jealously guarded by intolerant acts, which have too long remained in force, the protection of the law should be denied to publications in which the accepted truths of Christianity are doubted, or denied, with moderation and sincerity, and without injury to public morals.

But it is not probable that the English courts will yet go so far as to protect a work in which is expressly denied, however temperately or conscientiously, the fundamental principles of religion. The laws of England relating to blasphemy and other offences against religion are stringent. A statute of the seventeenth century still subjects to punishment "any person or persons having been educated in or at any time having made profession of the Christian religion within this realm" who "shal assert or maintain there are more gods than one or shal deny the Christian religion to be true or the Holy Scriptures of the Old and New Testament to be of divine authority."¹

Although this statute, as far at least as the enforcement of its penalties is concerned, is practically obsolete, its spirit is to be found in the still prevalent common-law doctrines which have been affirmed by the courts. In the cases that have arisen, the wrong-doer has been held to have made wanton and impious attacks on religion or Christianity, and against these acts the law has been construed with vigor. Whether the same or a different rule is applicable in cases of temperate expression of honest religious disbelief has not been directly adjudicated or considered by the courts. Nor can it be determined with certainty what freedom, consistent with the decisions heretofore rendered, a conscientious disbeliever may lawfully exercise in soberly promulgating views hostile to the accepted teachings of the Bible. In theory, malice and a wanton manner are essential to blasphemy. But there is little in the reported cases to show that impious motives and manner will not be presumed as a matter of course, where views

¹ 9 Will. III. c. 35, passed in 1698, given as 9 & 10 Will. III. c. 32, in Ruff-2 Revised Statutes, 72. This act is head's Statutes at Large.

antagonistic to religion are promulgated. In other words, if the stringent doctrines of the early decisions shall be still followed, it will probably be a rare case in which the rigor of the law against a disbeliever will be overcome by the sincerity with which his convictions are held, or the moderation with which they are expressed. But there is little doubt that in penal actions for blasphemy more liberal views will now govern the courts, and that the presence or the absence of express malice and a wanton manner will be a controlling inquiry in determining the law.¹

¹ The leading English decisions relating to blasphemy may be found in Starkie's *Law of Slander and Libel* (4th ed., by Folkard; Wood's Am. ed.), and *The Law relating to Works of Literature and Art*, by Shortt (London, 1871).

Mr. Starkie's liberal statement of the law, however desirable and sound in theory it may be, is hardly sustained by the decisions. He says:—

“There are no questions of more intense and awful interest than those which concern the relations between the Creator and the beings of his creation; and although, as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions, yet it cannot be doubted that any man has a right, not merely to judge for himself on such subjects, but also legally speaking to publish his opinions for the benefit of others. When learned and acute men enter upon these discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing mischief, must in general tend to the advancement of truth, and the establishment of religion on the firmest and most stable foundations. The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless; but, be this as it may, the law interferes not with his blunders so long

as they are honest ones, justly considering, that society are more than compensated for the partial and limited mischiefs which may arise from the mistaken endeavors of honest ignorance, by the splendid advantages which result to religion and to truth from the exertions of free and unfettered minds. It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals,—a state of apathy and indifference to the interests of society,—is the broad boundary between right and wrong. If it can be collected from the circumstances of the publication, from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons or subjects, that the design of the author was to occasion that mischief to which the matter which he publishes immediately tends, to destroy or even to weaken men's sense of religious or moral obligations, to insult those who believe by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and form of worship

But the same liberality, however desirable, can hardly be expected in the judicial treatment of civil questions. As recently as 1867, it was held by a court of law in a civil case to be unlawful to deliver lectures on such subjects as "The Character and Teachings of Christ; the former defective, the latter misleading:" and "The Bible shown to be no more inspired than any other book; with a refutation of modern theories thereon." The plaintiff had contracted for the use of a public hall in Liverpool in which to deliver lectures, and afterward advertised the subjects, when the defendant refused to permit his hall to be used for such purposes, and an action for breach of contract followed. For the plaintiff, it was contended that "the test of blasphemy lies rather in the manner than the matter of what is said; and the current opinion of modern times has been, that, to support a prosecution for blasphemy, there must be a scurrilous and indecent attack upon commonly received opinions, or a maintenance of views flagrantly opposed to ordinary morality." It does not appear that the judges expressed any opinion on the vital question here raised, except that Sir George Bramwell remarked that, whatever might be the law in penal actions for blasphemy, a more stringent rule should be applied in civil cases. The court found that the contract was for an unlawful purpose, and held that it could not be enforced.¹

into disgrace and contempt, the offence against society is complete." Folkard's *Starkie*, p. 599; Wood's ed. p. 771.

Mr. Shortt justly notes that the law is here stated "with a degree of liberality which, however desirable it may be in itself, the decided cases seem hardly to warrant." "It is a matter of some doubt," he says, "whether a criminal prosecution could, with the tolerant views now prevailing, be successfully maintained for the *bona fide* publication of opinions sincerely and conscientiously entertained, and temperately expressed, though hostile to the doctrines of Christianity. The actual decisions on the subject do not warrant a more confident statement; and the language of the statute 9 & 10 Will. III. c. 32, which is still in

force, hardly warrants even this." *Law of Literature and Art*, pp. 305, 307.

The question under consideration was put directly to Lord Chief Justice Abbott in *The King v. Waddington*, 1 Barn. & Cr. 26, but was not answered. The defendant was on trial for having said that "Jesus Christ was an impostor, and a murderer in principle." One of the jurors asked whether a work which denied the divinity of the Saviour was libellous. But the Chief Justice evasively replied: "A work speaking of Jesus Christ in the language used in the publication in question was a libel."

¹ *Cowan v. Milbourn*, Law Rep. 2 Exch. 230.

"It would be a violation of duty," said Kelly, C. B., "to allow the ques-

To apply this illiberal doctrine in determining the validity of copyright in a book is to affirm the Eldonian theory. To adopt that unsound theory now, is to annihilate the literary property in not a few of the works which are to make the Victorian age of intellectual achievements as glorious as the Elizabethan.¹

United States. — In this country there is no reported case in which the question of copyright in irreligious books has been considered. But the large freedom of inquiry and discussion allowed in religious matters is shown by the construction of the law relating to blasphemy. This law punishes scurrilous and impious attacks on the Christian religion, but does not prohibit the dissemination of any opinions or beliefs, however extreme, provided they are conscientiously entertained, and promulgated with propriety. The rule has been expressly declared, that impious purposes and a wanton manner are essential to complete the offence; and that, in the absence of these, not even a denial of the existence of the Deity will amount to blasphemy.² In the language of Chief-Justice Shaw,

tion raised to remain in any doubt. That question is, whether one who has contracted to let rooms for a purpose stated in general terms, and who afterwards discovers that they are to be used for the delivery of lectures in support of a proposition which states, with respect to our Saviour and His teaching, that the first is defective and the second misleading, is nevertheless bound to permit his rooms to be used for that purpose in pursuance of that general contract. There is abundant authority for saying that Christianity is part and parcel of the law of the land; and that, therefore, to support and maintain publicly the proposition I have above mentioned is a violation of the first principles of the law, and cannot be done without blasphemy. I therefore do not hesitate to say that the defendant was not only entitled, but was called on and bound by the law, to refuse his sanction to this use of his rooms. It is contended that this was not the real motive which actuated the defendant, and that the evidence

showed another and different motive, and that this reason was put forward only as an excuse. But I am of opinion that, whatever may have been the motive operating on his own mind, it was open to him by law, at the last moment before the rooms had been taken possession of, to refuse their use, and to justify that refusal on the ground that the plaintiff had in fact this purpose in view."

¹ "When Dr. Johnson and I were left by ourselves," says Boswell, "I read to him my notes of the opinions of our judges upon the questions of literary property. He did not like them; and said, 'They make me think of your judges not with that respect which I should wish to do.' To the argument of one of them, that there can be no property in blasphemy or nonsense, he answered, 'Then your rotten sheep are mine! By that rule, when a man's house falls into decay, he must lose it.'" ⁴ Life of Johnson (Croker's ed., 10 vols., London), 45.

² *People v. Ruggles*, 8 Johns. Rep.

the law "does not prohibit the fullest inquiry and the freest discussion, for all honest and fair purposes, one of which is the discovery of truth. It admits the freest inquiry when the real purpose is the discovery of truth, to whatever result such inquiries may lead. It does not prevent the simple and sincere avowal of a disbelief in the existence and attributes of a supreme intelligent Being, upon suitable and proper occasions."¹ "The free, equal, and undisturbed enjoyment of religious opinion," said Chief Justice Kent, "whatever it may be, and free and decent discussions on any religious subject, are granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right."² Mr. Justice Cooley has given expression to the following sound views on this subject: "But it does not follow because blasphemy is punishable as a crime, that therefore one is not at liberty to dispute and argue against the truth of the Christian religion, or of any accepted dogma. Its 'divine origin and truth' are not so far admitted in the law as to preclude their being controverted. To forbid discussion on this subject, except by the various sects of believers, would be to abridge the liberty of speech and of the press in a point which, with many, would be regarded as most important of all. Blasphemy implies something more than a denial of any of the truths of religion, even of the highest and most vital. A bad motive must exist; there must be a wilful and malicious attempt to lessen men's reverence for the Deity, or for the accepted religion. But, outside of such wilful and malicious attempt, there is a broad field for candid investigation and discussion, which is as much open to the Jew and the Mahometan as to the professors of the Christian faith."³

The question now arises, Will or should the same liberal

(N. Y., 2d ed.) 225; *Updegraph v. Commonwealth*, 11 Serg. & R. (Pa.) 394; *State v. Chandler*, 2 Harring. (Del.) 553; *Commonwealth v. Kneeland*, 20 Pick. (37 Mass.) 206.

¹ *Commonwealth v. Kneeland*, *supra*, 220. In the same case, Mr. Justice Morton said: "To complete this offence in my judgment, there must be

not only a denial of God, but it must be done in a manner and in language justly offensive to others and attended by a corrupt and malicious intent; in other words it must be blasphemously done." *Ibid.* 239.

² *People v. Ruggles*, 8 Johns. Rep. (N. Y. 2d ed.) 228.

³ *Const. Lim.* 474.

doctrines be applied in determining questions of literary property? The law for the punishment of blasphemy is penal, and should therefore, it may be urged, be construed with less stringency than in civil cases. It may also be argued, that, because the law refuses to punish the authors of certain works injurious to religion, it does not follow that it will protect their property in such works; that not to treat the publication of the objectionable writing as an offence is one thing, but to apply active remedies for its protection is another and a different matter. Whatever plausibility or force there may be in this argument, the distinction is not a valid one to defeat the copyright in a publication which is not blasphemous. Copyright confers *prima facie* title to property in a book. That property is entitled to protection, and the courts are bound to give the usual remedies, until a defect in the title, or a fault in the property, is shown. If the work appears on its face, or is proved to be blasphemous, libellous, or seditious, its publication is unlawful, because blasphemy, libel, and sedition are offences against the law, and the author is thereby deprived of his remedies. If it be immoral, the right of protection is forfeited, because immorality is regarded in every civilized community as an offence against society and harmful to the public welfare.

But the temperate promulgation of sincere beliefs, hostile to the Christian religion, is not in this country a violation of any law, and cannot justly be regarded as injurious to morality or the public welfare. To defeat the right of property on the ground of the obnoxious character of the book, it must appear that some positive law is violated, or that the publication is dangerous to the peace of the community, or harmful to public morals. There are those who believe that the dissemination of doctrines hostile to religion is an act of immorality, and dangerous to the welfare of society. So, also, not a few regard the exercise of a large freedom in political discussion as damaging to the government and baneful to the commonwealth. But in this country the expression of political opinions, however hostile to the government, comes within the cognizance of the law only when the public peace and order are thereby disturbed or threatened, or the government exposed to peril. A like rule is proper in the case of religious inquiry. Religion and morality,

irreligion and immorality, are not synonymous words. Disbelief in the Bible or the religious doctrines which it teaches does not in itself amount to immorality; and the proper expression of that disbelief does not justly interfere with the public order or undermine public morals. Until this tendency can be shown in a literary composition, its religious character is not a proper subject of judicial inquiry. Unless the object be to ascertain whether the promulgation of views hostile to religion amounts to blasphemy, immorality, or a breach of the public peace, the law can rightly take no more cognizance of differences of opinion in religion than in politics or philosophy or political economy, or any other department of thought.¹

In the absence, therefore, of any judicial or statutory restrictions on this subject, there appears to be no good reason why valid copyright will not rest in a publication in which are denied any or all of the doctrines of the Bible; provided the motives and the manner of the author be such as not to warrant the finding of a case of blasphemy, immorality, or breach of the peace.

FALSE PRETENCES AS TO AUTHORSHIP.

The principle that a work subversive of good order or morality is not a proper subject of copyright has been ex-

¹ "If a court of equity," says Mr. Justice Story, "under color of its general authority, is to enter upon all the moral, theological, metaphysical and political inquiries, which in past times have given rise to so many controversies, and in the future may well be supposed to provoke many heated discussions, and if it is to decide dogmatically upon the character and bearing of such discussions, and the rights of authors, growing out of them; it is obvious that an absolute power is conferred over the subject of literary property, which may sap the very foundations on which it rests, and retard, if not entirely suppress, the means of arriving at physical as well as meta-

physical truths. Thus, for example, a judge who should happen to believe, that the immateriality of the soul, as well as its immortality, was a doctrine clearly revealed in the Scriptures (a point upon which very learned and pious minds have been greatly divided), would deem any work ante-Christian, which should profess to deny that point, and would refuse an injunction to protect it. So, a judge who should be a Trinitarian might most conscientiously decide against granting an injunction in favor of an author, enforcing Unitarian views; when another judge of opposite opinions might not hesitate to grant it." 2 Eq. Jur. § 988.

tended in England to protect the public against publications issued under false and fraudulent representations, intended injuriously to deceive the buyer. In an action for piracy of a book entitled *Evening Devotions*, from the German of C. C. Sturm, it was shown that the work was not a translation from Sturm, but that it had been wilfully and falsely represented to be so, with a view of gaining profits by the unwarranted use of the name of that well-known writer. The falsehood expressed in the title was reiterated at length in the preface. The court characterized this proceeding on the part of the plaintiff as an attempt to obtain money under false pretences, and held that there could be no valid copyright in a work whose "sale produces such consequences." Chief Justice Tindal, who pronounced the decision, drew a distinction between this case and the common one of publications issued under an assumed name, with innocent intent by the author and without harm to the buyer. In the latter case, there is no serious design on the part of the author to deceive the buyer, or to acquire unlawful profits by false representation; and it is a matter of indifference to the public whether the representation be real or fictitious. The copyright is not affected by such innocent representations. But, when the public is induced to buy a book in the false belief that it is the work of a well-known writer, who in fact has had no part in its production, the transaction is a fraud which will defeat the copyright.¹

¹ *Wright v. Tallis*, 1 C. B. 893. The Chief Justice said: "The first observation, therefore, that arises, is, that the present case is perfectly distinguishable from those which have been referred to at the bar, of books of amusement or instruction having been published as translations, whilst they have been, in fact, original works; or having been published under an assumed, instead of a true name. Such was the instance given of *The Castle of Otranto* [by Walpole], professing to be translated from the Italian; and such the case of innumerable works published under assumed names—voyages, travels, biography, works of fiction or romance, and even works of science and instruction; for, in all these instances the misrepresentation is innocent and harmless. There is not found in any one of those cases, any serious design on the part of the author to deceive the purchaser, or to make gain and profit from him by the false representation. The purchaser, for any thing that appears to the contrary, would have purchased at the same price, if he had known that the name of the author was an assumed, and not a genuine name; or had known that the work was original, and not translated. And, indeed, in most of the cases that can be put, the statement is

Equity has restrained the publication of a book falsely represented to be the production of a well-known author.¹

ORIGINALITY.

The rule has been laid down and universally recognized, that originality is an essential attribute of copyright in a literary composition. The words original and originality, as used in the law of copyright, have a most comprehensive meaning. Very few, if any, intellectual productions are original in the strict sense that the author is the creator of all that is expressed in his composition. Knowingly or unknowingly, one writer borrows from another; and in the most original works of modern genius are found thoughts and sentiments as old as language itself.² The object of the law of copyright is to pro-

not calculated in its nature to deceive any one, but is seen, upon the very first glance, to be plainly and manifestly fictitious. In those cases, therefore, it was perfectly indifferent to the public, whether the representation was true or not; and, in all probability, the book would have obtained an equal sale, whether it was a translation or an original, whether the name of the author was assumed or genuine.

"But, in the case before us, no one of these observations will apply. The facts stated in the plea import a serious design on the part of the plaintiff to impose on the credulity of each purchaser, by fixing upon the name of an author who once had a real existence, and who possessed a large share of weight and estimation in the opinion of the public. The object of the plaintiff is, not merely to conceal the name of the genuine author, and to publish opinions to the world under an innocent disguise; but to deceive the public, by inducing them to believe, that the work is the original work of the author whom he names, when he himself knows it not to be so, to obtain from the purchaser a greater price than he would otherwise obtain. The transaction, therefore, ranges itself under the head of *crimen falsi*. The publisher seeks to obtain money under

false pretences; and as, not only the original act of publishing the work, but the sale of copies to each individual purchaser, falls within the reach of the same objection, we think the plaintiff cannot be considered as having a valid and subsisting copyright in the work, the sale of which produces such consequences, or that he is capable of maintaining an action in respect of its infringement.

"The cases in which a copyright has been held not to subsist where the work is subversive of good order, morality, or religion, do not, indeed, bear directly on the case before us; but they have this analogy with the present inquiry, that they prove that the rule which denies the existence of copyright in those cases is a rule established for the benefit and protection of the public. And we think the best protection that the law can afford to the public against such a fraud as that laid open by this plea, is, to make the practice of it unprofitable to its author." *Ibid.* 906.

¹ *Byron v. Johnston*, 2 Meriv. 29; *Seeley v. Fisher*, 11 Sim. 581; *Harte v. DeWitt*, 1 Cent. Law Jour. 360. See also *Archbold v. Sweet*, 5 Car. & P. 219, treated in Chap. VII.

² "In truth, in literature, in science and in art," said Mr. Justice Story,

mote learning and useful knowledge by protecting the fruits of intellectual activity. Almost every product of independent literary labor is a proper subject of copyright; and, to be entitled to protection, the author has simply to show something material and valuable produced by himself, and not copied from the protected matter of another.¹

Work need not be wholly Original. — In many cases the author has created the substance as well as the form of the

“there are, and can be, few, if any things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before. No man creates a new language for himself, at least if he be a wise man, in writing a book. He contents himself with the use of language already known and used and understood by others. No man writes exclusively from his own thoughts, unaided and uninstructed by the thoughts of others. The thoughts of every man are, more or less, a combination of what other men have thought and expressed, although they may be modified, exalted, or improved by his own genius or reflection. If no book could be the subject of copyright which was not new and original in the elements of which it is composed, there could be no ground for any copyright in modern times, and we should be obliged to ascend very high, even in antiquity, to find a work entitled to such eminence.

“Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast, as the brightest originals, would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days. What is La Place’s great work, but the combination of the processes and discoveries of the great mathematicians before his day, with his own ex-

traordinary genius? What are all modern law-books, but new combinations and arrangements of old materials, in which the skill and judgment of the author in the selection and exposition and accurate use of those materials, constitute the basis of his reputation, as well as of his copyright? Blackstone’s Commentaries and Kent’s Commentaries are but splendid examples of the merit and value of such achievements.” *Emerson v. Davies*, 3 Story, 779.

¹ “The defendant is not liable to this action, unless the jury find that Russell was the author of the musical composition, *The Old Arm Chair*, for which he obtained a copyright in 1840; and it is for the jury to decide, upon the whole evidence, whether he was or was not the author. If the said musical composition was borrowed altogether from a former one, or was made up of different parts, copied from older musical compositions, without any material change, and put together into one tune, with only slight and unimportant alterations or additions, then Russell was not the author within the meaning of the law; but the circumstance of its corresponding with older musical compositions, and belonging to the same style of music, does not constitute it a plagiarism, provided the air in question was, in the main design, and in its material and important parts, the effort of his own mind.” *Taney, C. J. Reed v. Carusi*, Tan. Dec. 72.

So a play may be original, although its characters and incidents are similar to those of a previously published novel. *Boucicault v. Fox*, 5 Blatchf. 87.

composition for which he claims copyright; and, though the sentiments and thoughts may not all be original, neither the whole nor a material integral part of the composition can be said to have previously existed. Popularly speaking, the work is wholly new and original. But the law does not require that a person, to be entitled to copyright, shall be the sole creator of the work for which protection is claimed. Labor bestowed by one person on the production of another, if no rights are thereby invaded, will often constitute a valid claim for copyright. The maker of an abridgment, translation, dramatization, digest, index, or concordance of a work of which he is not the author, may obtain a copyright for the product of his own labor and skill. So, also, any one, by making material changes, additions, corrections, improvements, notes, comments, &c., in the unprotected work of another, may create a valid claim for copyright in a new and revised edition. A person acquires a title to copyright by arranging music which he has not composed.¹ A photograph, chromo, or engraving is often but a copy of a work of art in whose production the photographer or engraver had no part.² In all such cases, the test of originality is applied to that which represents the labor or skill of the

¹ *Atwill v. Ferrett*, 2 Blatchf. 39; *Wood v. Boosey*, Law Rep. 2 Q. B. 340, on ap. 3 Id. 223. See also *Boosey v. Fairlie*, 7 Ch. D. 301, 309.

In *Wood v. Boosey*, Bramwell, B., said: "It has been said that there is nothing inventive on the part of the person who makes the arrangement. In one sense, there is not, that is to say, he neither invents the tune nor the harmony; but there is invention in another sense, or rather there is composition in the adaptation to the particular instrument. Of that, the adapter is the author, and it is perfectly certain that the man who wanted to arrange this opera for a piano-forte would find it a great deal easier to copy what Brissler had done than to take the score and do it over again." Law Rep. 3 Q. B. 232.

² In a recent English case it was contended that a photograph of an engraving was not an original production

within the meaning of 25 & 26 Vict. c. 68, s. 1, which secures copyright in "every original painting, drawing, and photograph." In overruling this objection, Mr. Justice Blackburn said:—

"The distinction between an original painting and its copy is well understood, but it is difficult to say what can be meant by an original photograph. All photographs are copies of some object, such as a painting or a statue. And it seems to me that a photograph taken from a picture is an original photograph, in so far that to copy it is an infringement of this statute. As I have already pointed out, by section 2, although it is unlawful to copy a photograph or the negative, it is permitted to copy the subject-matter of the photograph by taking another photograph." *Graves's Case*, Law Rep. 4 Q. B. 723.

person claiming copyright. In the case of an abridgment, the question is whether the maker has fairly condensed the matter of the original, and reproduced it as a work of his own authorship, or whether he has merely shortened it by omitting parts. So, a dramatization must have a value due to the work of the dramatist, and not found in the novel or poem dramatized.

Collections of Well-known Facts.—A title to authorship is acquired by collecting well-known facts and information, or describing common objects. “As to copyright,” said Lord Eldon, “I do not see why, if a person collects an account of natural curiosities and such articles, and employs the labor of his mind by giving a description of them, that is not as much a literary work as many others that are protected by injunction and by action. It is equally competent to any other person, perceiving the success of such a work, to set about a similar work, *bona fide* his own. But it must be in substance a new and original work, and must be handed out to the world as such.”¹

In *Jarrold v. Houlston*,² the work in controversy was Dr. Brewer’s *Guide to Science*, the purpose of which was to explain, on scientific principles, and by means of questions and answers, some of the ordinary phenomena of nature. In preparing the work, the author had collected inquiries which he had heard made by many persons, and had solicited questions from others. These inquiries, with answers furnished partly from his own information and partly obtained from published works, constituted the matter of his book. For the defence it was contended that a work so composed did not meet the requirements of the law as to originality. But this argument was without force; and the court, without hesitation, upheld the copyright in the book. “That an author,” said Vice-Chancellor Wood, “has a copyright in a work of this description is beyond all doubt. If any one by pains and labor collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions, and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of his former

¹ *Hogg v. Kirby*, 8 Ves. 221.

² 8 Kay & J. 708.

general reading, or out of works consulted by him for the express purpose, the reduction of questions so collected, with such answers, under certain heads and in a scientific form, is amply sufficient to constitute an original work, of which the copyright will be protected.”¹

So he who simply describes specimens of fruit before him,² or reproduces and describes monumental designs from tombstones in a cemetery,³ performs an act of authorship which brings him within the protection of the law. The maker of a map or chart merely represents boundaries, places, and distances which he finds fixed by nature or man. A directory is but a list of the names and residences of citizens. A catalogue is often a mere arrangement of the titles of books or other things. In such case, the law does not inquire whether the facts and information given are new or old. The question is, whether there is any material product of authorship on the part of the person claiming copyright; whether the publication is the result of independent labor, other than that of mere copying.

Compilations. — A compilation of old materials gathered from published works and other common sources is an original production within the meaning of the law. Here the test of originality is applied, not to the materials, but to their arrangement and combination. A mere copy or reprint, not differing materially from the original matter, is not entitled to protection.⁴ But labor, skill, or learning, exercised in selecting, arranging, and combining old materials in a new and useful form, creates a title to authorship. “The question is not,” said Mr. Justice Story, “whether the materials which are used are entirely new, and have never been used before; or even that they have never been used before for the same purpose. The true question is, whether the same plan, arrangement and combination of materials have been used before for the same purpose or for any other purpose. If they have not, then the plaintiff is entitled to a copyright, although he may

¹ 3 Kay & J. 713.

² *Hogg v. Scott*, Law Rep. 18 Eq. 444.

³ *Grace v. Newman*, Law Rep. 19 Eq. 623.

⁴ *Hedderwick v. Griffin*, 3 Sc. Sess.

Cas. 2d ser. 883; *Jollie v. Jaques*, 1 Blatchf. 618; *Boucicault v. Fox*, 6

Id. 87, 101.

have gathered hints for his plan and arrangement, or parts of his plan and arrangement, from existing and known sources. He may have borrowed much of his materials from others; but if they are combined in a different manner from what was in use before, and *fortiori*, if his plan and arrangement are real improvements upon the existing modes, he is entitled to a copyright in the book embodying such improvement. It is true he does not thereby acquire the right to appropriate to himself the materials which were common to all persons before, so as to exclude those persons from a future use of such materials; but then they have no right to use such materials with his improvements superadded, whether they consist in plan, arrangement or illustrations or combinations; for these are strictly his own."¹

¹ Emerson v. Davies, 3 Story, 778. See Compilations, *ante*, p. 152.

In Gray v. Russell, 1 Story, 16, Mr. Justice Story said: "The argument proceeds mainly upon this ground, that there is nothing substantially new in Mr. Gould's notes to his edition of Adam's Latin Grammar; and that all his notes in substance, and many of them in form, may be found in other works antecedently printed. That is not the true question before the court. The true question is, whether these notes are to be found collected and embodied in any former single work. It is admitted, that they are not so to be found. The most that is contended for, is, that Mr. Gould has selected his notes from very various authors, who have written at different periods; and that any other person might, by a diligent examination of the same works, have made a similar selection. It is not pretended, that Mr. Cleveland undertook or accomplished such a task by such a selection from the original authors. Indeed, it is too plain for doubt, that he has borrowed the whole of his notes directly from Mr. Gould's work; and so literal has been his transcription, that he has incorporated the very errors thereof.

"Now, certainly, the preparation and collection of these notes from

these various sources, must have been a work of no small labor, and intellectual exertion. The plan, the arrangement, and the combination of these notes in the form in which they are collectively exhibited in Gould's Grammar, belong exclusively to this gentleman. He is, then, justly to be deemed the author of them in their actual form and combination, and entitled to a copyright accordingly. If no work could be considered by our law as entitled to the privilege of copyright, which is composed of materials drawn from many different sources, but for the first time brought together in the same plan and arrangement and combination, simply because those materials might be found scattered up and down in a great variety of volumes, perhaps in hundreds, or even thousands of volumes, and might, therefore, have been brought together in the same way and by the same researches of another mind, equally skilful and equally diligent, — then, indeed, it would be difficult to say, that there could be any copyright in most of the scientific and professional treatises of the present day. What would become of the elaborate commentaries of modern scholars upon the classics, which, for the most part, consist of selections from the works and criticisms of vari-

To what extent the functions of the compiler must go beyond those of a mere copyist is to be determined by the circumstances of each case. But there must be substantial results due to the operation of his mind; the compilation must have a material value not found in the parts taken separately. The principle is the same whether the common materials are taken by the compiler from published or unpublished sources. If he is not the owner of the manuscripts, if they are common property, his exclusive rights will be determined by the compilation which he has made. Where a collection of statistics had been made from unpublished official records, and it appeared that the compiler had exercised industry and judgment in selection and arrangement, it was held that the requirements of the law as to originality had been fulfilled.¹ But the compiler could have acquired no title to authorship by merely copying the figures as he found them.

In *Alexander v. Mackenzie*, the validity of the complainant's copyright in a collection of legal forms or "styles" was questioned, on the ground that, in preparing them, he had simply followed the directions prescribed by the statute; and that, under the circumstances, the forms prepared by two or more persons must be substantially the same. The court held that, if the statute had contained the forms themselves, and the complain-

ous former authors, arranged in a new form, and combined together by new illustrations, intermixed with them? What would become of the modern treatises upon astronomy, mathematics, natural philosophy, and chemistry? What would become of the treatises in our own profession, the materials of which, if the works be of any real value, must essentially depend upon faithful abstracts from the reports, and from juridical treatises, with illustrations of their bearing. Blackstone's Commentaries is but a compilation of the Laws of England, drawn from authentic sources, open to the whole profession; and yet it was never dreamed, that it was not a work, which, in the highest sense, might be deemed an original work; since never before were the same materials so admirably com-

bined, and exquisitely wrought out, with a judgment, skill, and taste absolutely unrivalled. Take the case of the work on insurance, written by one of the learned counsel [Phillips] in this cause, and to which the whole profession are so much indebted; it is but a compilation with occasional comments upon all the leading doctrines of that branch of the law, drawn from reported cases, or from former authors, but combined together in a new form, and in a new plan and arrangement; yet I presume, none of us ever doubted, that he was fully entitled to a copyright in the work, as being truly, in a just sense, his own."

¹ *Scott v. Stanford*, Law Rep. 3 Eq. 718; *Macleane v. Moody*, 20 Sc. Sess. Cas. 2d ser. 1154.

ant had simply copied them, his copyright would have failed through want of originality. But, as the statute gave simply directions, it was an act of authorship to prepare the forms pursuant to such directions.¹

So a good title to copyright is acquired by representing on a map boundaries of townships which are fixed by statute.²

Works alike may be Original.—It is not essential that any production, to be original or new within the meaning of the law of copyright, shall be different from another. Whether the composition for which copyright is claimed is the same as or different from, whether it is like or unlike, an existing one, are matters of which the law takes no cognizance, except to determine whether the production is the result of independent labor or of copying. There cannot be exclusive property in a general subject, or in the method of treating it;³ nor in the mere plan of a work;⁴ nor in common materials, or the manner or purpose for which they are used.⁵ The rights of any

¹ 9 Sc. Sess. Cas. 2d ser. 748. "It is said," remarked Lord Fullerton, "that owing to the particular nature of the styles they cannot be the subject of copyright, because they are drawn up precisely after the form prescribed in the statute, and because any styles relating to the same subjects as those given by the complainer must, if the directions of the statutes and phraseology of conveyances were used, be expressed in the same manner exactly as those compared by the complainer. Now it may be quite true, that if the statute had supplied certain forms, by which the operations intended to be thereby regulated were to be done, if the statute had contained, as such statutes sometimes do, an appendix exhibiting certain schedules of forms which it was only necessary for any one to copy in order to avail himself of the provisions of the act, then I hold that the reprinting of such forms in a separate publication would not give him a copyright in those forms. But the case here is different, for the statute only gives very general directions and descriptions of the styles that are to be used. The schedules

are very general in their terms, and it is no doubt of great practical importance to suit these general directions to each case falling under the statute as it may arise. The preparing and adjusting of such writings require much care and exertion of mind. As to invention that is a different thing. It does not require the exercise of original or creative genius, but it requires industry and knowledge." *Ibid.* 754.

² *Farmer v. Calvert Lithographing, Engraving, & Map-Publishing Co.*, 5 Am. L. T. R. 168.

³ *Matthewson v. Stockdale*, 12 Ves. 270; *Longman v. Winchester*, 16 Id. 269; *Lewis v. Fullarton*, 2 Beav. 6; *Blunt v. Patten*, 2 Paine, 393, 397; *Banks v. McDivitt*, 13 Blatchf. 163.

⁴ *Mack v. Petter*, Law Rep. 14 Eq. 431; *Lawrence v. Cupples*, 9 U. S. Pat. Off. Gaz. 254.

⁵ *Barfield v. Nicholson*, 2 Sim. & St. 1; *Murray v. Bogue*, 1 Drew. 353; *Spiers v. Brown*, 6 W. R. 352; *Pike v. Nicholas*, Law Rep. 5 Ch. 251; *Cox v. Land & Water Journal Co.*, Law Rep. 9 Eq. 324; *Farmer v. Calvert Lithographing, Engraving, & Map-Publishing Co.*, *supra*. Section 2 of 25 &

person are restricted to his own individual production. There is nothing in the letter or the spirit of the law of copyright to prevent or to discourage any number of persons from honestly laboring in the same field. Two or more authors may write on the same subject, treat it similarly, and use the same common materials in like manner and for one purpose. Their productions may contain the same thoughts, sentiments, ideas; they may be identical. Such resemblance or identity is material only as showing whether there has been unlawful copying.¹ In many cases, the natural or necessary resemblance between two productions, which are the result of independent labor, will amount to substantial identity. Thus, the differences will be often slight, and sometimes immaterial, between two descriptions of a common object; two compilations of like materials; two maps, charts, or road-books of a common region; two directories of one city; two photographs of the same scene; two engravings of the same painting. But, notwithstanding their likeness to one another, any number of productions of the same kind may be original within the meaning of the law; and no conditions as to originality are imposed on the makers, except that each shall be the producer of that for which he claims protection.²

26 Vict. c. 68, which secures copyright in paintings, drawings, and photographs, declares that "nothing herein contained shall prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding there may be copyright in some representation of such scene or object."

¹ *Br. Roworth v. Wilkes*, 1 Camp. 94; *De Berenger v. Wheble*, 2 Stark. 548; *Barfield v. Nicholson*, 2 Sim. & St. 1; *Nichols v. Loder*, 2 Coop. (*temp. Cottenham*) 217. *Am. Blunt v. Pat-ten*, 2 Paine, 393, 397; *Reed v. Carusi*, Tan. Dec. 72; *Benn v. LeClercq*, 18 Int. Rev. Rec. 94. In *Wood v. Boosey*, as reported 18 L. T. N. S. 108, Kelly, C. B., said: "After the original opera there may be an arrangement of it for the piano-forte by one author or composer, and there may be another ar-

angement of it for the piano by another author and composer. If the copyright in the original opera be expired, a copyright might exist in the composers of both of those arrangements; each would be a new substantive work entitled to the benefit of any existing law of copyright, and one might or might not be a piracy of the other."

² "A copyright cannot subsist in a chart, as a general subject, although it may in the individual work, and others may be restrained from copying such work. But the natural objects from which the charts are made are open to the examination of all, and any one has a right to survey and make a chart. And if such surveys and charts are all correct, all will be alike, but no one would complain of his rights having been infringed, and each one may be considered an original chart. A right in such a subject is violated only when

Tables of figures have been held to be a proper subject of copyright. The copyright is not in the mode or rules of computation, but in the results. Of course, the same calculations, when correctly made, must produce the same results; and the test of originality is simply whether the person claiming protection has himself performed the operations, or has copied the results.¹ Where it was shown that, of thirteen tables in which copyright was claimed, at least seven had been published in different works long before the plaintiff's publication appeared, Vice-Chancellor Leach said: "I am not of opinion that the plaintiff ceases to be entitled to protection, though the tables in respect of which his complaint is made, may have been pre-existing. He has a right to protection, if they were original calculations of his own; and such he swears them to have been. . . . The plaintiff's title to the tables is that he calculated them; the defendant, by calculating them on his part, acquires the same right."²

There can be no monopoly in the plan of a directory, and the same sources of information are common to all persons. All that is required of each compiler is, that he shall prepare his own publication without copying from that of his rival.³ So in the case of compilations consisting of matter taken from other publications. Any number of persons may use the same common materials, in like manner and for a similar purpose.⁴ Each compilation must be original, in the sense that it is a work materially different from its component parts taken sepa-

another copies from the chart of him who has secured the copyright and thereby availing himself of his labor and skill. And in all such cases it is a proper question for a jury, whether the one is a copy of the other or not. If the two are in all respects alike, the *prima facie* presumption probably would be, that one was a copy of the other, yet both might be originals; and if there was some small variance, it would be a proper subject of inquiry whether the alteration was not merely colorable and that the one was in substance a mere transcript of the other." *Thompson, J., Blunt v. Patten*, 2 Paine, 400.

¹ *Baily v. Taylor*, 3 L. J. (Ch.) 66, 1 Russ. & My. 73; *M'Neill v. Williams*, 11 Jur. 344.

² *Baily v. Taylor*, 3 L. J. (Ch.) 66.

³ *Kelly v. Morris*, Law Rep. 1 Eq. 697; *Morris v. Ashbee*, 7 Id. 34; *Morris v. Wright*, Law Rep. 5 Ch. 279.

⁴ "No compiler of such a book has a monopoly of the subject of which the book treats. Any other person is permitted to enter that department of literature and make a similar book. But the subsequent investigator must investigate for himself from the original sources which are open to all." *Shipman, J., Banks v. McDivitt*, 18 Blatchf. 166.

rately; that it is not a mere reprint of what the compiler is in no sense the author. It must also be original in the sense that the compiler has obtained the materials from the common sources, and has arranged and combined them by his own labor and skill. But the originality of a compilation is not affected by the fact that the same materials have been used before for the same purpose and in the same order; in other words, that the work is not different from one previously published.¹

The principle is the same in the case of original compositions. It is not probable that two authors, working independently of each other, will produce two poems, novels, essays, &c., which will be precisely alike. But, if such a case should arise, each author would be entitled to copyright in his own production.²

Test of Originality. — In all cases, whatever may be the kind or the character of the work for which protection is claimed, the true test of originality is whether the production is the result of independent labor or of copying. A close resemblance between two publications may afford strong evidence of copying; and in some cases, especially when the similarity is not explained, it may amount to conclusive proof of piracy. But, when it is established that a work is the result of honest authorship, its likeness to another publication is immaterial.

LITERARY MERIT AND QUALITY.

Literary Merit. — When a production meets the requirements of the law as to innocence and originality, the only inquiry relating to its character is, whether it is a material contribution to useful knowledge. This raises the question, whether literary merit, in the common meaning of that expression, is essential

¹ *Br. Barfield v. Nicholson*, 2 Sim. & St. 1; *Murray v. Bogue*, 1 Drew. 353; *Spiers v. Brown*, 6 W. R. 352; *Pike v. Nicholas*, Law Rep. 5 Ch. 251. *Am. Gray v. Russell*, 1 Story, 11; *Webb v. Powers*, 2 Woodb. & M. 497; *Lawrence v. Dana*, 2 Am. L. T. R. N. S. 402; *Lawrence v. Cupples*, 9 U. S. Pat. Off. Gaz. 254; *Banks v. McDivitt*, 13 Blatchf. 163.

² "The order of each man's words," said Mr. Justice Erle, "is as singular as his countenance, and although if two authors composed originally with the same order of words each would have a property therein, still the probability of such an occurrence is less than that there should be two countenances that could not be discriminated." *Jefferys v. Boosey*, 4 H. L. C. 869.

to copyright in a composition. On this point the statute contains no express provision. The only guide from this source is that afforded by the avowed purpose of the legislature. The statute of Anne, entitled An Act for the Encouragement of Learning, was declared in the preamble to be "for the encouragement of learned men to compose and write useful books." The object of the 5 & 6 Vict. c. 45, as expressed in the preamble, is "to afford greater encouragement to the production of literary works of lasting benefit to mankind." The first American statute¹ was entitled An Act for the Encouragement of Learning, and was passed pursuant to that provision of the Constitution which empowers Congress "to promote the progress of science" by securing to authors the exclusive right to their writings.²

To the object of copyright legislation, as thus indicated, the courts have given a most liberal interpretation. They have declared that the law cannot be restricted to the protection of "literary works of lasting benefit to mankind," according to a strict interpretation of the preamble of 5 & 6 Vict. c. 45; but that its true scope and spirit are to encourage the production of "useful books," as avowed by the statute of Anne, which is the foundation of all English and American copyright legislation. Many productions without literary or scientific merit are valuable additions to useful knowledge; and such works, not less than those of learning, in the strict meaning of that expression, are within the scope of the copyright law as judicially construed. A directory, a calendar or catalogue of names, a compilation of statistics, a table of figures, a collection of legal forms, an abstract of titles to lands, a list of hounds, are productions which may be regarded as void of literary or scientific qualities. Yet they are contributions to the general fund of knowledge, and are sources of information useful to the public. Hence, they have been judicially recognized as proper subjects of copyright.³

In an early case in the United States Circuit Court, Mr.

¹ Act of 1790; 1 U. S. St. at L. 124.

² Art. 1, s. 8, cl. 8.

³ See *ante*, p. 153. In the Scotch case of *Macleane v. Moody*, 20 Sc. Sess.

Cas. 2d ser. 1163, Lord Deas said: "The act does not confine the privilege to works of literary merit."

Justice Thompson held that a daily price current, or review of the market, was not within the purview of the copyright statute.¹ But a more liberal doctrine now prevails. The importance and value of the information often contained in prices current, trade circulars, market reports, &c., are well recognized in the commercial world; and such publications are clearly within the principle on which copyright has been declared to vest in directories, calendars, statistical reports, &c.² In *Drury v. Ewing*, it was held that a chart or diagram, with directions for cutting garments, was entitled to protection as a book. "It is clearly no objection to the validity of her copyright," said Mr. Justice Leavitt, "that her production does not claim a standing as a work of great literary merit. The statute does not make this a necessary element of a legal copyright, and it is well known that there are works of great practical utility, having no pretension to literary merit, which are yet within, not only the words, but the scope and design of the statute."³

The material inquiry, then, is not whether a production has literary or scientific merit, but whether it may be regarded as a material addition to useful knowledge, a source of general information. If it be of substantial importance, and have a material value in this respect, the law does not inquire into the degree of its usefulness or of its merits. Whether one production is more or less useful, meritorious, or popular than another, is of no concern to the court, which exercises no functions of criticism.⁴

¹ *Clayton v. Stone*, 2 Paine, 382, 392. "The act in question," said Mr. Justice Thompson, "was passed in execution of the power here given [by the Constitution], and the object therefore was the promotion of science; and it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them. They are of a more fixed, permanent, and durable character. The term science, cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price current the subject-matter of which is daily changing, and is of mere temporary

use. . . . The title of the act of Congress is for the encouragement of learning, and was not intended for the encouragement of mere industry, unconnected with learning and the sciences."

² See *Kiernan v. Manhattan Quotation Telegraph Co.*, 50 How. Pr. (N. Y.) 194.

³ 1 Bond, 540, 548. See also *Folsom v. Marsh*, 2 Story, 109; *Lawrence v. Cupples*, 9 U. S. Pat. Off. Gaz. 254; *Richardson v. Miller*, 3 L. & Eq. Reporter, 614.

⁴ For a consideration of the question of literary value in unpublished works, see *ante*, p. 111.

While the requirements of the law as to the importance or value of a production are so slight that valid copyright will attach to almost any publication, and to many that appear to be of little or no consequence, not every collection of printed words or sentences is entitled to protection. To be worthy of copyright, a thing must have some value as a composition sufficiently material to lift it above utter insignificance and worthlessness. A title of a book,¹ a mere label,² an advertisement³ which serves no higher purpose than to make known the place and kind of business of the advertiser, are not proper subjects of copyright.

In a recent English case, copyright was claimed in a scoring-sheet or "tablet" used in the game of cricket. The tablet consisted of two lines ruled at the foot of the sheet, with spaces in which were marked the totals or number of the runs obtained in the game at the fall of each wicket. At the head of the tablet were the words "Runs at the fall of each wicket." It appeared that this was not original, having long been in common use. Vice-Chancellor Malins held that, even if original, it was not a proper object of copyright. He was of opinion that "to say that the particular mode of ruling a book constituted an object for copyright is absurd. A solicitor's bill is made out in that way, by casting up the totals; and what more is this? It is below all protection, being a mere arithmetical

¹ See cases cited *ante*, p. 145, note 1.

² *Scoville v. Toland*, 6 West. Law Jour. 84; *Coffeen v. Brunton*, 4 McLean, 516. In the former case, Mr. Justice McLean, said: "The label which the complainant claims to be a book refers to a certain medicinal preparation and was designed to be an accompaniment of it. Like other labels, it was intended for no other use than to be pasted on the vials or bottles which contained the medicine. As a composition distinct from the medicine it can be of no value. It asserts a fact that Dr. Rodgers' Compound Syrup of Liverwort and Tar is a certain cure for many diseases; but it does not inform us how the compound is made. In no respect does this label differ from

the almost numberless labels attached to bottles and vials containing medicines and directions how they shall be taken. Now these are only valuable when connected with the medicine. As labels they are useful, but as mere compositions, distinct from the medicine, they are never used or designed to be used. This is not the case with other compositions which are intended to instruct and amuse the reader, though limited to a single sheet or page. Of this character would be lunar tables, sonatas, music, and other mental labors concentrated on a single page."

³ *Collender v. Griffith*, 11 Blatchf. 211. See the consideration of the question of copyright in advertisements, *ante*, p. 164.

operation, which must have been done over and over again.”¹

Quantity. — How short a composition may be, and still be a subject of copyright when published alone, has not been definitely determined by the legislature or the courts. We have seen that productions written on a single page have been protected as books. In a recent English case, a passage of about sixty words was held to be entitled to protection by injunction.² The question is to be determined rather by the worth and importance of the production than by its length. It would seem that, however small the piece may be, if it has merit and value enough to be published alone, and to be an object of piracy, it should also be of sufficient importance to be entitled to protection. A gem of literature may be contained in a couplet of poetry or in a sentence of prose. Mr. Lincoln’s words at Gettysburg rank with the highest productions of oratory; yet they may be read in less than two minutes.

The same general test is to be applied in determining the validity of copyright in a compilation of old materials, or a new edition of a work previously published. The controlling question is whether the results due to the labor or skill of the compiler, or the author of the new edition, are of material consequence and value. Has the compilation a substantial worth not found in the materials uncombined? Is the new edition materially different from the old? In *Black v. Murray*,³ copyright was claimed in a new edition of one of Scott’s ballads which differed in but one word from the original edition in which the copyright had expired. Lord Deas earnestly contended that the change wrought in the author’s meaning by this substitution of a single word, and the force and beauty thereby given to the poem, were so great as to afford a basis for a new copyright in the revised edition. The other judges did not attach so much importance to the force of the revision, but regarded the new edition as a substantial reprint of the old.

¹ *Page v. Wisden*, 20 L. T. N. S. 435.

² *Cobbett v. Woodward*, Law Rep. 14 Eq. 407. See the question of quantity and value considered in Chaps. VIII., XI.

³ 9 Sc. Sess. Cas. 3d ser. 341. For a fuller consideration of this case, see *ante*, p. 149. See also *Hedderwick v. Griffin*, 3 Sc. Sess. Cas. 2d ser. 383.

The judgment of the court, therefore, was that there was not sufficient basis for a renewed term of protection. But the principle was evidently recognized, that the claim for copyright in such cases is to be tested by the change wrought in the meaning of a composition, rather than by the extent of the verbal alterations.

CHAPTER IV.

IN WHOM COPYRIGHT WILL VEST.

ONE of the first questions which arise in connection with this subject is, whether the copyright legislation of Great Britain, or that of the United States, is for the benefit of native authors alone, or of all authors without distinction as to nationality. The general copyright statutes of England grant protection to "authors," without declaring whether native or foreign authors are meant. By the International Copyright Acts, special provision is made for extending copyright to foreigners; but such protection is given only to those authors whose country extends reciprocal privileges to English authors. A noticeable feature of these acts is that they extend protection to works first published abroad, while first publication in the United Kingdom is essential to secure copyright under the general statutes.

INTERNATIONAL COPYRIGHT. — GREAT BRITAIN.

The first International Copyright Act was passed in 1838.¹ This was repealed in 1844 by the 7 & 8 Vict. c. 12, which, with the 15 & 16 Vict. c. 12, and the 38 & 39 Vict. c. 12, now governs the law of international copyright.

Foreign Works in Original Language. — By these acts, the Queen is empowered to direct by an Order in Council that authors, inventors, designers, engravers, and makers of books, prints, articles of sculpture and other works of art, to be defined in such order, which shall be first published in any foreign country to be named in the order, shall have copyright therein during a specified period; not exceeding, however, the duration of English copyright. In a similar manner, provision

¹ 1 & 2 Vict. c. 59.

is made for conferring upon the authors and composers of dramatic and musical compositions, first publicly represented or performed in foreign countries, the sole liberty of representing or performing them in any part of the British dominions, for a period not exceeding that during which protection is afforded to similar works first published in England. The provisions of the general copyright statutes are to apply to cases provided for by the International Copyright Acts; subject, however, to such special exceptions as may be made in the Order in Council. To acquire copyright, the foreign author must comply with certain prescribed regulations as to registry, and the delivery of copies for deposit in the British Museum. Orders in Council may specify different times for registration, and different periods during which protection will extend for different foreign countries, and for different classes of works.

Translations. — The above provisions seem to have been intended for the protection of foreign works in their original language. There are special regulations concerning translations. The 7 & 8 Vict. c. 12, expressly declares that its provisions shall not apply to translations.¹ But the 15 & 16 Vict. c. 12,² empowers her Majesty to direct, by Order in Council, that the author of a book or a dramatic composition first published or publicly represented in a foreign country may, by complying with the provisions of the act, prevent the publication or representation in the British dominions of an unauthorized translation for a specified period, not exceeding five years from the date of publication or public representation of the authorized translation; and in the case of a book published in parts, not extending as to each part beyond five years from the time when the authorized translation of such part is first published.

Adaptations of Dramatic Compositions. — Section 6 of the same act declares that nothing therein “shall be so construed as to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country.” But this provision was repealed in 1875 by the 38 & 39 Vict. c. 12, which provides that the Queen, by Order in Council, may “direct that the sixth section of the

¹ s. 18.² s. 2.

said act shall not apply to the dramatic pieces to which protection is so extended; and thereupon the said recited act shall take effect with respect to such dramatic pieces and to the translations thereof as if the said sixth section of the said act were hereby repealed.”

Newspapers and Periodicals. — The provision of the statute relating to books published in parts has been judicially construed to refer to publications which are to be completed in a definite number of parts, and not to those to be continued indefinitely. Newspapers and periodicals do not therefore come within the scope of this clause;¹ but for such publications special provision is made. Section 7 of 15 & 16 Vict. c. 12, provides that “any article of political discussion which has been published in any newspaper or periodical in a foreign country may, if the source from which the same is taken be acknowledged, be republished or translated in any newspaper or periodical in this country; and any article relating to any other subject which has been so published as aforesaid may, if the source from which the same is taken be acknowledged, be republished or translated in like manner, unless the author has signified his intention of preserving the copyright therein, and the right of translating the same, in some conspicuous part of the newspaper or periodical in which the same was first published.” In case of such reservation, articles other than those of “political discussion” will be entitled to the same protection that is extended to books, but subject to the conditions and requirements relating to registration, &c., prescribed in the case of books.² The formalities prescribed in the case of the translation of a book or dramatic composition do not apply to translations of articles originally published in newspapers and periodicals, unless such articles are published in separate form.³

The Order in Council dated Jan. 10, 1852, for extending protection to French authors, provides that works first published in France shall be registered at Stationers’ Hall, London, and copies delivered “within three months after the first publication thereof in any part of the French dominions, or, if such

¹ *Cassell v. Stiff*, 2 Kay & J. 279.

² *Cassell v. Stiff*, *supra*.

³ 15 & 16 Vict. c. 12, s. 8, cl. 7.

work be published in parts, then within three months after the publication of the last part thereof." It has been held that a newspaper or periodical is not such a work published in parts as is contemplated by this provision; and that it must be registered within three months after the beginning of its publication, or within three months after the date of the Order in Council, if its publication was begun before the issue of that order.¹

Statutory Requirements in Case of Translations. — In order to entitle a foreign author or his assignee to protection for the translation of any book or dramatic composition, there must be a compliance with the following requirements prescribed by 15 & 16 Vict. c. 12, s. 8:—

1. The original work from which the translation is to be made must be registered and a copy thereof deposited in the United Kingdom in the manner required for original works by the said International Copyright Act, within three calendar months of its first publication in the foreign country:

2. The author must notify on the title-page of the original work, or, if it is published in parts, on the title-page of the first part, or, if there is no title-page, on some conspicuous part of the work, that it is his intention to reserve the right of translating it:

3. The translation sanctioned by the author, or a part thereof, must be published either in the country mentioned in the order in council by virtue of which it is to be protected, or in the British dominions, not later than one year after the registration and deposit in the United Kingdom of the original work; and the whole of such translation must be published within three years of such registration and deposit:

4. Such translation must be registered and a copy thereof

¹ *Cassell v. Stiff*, 2 Kay & J. 279. Referring to the language of the Order relating to works published in parts, Vice-Chancellor Wood said: "The only interpretation of that clause is that it refers to a publication which is to be completed in a specified number of parts, and not one which is to be continued for an indefinite period. There would be no sense in the other construction. The effect of it would be that at any period the publisher of

such a work might register it, and carry back his copyright to the earliest period in 1852 when French authors first had a copyright in this country. That cannot be the intention; it must mean to apply to a work to be completed in a definite number of parts, and such a work, though not registered at its commencement, may be registered within three months after the publication of the last part." *Ibid.* 286.

deposited in the United Kingdom within a time to be mentioned in that behalf in the order by which it is protected, and in the manner provided by the said International Copyright Act for the registration and deposit of original works :

5. In the case of books published in parts, each part of the original work must be registered and deposited in this country in the manner required by the said International Copyright [Act] within three months after the first publication thereof in the foreign country :

6. In the case of dramatic pieces the translation sanctioned by the author must be published within three calendar months of the registration of the original work :

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

It has been held that the act contemplates and requires a translation of the whole work, and that a translation of a part is not enough to entitle the author to protection. Moreover, the version must be a *bona fide* translation. In the case of a drama, a mere imitation or adaptation to the English stage, although sanctioned by the author as a translation, is insufficient for the completion of a valid title. Where it was sought to restrain the representation of an unauthorized adaptation to the English stage of a French comedy originally represented in Paris, the court held that the plaintiff's title was defeated by the fact that the version approved by the authors of the comedy as a translation, and duly registered as such, was a mere adaptation, without the elements of such a translation as is required by the statute. What Parliament intended, said Vice-Chancellor James, was "that the English people should have the opportunity of knowing the French work as accurately as it is possible to know a French work by the medium of a version in English."¹

¹ Wood v. Chart, Law Rep. 10 Eq. 193, 205. "It is provided," said the Vice-Chancellor, "that in the case of dramatic pieces the translation sanctioned by the author must be published within three calendar months of the registration of the original work. Now I do not think it is possible to say that means that any thing which the author shall sanction as a translation shall be published within three calendar months. It means that a real

Importing Piratical Copies Prohibited.—In order to secure more effectually the protection granted, the statute prohibits the unauthorized importation into any part of the British dominions of copies of any work of literature or art in which copyright exists by virtue of the International Copyright Acts, which have been printed, reprinted, or made in any foreign country other than that in which such work was originally published; and the same prohibition applies to unauthorized translations of books or dramatic compositions protected by the acts.¹

translation, being a translation which has been authorized or sanctioned by the author, must be published within three calendar months of the registration of the original work. It appears to me that the plaintiff in this case has gone out of his course to dig a pitfall for himself, for what he says he has done is—the original thing being called *Frou-Frou*—he has published in England a comedy called *Like to Like*, a comedy in five acts, being an English version of MM. Meilhac and Halévy's *Frou-Frou*, written by H. Sutherland Edwards. Then he has introduced English characters; he has transferred the scene to England; he has made the alterations necessary for making it an English comedy, and he has left out a great number of speeches and passages—especially in the first act—which would seem to me to imply, that at first he was really making an imitation or adaptation, and afterwards was minded more completely to make a translation. The first two acts seem to me particularly to be what is referred to in the act itself as an imitation or adaptation. Whether it is a fair imitation or adaptation is another question; but if one wanted to have an example of what is an imitation or adaptation to the English stage, one would have said that this is exactly the thing which is meant. It is an imitation and adaptation to the English stage; that is, you have transferred the characters to England, you make them English characters, you introduce English manners,

and you leave out things which you say would not be suitable for representation on the English stage. Now that is not, in my view of the case, what the act requires, for some sufficient purpose as I have said before, when it requires that a translation should be made accessible to the English people. What is required is, that the English people should have the opportunity of knowing the French work as accurately as it is possible to know a French work by the medium of a version in English." Ibid. 204.

When this decision was rendered, the statute expressly provided that "fair imitations or adaptations to the English stage" of any foreign play might be made without the consent of the author of the original. 15 & 16 Vict. c. 12, s. 6. This clause has been repealed since *Wood v. Chart* was decided. 38 & 39 Vict. c. 12. But it does not appear that the court in that case was influenced by the provision just referred to. Referring to the necessity of publishing such a translation as was contemplated by this statute, Vice-Chancellor James said: "If the author had complied with the condition required by the act of Parliament, or any other person claiming under the author had complied with that condition, I should at once have restrained the acting of such a piece as this by any one else, as not being a fair imitation or adaptation, but as being a piratical translation of the original work." Law Rep. 10 Eq. 206.

¹ 15 & 16 Vict. c. 12, s. 9.

Works first Published Abroad not entitled to Copyright, except under International Acts. — Section 19 of 7 & 8 Vict. c. 12, declares that the author of a book, dramatic composition, or other work mentioned in the act, which shall be first published out of the British dominions, shall have no copyright therein, nor the exclusive right of representation, “otherwise than such (if any) as he may become entitled to under this act.” It has been held that this section applies to native as well as to foreign authors, and to works first published in any foreign country, whether the provisions of the International Copyright Acts have or have not been extended to that country; and, accordingly, that no author, whether a British subject or an alien, is entitled to any other protection for a work first published abroad than that which he may claim under the International Copyright Acts.¹

RIGHTS OF FOREIGN AUTHORS IN GREAT BRITAIN.

The International Copyright Acts do not affect the rights of an alien under the general copyright statutes, and leave untouched the question whether, under the latter, a foreigner is entitled to any protection for a work first published in England. This question has undergone the most elaborate discussion in the courts, and is one on which the ablest judges have expressed opinions diametrically opposed. The conflict of opinion is the result of the different meanings given to the word author in the statute 8 Anne, c. 19,² and 5 & 6 Vict. c. 45;³ the question being whether Parliament legislated for all authors, native and foreign, or for British subjects alone. Of course, it has never been claimed that a foreigner is entitled to any privileges, except on the conditions which are to be observed by an Englishman.

The doctrine that an alien is capable of acquiring British copyright was not opposed by any direct authority until 1849. Before that year, the protection of the law had been uniformly

¹ *Boucicault v. Delafield*, 1 Hem. & M. 597; *Boucicault v. Chatterton*, 5 Ch. D. 267. See these authorities considered more fully under Publication in

Chap. V. For countries with which international copyright conventions have been made, see *ante*, p. 86.

² s. 1.

³ s. 3.

extended to the works of foreign authors;¹ and, in 1848, the Court of Common Pleas, after an elaborate discussion of the subject, unanimously held, in *Cocks v. Purdy*, that an alien friend, though resident abroad at the time of publication, was entitled to copyright in a work first published in England.² The law was construed to the same effect by the Court of Queen's Bench, in *Boosey v. Davidson*, decided in 1849.³

The soundness of this doctrine was first judicially questioned in 1845, when Chief Baron Pollock, delivering the judgment of the Court of Exchequer in *Chappell v. Purday*, remarked that "upon the construction of the statutes alone a foreign author, or the assignee of a foreign author, whether a British subject or not, had no copyright in England, and no right of action on the ground of any piracy of his work in the British territories."⁴ But the result of the decisions at that time was stated to be that a foreigner became entitled to the benefit of the statutes by first publishing in England; and, in view of such authorities, the court went no farther than to express a doubt whether English copyright would vest in a foreigner resident abroad.⁵ But the determination of this question, if not the discussion, was unnecessary; as the copyright in controversy was clearly defeated by a prior publication of the work abroad. In 1849, the same court, contrary to all the authorities on the subject, held, in *Boosey v. Purday*, that a foreigner, domiciled abroad, by sending his work to Great Britain for first publication, acquired no copyright, and could not confer a valid

¹ *Bach v. Longman*, Cowp. 623; *Guichard v. Mori*, 9 L. J. (Ch.) 227; *D'Almaine v. Boosey*, 1 Y. & C. Exch. 288; *Bentley v. Foster*, 10 Sim. 329; *Chappell v. Purday*, 4 Y. & C. Exch. 485. In the case last cited, the copyright was defeated by a prior publication of the work abroad; but Lord Abinger said, that "a foreigner who is the author of a work unpublished in France may communicate his right to a British subject." *Ibid.* 495.

² 5 C. B. 860.

³ 13 Q. B. 257. See also *Ollendorff v. Black*, 4 De G. & Sm. 209; *Buxton v. James*, 5 Id. 80.

⁴ 14 Mees. & W. 318.

⁵ *Ibid.* 321. In *Delondre v. Shaw*, 2 Sim. 237, decided in 1828, Vice-Chancellor Shadwell said: "The court does not protect the copyright of a foreigner." But this case had no connection with the law of copyright, and the above was a mere remark carelessly made. Moreover, in *Bentley v. Foster*, 10 Sim. 329, decided in 1839, the same judge did not hesitate to declare that a foreign author who gave "the British public the advantage of his industry and knowledge," by first publishing his work in England, was entitled to the protection of the copyright statutes.

title upon a British subject.¹ “Our opinion,” said Baron Pollock, “is that the legislature must be considered *prima facie* to mean to legislate for its own subjects, or those who owe obedience to its laws; and, consequently, that the acts apply *prima facie* to British subjects only in some sense of that term which would include subjects by birth or residence being authors; and the context or subject-matter of the statutes does not call upon us to put a different construction upon them. The object of the legislature clearly is not to encourage the importation of foreign books and their first publication in England as a benefit to this country; but to promote the cultivation of the intellect of its own subjects.”²

This judgment was followed, in *Boosey v. Jefferys*, by the Court of Exchequer, whose decision was overruled by the Exchequer Chamber in 1851, when it was again declared that all authors, native or foreign, resident in England or abroad, were entitled to the protection of the law, on condition of first publishing their works in England.³ “We see no sufficient reason,” said Lord Chief Justice Campbell, “for thinking that it was the intention of the legislature to exclude foreigners from the benefit of the acts passed for the protection of literary property. The British Parliament has no power, and cannot by any general words be supposed to intend, to legislate for aliens beyond British territory; but, for any thing within British territory, it has the power to legislate for aliens as well as natural-born subjects; and, as we conceive, by general words must be presumed to do so. The monopoly which the statutes confer is to be enjoyed here, and the conditions which they require for the enjoyment of it are to be performed here. What is there to rebut the presumption that aliens are included? The act 8 Anne, c. 19, which the others follow, is entitled ‘An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies.’ Assuming that the legislature looked only to the enlightenment of the kingdom of Great Britain, without any general regard for the republic of letters, may it not be highly for the encour-

¹ 4 Exch. Rep. 145.

² Ibid. 156.

³ 6 Exch. Rep. 580. The law as

expounded in this case was followed in *Buxton v. James*, 5 De G. & Sm.

80.

agement of learning in this country, that foreigners should be induced to send their works composed abroad, either in English or in a foreign language, to be first published in London? If Rapin or De Lolme had written their valuable works to illustrate our history and constitution, without even visiting our shores, could it be intended that they should be debarred from publishing on their own account in England, or selling their copyright to an English bookseller? . . . For these reasons, we think that if an alien residing in his own country were to compose a literary work there, and, continuing to reside there, without having before published his work anywhere, should cause it to be first published in England in his own name and on his own account, he would be an author within the meaning of our statutes for the encouragement of learning; and that he might maintain an action in our courts against any one who, in this country, should pirate his work.”¹

Foreigner Resident Abroad not Entitled to Copyright. — An appeal from this decision was taken to the House of Lords, where, in 1854, the authorities and principles involved were discussed with a thoroughness that makes *Jefferys v. Boosey*² the leading copyright case of this century, as *Millar v. Taylor* and *Donaldson v. Becket* were of the last. The leading question submitted to the judges in attendance was, whether valid copyright was vested in the opera, *La Sonnambula*, which had been composed by Bellini, a foreigner, resident in Italy, and first published in England by his assignee, Boosey. The discussion turned on the meaning of the word author in the statute of Anne. Six³ of the eleven judges maintained that this was

¹ 6 Exch. Rep. 593, 596.

² 4 H. L. C. 815.

³ Erle, Williams, Coleridge, Maule, Wightman, Crompton.

“The general rule,” said Mr. Justice Maule, “is that words in an act of Parliament, and indeed in every other instrument, must be construed in their ordinary sense, unless there is something to show plainly that they cannot have been used, and so, in fact, were not used in that sense. Here the words to be construed are ‘author, assignee and assigns.’ These words plainly comprehend aliens as well as

others; and there is nothing, as it seems to me, in any part of the acts to show that they are to be restricted. Indeed, those who reject this construction do not rely on any thing to be found in the terms of the acts; nor is it pretended that, by construing the words in their proper sense, any contradiction, incongruity, or absurdity will arise. But it is said that the intention of the acts is restricted to the encouragement of British industry and talent, and that this construction of the words would give an effect to the act beyond that restricted intention. I

used in a general sense, embracing all authors, native and foreign; that there was nothing in the statute to restrict its meaning to British subjects, and that such restriction would be against established principles of statutory construction, and contrary to the spirit of the act; that the purpose of the legislature was to promote learning and literature in Great Britain,

cannot bring myself to think that any such restriction was intended; it certainly is not expressed. But, even taking the intention of the acts to be as assumed, it would not, I think, be sufficient to take from the general words of the legislature their natural and large construction; for British industry and talent will be encouraged by conferring a copyright on a foreigner first publishing in England; industry, by giving it occupation; and talent, by furnishing it with valuable information and means for cultivation.

“It is also said that the legislature was dealing with British interests and legislating for British people. This is true; but to give a copyright to a foreign author publishing in this country is dealing with British interests and legislating for British people. Some parts of the acts, it is said, though expressed generally, must be construed with a restriction to this country. And this is true with respect to the extent of the sole liberty of printing conferred by the acts in general terms. But these words are, with respect to their operation, necessarily confined to the dominions within which the legislature had the power of conferring such liberty; and the words prohibiting importation show that the framers of the acts had this construction distinctly in view. But this consideration has no operation with respect to the persons on whom the sole liberty is conferred. The words ‘author, assignee, and assigns’ naturally comprehend aliens; and the legislature is not denied to have had the right and power of conferring the sole liberty on them if it thought fit. In my opinion, therefore, the acts confer a copyright on a foreign author, or his assignee, first publishing in England. To hold otherwise, would,

I think, be contrary to the plain meaning of the acts, and would be a most inconvenient restriction of the rule, which, in personal matters, places an alien in the same situation as a natural-born subject.” 4 H. L. C. 895.

“As to the intention of the legislature,” said Mr. Justice Erle, “to exclude alien authors from the rights of authors in England, because it is intended to encourage learning, and to induce learned men to write useful books, the recited intention leads me to an opposite construction; for learning is encouraged by supplying the best information at the cheapest rate, and according to this view the learner should have free access to the advances in literature and science to be found in the useful books of learned men of foreign nations, and I gather from the statute that this was its scope. It is not to be supposed that the legislature looked upon all foreign literature as bad, because of some pernicious writings, or on all British productions as good, on account of some works of excellence; nor is it to be supposed that the legislature planned either to release British authors from a competition with aliens, or to restrict readers to a commodity of British productions of inferior quality, at a higher price; or that it intended to give to British authors of mediocrity a small premium, at the expense of depriving British printers and booksellers of the profit of printing and selling works of excellence by aliens. If any such plan existed, the enactment contains no words for executing it. It provides for authors, which, in common acceptation, denotes authors of all countries; author expressing a relation to a work exclusive of country.” *Ibid.* 878.

and that this object was advanced by encouraging foreign authors to send their works to England for first publication. Five judges¹ argued that, though foreigners were not expressly excluded from the privileges of the statute, a British legislature, dealing with British interests, must be presumed to have legislated for British subjects and for the encouragement of native authors alone. Lord St. Leonards and Lord Brougham, who advised their peers, followed the minority of the judges. The House of Lords adopted the same views; and, in pronouncing the most important copyright decision since Lord Mansfield's time, held that English copyright would not vest in the work of a foreign author resident abroad.²

¹ Cranworth, Jervis, Pollock, Parke, Anderson. Lord Chancellor Cranworth said:—

“The substantial question is, whether, under the term author, we are to understand the legislature as referring to British authors only, or to have contemplated all authors of every nation. My opinion is, that the statute must be construed as referring to British authors only. *Prima facie* the legislature of this country must be taken to make laws for its own subjects exclusively, and where, as in the statute now under consideration, an exclusive privilege is given to a particular class at the expense of the rest of her Majesty's subjects, the object of giving that privilege must be taken to have been a national object, and the privileged class to be confined to a portion of that community, for the general advantage of which the enactment is made. When I say that the legislature must *prima facie* be taken to legislate only for its own subjects, I must be taken to include under the word subjects all persons who are within the Queen's dominions, and who thus owe to her a temporary allegiance. I do not doubt but that a foreigner resident here, and composing and publishing a book here, is an author within the meaning of the statute; he is within its words and spirit. I go further; I think that if a foreigner, having composed, but not having published, a work abroad, were

to come to this country, and, the week or day after his arrival, were to print and publish it here, he would be within the protection of the statute. This would be so if he had composed the work after his arrival in this country, and I do not think any question can be raised as to when and where he composed it. So long as a literary work remains unpublished at all, it has no existence, except in the mind of its author, or in the papers in which he, for his own convenience, may have embodied it. Copyright, defined to mean the exclusive right of multiplying copies, commences at the instant of publication; and if the author is at that time in England, and while here he first prints and publishes his work, he is, I apprehend, an author, within the meaning of the statute; even though he should have come here solely with a view to the publication. . . . If publication, which is (so to say) the overt act establishing authorship, takes place here, the author is then a British author, wherever he may, in fact, have composed his work. But if at the time when copyright commences by publication, the foreign author is not in this country, he is not, in my opinion, a person whose interests the statute meant to protect.” 4 H. L. C. 954, 955.

² Followed in *Novello v. James*, 5 De G. M. & G. 876.

The Law Criticised. — This, therefore, must be regarded as the law of England, until it shall be changed by a tribunal of equal authority to that by which it was declared. But the judgment is indefensible. It was in opposition to the opinions of a majority of the judges, and was against the current of authorities. It was not less contrary to sound principles and established rules of construction. The word author is used in the statute in a general sense, and there is nothing to show that the legislature intended that its meaning should be restricted to native authors. The primary object of the act was the advancement of learning in Great Britain, which Parliament aimed to effect by encouraging the first publication there of literary works; thus securing to the British public the advantages arising therefrom. The protection extended to authors is but a means to this end, which is equally promoted whether the works published are those of native or foreign authors, and whether the author be at Calais or at Dover. “The act,” said Lord Westbury, “is auxiliary to the advancement of learning in this country. The real condition of obtaining its advantages is the first publication by the author of his work in the United Kingdom. Nothing renders necessary his bodily presence here at the time; and I find it impossible to discover any reason why it should be required, or what it can add to the merit of the first publication. It was asked, in *Jefferys v. Boosey*, why should the act (meaning the statute of Anne) be supposed to have been passed for the benefit of foreign authors? But if the like question be repeated with reference to the present act, the answer is, in the language of the preamble, that the act is intended ‘to afford greater encouragement to the production of literary works of lasting benefit to the world,’ a purpose which has no limitation of person or place. But the act secures a special benefit to British subjects by promoting the advancement of learning in this country, which the act contemplates as the result of encouraging all authors to resort to the United Kingdom for the first publication of their works. The benefit of the foreign author is incidental only to the benefit of the British public. Certainly the obligation lies on those who would give the term author a

restricted signification to find in the statute the reasons for so doing.”¹

The judges who maintained that an alien residing abroad was not within the purview of the statute conceded that valid copyright would vest in the work of a foreign author, provided he were in England at the time of publication. It was pertinently asked, by those who rightly thought this to be a fanciful distinction, what the English people, or the cause of learning in Great Britain, would gain by its observance, and why the law gave copyright to a foreigner staying for a day at Dover, but denied it to him if he stopped at Calais and sent his manuscript to London. As long as the lower courts are governed by the authority of *Jefferys v. Boosey*, a foreign author, resident abroad, who publishes in Great Britain, has no protection there against piracy; but, should the direct issue come again before the highest judicial tribunal of Great Britain, there is good reason for believing that the judgment of 1854 will be reversed, and the protection of English law extended to every author, wherever or in whatever language he may write, who gives the British nation the benefit of the first publication of his work. Indeed, in 1868, when *Routledge v. Low* was before the House of Lords, although the direct issue did not arise, Lord Chancellor Cairns and Lord Westbury expressed the opinion that *Jefferys v. Boosey*, which was decided under the act of Anne, is not a binding authority in the construction of the present statute; and that the latter extends protection to every author, native or foreign, who first publishes in the United Kingdom, wherever he may then be resident.²

¹ *Routledge v. Low*, Law Rep. 3 H. L. 118.

² “It is impossible,” said the Lord Chancellor, “not to see that the *ratio decidendi* in that case [*Jefferys v. Boosey*] proceeded mainly, if not exclusively, on the wording of the preamble of the statute of Anne, and on a consideration of the general character and scope of the legislation of Great Britain at that period. The present statute has repealed that act and professes to aim at affording greater encouragement to the production of literary works of lasting benefit to the

world. And accepting the decision of this House as to the construction of the statute of Anne, it is, I think, impossible not to see that the present statute would be incompatible with a policy so narrow as that expressed in the statute of Anne.” Law Rep. 3 H. L. 111.

“The case of *Jefferys v. Boosey*,” said Lord Westbury, “is a decision which is attached to and depends on the particular statute of which it was the exponent; and as that statute has been repealed, and is now replaced by another act, with different enactments

“In my opinion,” said the Lord Chancellor, “the protection is given to every author who publishes in the United Kingdom, wheresoever that author may be resident, or of whatever state he may be the subject. The intention of the act is to obtain a benefit for the people of this country, by the publication to them of works of learning, of utility, of amusement. This benefit is obtained, in the opinion of the legislature, by offering a certain amount of protection to the author, thereby inducing him to publish his work here. This is, or may be, a benefit to the author of the work; but it is a benefit given, not for the sake of the author of the work, but for the sake of those to whom the work is communicated. The aim of the legislature is to increase the common stock of the literature of the country; and if that stock can be increased by the publication for the first time here of a new and valuable work composed by an alien, who never has been in the country, I see nothing in the wording of the act which prevents, nothing in the policy of the act which should prevent, and every thing in the professed object of the act, and in its wider and general provisions, which should entitle, such a person to the protection of the act, in return and compensation for the addition he has made to the literature of the country. My Lords, I am glad to be able to entertain no doubt that a construction of the act so consistent with a wise and liberal policy is the proper construction to be placed upon it.”¹

expressed in different language, the case of *Jefferys v. Boosey* is not a binding authority in the exposition of this latter statute.” *Ibid.* 117.

But Lord Cranworth did not “as at present advised, see any difference between the two statutes, so far as relates to the subject of the residence of foreign authors.” *Ibid.* 114. And Lord Chelmsford was of the same opinion. *Ibid.* 116.

¹ *Law Rep.* 3 II. L. 110. Lord Westbury said: “The question then arises, who are included in the term authors. The word is used in the statute without limitation or restriction. It must, therefore, include every person who shall be an author, unless from the rest of the statute sufficient

grounds can be found for giving the term a limited signification. It is proposed to construe the act as if it had declared in terms that the protection it affords shall extend to such authors only as are natural-born subjects, or foreigners who may be within the allegiance of the Queen on the day of publication. But there is no such enactment in express terms, and no part of the act has been pointed out as requiring that such a construction should be adopted. The act appears to have been dictated by a wise and liberal spirit; and in the same spirit it should be interpreted, adhering of course to the settled rules of legal construction. The preamble is, in my opinion, quite inconsistent with the conclusion that

Foreigner within British Dominions may Secure Copyright. — It was conceded in *Jefferys v. Boosey*, and expressly held by the House of Lords in *Routledge v. Low*,¹ that an alien author may acquire copyright by first publishing in the United Kingdom, provided he be within the British dominions at the time of publication. It matters not where he has composed his work, nor whether he goes into the realm with the sole purpose of being there at the time of publication, and leaves when publication has taken place.² No definite period has been fixed during which he shall remain on British soil. His presence does not seem to be required before or after publication, but merely "at the time of publication." As publication takes place on one day, it may be assumed that the requirements of the law will be met if the author be within the realm during the same period.³ It is not necessary that he shall be at the place of publication or in England. Thousands of miles may separate him and his publishers. On the day his book is published in the United Kingdom, he may be anywhere within the British dominions, at any point in Canada between the two oceans, in India, in the most distant English colony, at any spot over which waves the British flag. But the author must be there in person. He cannot appear by proxy, — cannot send his assignee, his publisher, or his agent. Why the majesty of the law demands the bodily presence of the author, why copyright will vest if the author tarry for ten hours on one side of the St. Lawrence, or on one side of an imaginary line, but not if he

the protection given by the statute was intended to be confined to the works of British authors. On the contrary, it seems to contain an invitation to men of learning in every country to make the United Kingdom the place of first publication of their works; and an extended term of copyright throughout the whole of the British dominions is the reward of their so doing." *Ibid.* 118.

¹ Law Rep. 3 H. L. 100. See also *Low v. Ward*, Law Rep. 6 Eq. 415; *Boucicault v. Delafield*, 1 Hem. & M. 597.

² See remarks of Lord Cranworth, *ante*, p. 225, note 1. In *Routledge v.*

Low, the fact was clearly before the court that Miss Caroline, an American author, whose work was published in London, had gone to Montreal, Canada, in accordance with an arrangement with her English publishers; and was merely staying there temporarily for the express purpose of acquiring copyright.

³ "It seems, indeed, to be admitted, that if a foreign author comes to England for however short a time, and first publishes his work here, he is entitled to the benefit of the statute." Wightman, J., *Jefferys v. Boosey*, 4 H. L. C. 887.

is on the other, is a mystery as unfathomable as the distinction is fanciful.

British Subject Resident Abroad Entitled to Copyright. — It appears to be conceded, although the question has not been judicially determined, that a British subject, while resident abroad, may acquire copyright by first publishing in his own country. "It seems not to be denied," said Lord St. Leonards, "that an English author may reside abroad, and yet may have his rights as an English author, upon publication here. Why? Because he owes a natural allegiance, which he cannot shake off."¹

Law Summarized. — The law concerning the nativity and residence of the author may now be given succinctly. English copyright will not vest in the work of an alien who is not within the British dominions at the time of publication. A foreign author may acquire copyright in England on three conditions: 1, Publication must be in the United Kingdom; 2, there must have been no previous publication; 3, the author must be at the time of publication within the British dominions.² A native author must comply with the first two of these requisites; but it is immaterial whether he is within or without the British dominions at the time of publication.

Works of Art. — Sculpture, models, and casts are governed by a special statute;³ and so are prints and engravings.⁴ But these statutes, like those relating to literary compositions, make no distinction between native and foreign authors.⁵ The act

¹ *Jefferys v. Boosey*, 4 H. L. C. 985. "If Mr. Gibbon," said Lord Chief Justice Campbell, "after writing the later volumes of his *Decline and Fall*, at Lausanne, had continued to reside there, can it be doubted that, while domiciled there, he might have caused them to be published in London, acquiring the same rights as an author as if he had returned to this country; or that he might have sold the copyright to another residing in Lausanne, who might have published as the purchaser in London, or assigned the right to a London bookseller?" *Boosey v. Jefferys*, 6 Exch. Rep. 596. And Lord Chancellor Cranworth intimated that

if Gibbon had "established himself at Lausanne, without any *animus revertendi*," he would not have lost his rights as a British subject. *Jefferys v. Boosey*, 4 H. L. C. 822.

² For the extent of the United Kingdom and of the British dominions, see *post*, p. 298.

³ 54 Geo. III. c. 56.

⁴ 8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57.

⁵ In *Page v. Townsend*, decided in 1832, Shadwell, V. C., held, concerning prints and engravings, that "the object of the legislature was to protect those works which were designed, engraved, etched or worked in Great Brit-

relating to paintings, drawings, and photographs, grants copyright to an "author, being a British subject or resident within the dominions of the crown."¹ This seems to exclude a foreign author who resides abroad, but not one who may be resident within the British dominions.

RIGHTS OF FOREIGNERS IN THE UNITED STATES.

No Copyright in Work of Foreign Author. — In this country, the question whether a foreigner is entitled to copyright is free from much of the doubt and difficulty which have surrounded it in England. From the first statute, enacted in 1790, to that passed in 1870, Congress has granted copyright to such author only as may be "a citizen of the United States or resident therein," and has expressly declared that no protection shall be extended to the works of a foreigner. The statutes in force before 1870 completely excluded foreign authors from all privileges. There is no reason for believing that Congress, in passing the act now in force, deliberately intended to make any change in the law in this respect. But this statute cannot be construed to prevent a resident owner from securing valid copyright for certain works of art produced by foreign authors.

Statutory Prohibition not Extended to certain Works of Art. — Section 4952 of the Revised Statutes provides that "any citizen of the United States or resident therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person," shall be entitled to secure copyright therein. There is nothing in this section to prevent a citizen or a resident of the United States from acquiring copyright in a work

ain, and not those which were designed, engraved, etched or worked abroad and only published in Great Britain." 5 Sim. 404. In this case the prints had been struck off abroad, and only published in England. The decision

is not an authority against the doctrine that the foreigner might have acquired copyright if his productions had been *printed* and published in England.

¹ 25 & 26 Vict. c. 68, s. 1.

which he has bought from a foreign author; for a "proprietor" is empowered to secure copyright, and in such case no condition or requirement is prescribed as to the nativity or residence of the author. The part of the statute which excludes from protection the works of foreign authors is section 4971; which declares that "nothing in this chapter shall be construed to prohibit the printing, publishing, importation, or sale of any book, map, chart, dramatic or musical composition, print, cut, engraving, or photograph, written, composed, or made by any person not a citizen of the United States nor resident therein." It is clear that no protection can be secured for any work here named which is the production of a person who is not a citizen or a resident of the United States.¹ But there is no mention in this section of paintings, drawings, chromos, statues, statuary, models, or designs; and there is nothing in the statute to prevent a resident owner of any such production from securing a valid copyright therein, though it be the work of a foreigner.

Translations, Abridgments, Dramatizations. — There is no reasonable doubt that valid copyright will vest in a translation, abridgment, or dramatization made by a citizen or resident at from the work of a foreign author. The law recognizes such productions as proper subjects of copyright; and, as the copyright does not extend to the original, it matters not that this is the work of a foreign author. But, in such case, the law protects each author only in his own production. The original, being common property, may be used by any person, without infringing the copyright in a protected abridgment, translation, or dramatization.²

Joint Native and Foreign Authors. — In the case of a work of which a citizen and a foreigner are joint authors, there is nothing to prevent a valid copyright from vesting in that part of which the former is the author, provided this can be separated from that written by the foreign author. If the parts cannot be separated, it would seem that copyright will not vest in any of it.

¹ *Carey v. Collier*, 56 Niles Reg. 262; *Keene v. Wheatley*, 9 Am. Law Reg. 33; *Boucicault v. Wood*, 2 Biss. 34.

² *Shook v. Rankin*, 6 Biss. 477; *Shook v. Rankin*, 3 Cent. Law Jour. 210; *Benn v. LeClercq*, 18 Int. Rev. Rec. 94.

Meaning of Resident.—The judicial construction given to the word resident, as used in the copyright statute, is that it refers to a person who is residing in the United States with the intention of making this country his place of permanent abode. A formal declaration of such intention is not necessary, nor is any definite period of time indicated as requisite to constitute such residence. Nor is it essential that such person shall be a householder. He may be a lodger or boarder. The question is determined by the state of mind, the intention, of the person at the time he has his abode here; and by his acts, as far as they show what that intention was. If while here he intends to stay and make this his home, he becomes during the continuance of that intention a resident within the meaning of the law, though afterward he may change his mind, and return to his native land. How long such intention shall continue, the courts have not said; but, if it exist *bona fide* at the time of recording the title, valid copyright vests, and will not be defeated by any subsequent acts or change of mind on the part of the claimant. On the other hand, if a foreign author comes to this country intending to stay temporarily, although he actually remains many years, he is a mere sojourner, and does not acquire a residence within the meaning of the act.¹ To determine thus the intention in the mind of a person may be attended with difficulty, and even with fraud. It is a question of fact, on whose determination the law will depend.²

In *Boucicault v. Wood*,³ it appeared that the plaintiff, who was a native of Great Britain, had been in the United States from 1853 to 1861, when he returned to the former country. During this period, he had copyrighted certain plays which he had written. The defence was that the plaintiff, being a foreigner, was not entitled to copyright in this country.

¹ *Boucicault v. Wood*, 2 Biss. 34.

² In *Carey v. Collier*, 56 Niles Reg. 262, decided by the United States Circuit Court in 1839, it was held that Capt. Marryatt, who had filed a declaration of his intention to become a citizen of the United States, did not thereby become a resident, for the reason that the evidence showed that he was still a subject of Great Britain in whose navy he was an officer, and

that he intended to return to that country to reside. Mr. Justice Betts said that "it was evident that a man who was a mere transient visitant, whose family, business intentions and relations were all abroad, could not be considered a resident; and the filing a declaration of his intention to become a citizen could not make him so."

³ *Supra*.

The jury was directed to find whether Boucicault, when he entered his copyright, intended to make this country his home. It was found that such intention then existed in his mind, and accordingly the copyright was held to be valid. The law on this point was expounded by Mr. Justice Drummond as follows: "No person is entitled to the benefit of these acts unless he be, at the time of filing the title, a citizen of the United States, or a resident therein. Residence ordinarily means domicile, or the continuance of a man in a place, having his home there. It is not necessary that he should be the occupant of his own house; he may be a boarder or a lodger in the house of another. The main question is the intention with which he is staying in a particular place. In order to constitute residence, it is necessary that a man should go to a place, and take up his abode there with the intention of remaining, making it his home. If he does that, then he is a resident of that place. This question of residence is not to be determined by the length of time that the person may remain in a particular place. For example, a man may go into a place and take up his abode there with the intention of remaining, and if so, he becomes a resident there, although he may afterwards change his mind, and within a short time remove. So if a person goes to a place with the intention of remaining for a limited time, although in point of fact he may remain for a year or more, still this does not constitute him a resident. So it is his intention accompanied with his acts, and not the lapse of time, which determines the question of residence. The plaintiff came to this country in 1853, and remained, pursuing his profession as an actor and author until 1861; and if at the time of filing the title he had his abode in this country with the intention of remaining permanently, he was a resident within the meaning of the law, even though he afterwards changed his mind and returned to England. If, however, he was a sojourner, a transient person, or at the time of this filing had the intention to return to England, he is not entitled to the protection of these laws." ¹

Immaterial where Work is Produced or Citizen Author Resides.
—No conditions are prescribed as to where the work shall be

¹ 2 Biss. 38; s. c. 7 Am. Law Reg. n. s. 539, 545.

produced. And it is obviously immaterial whether it has been written in or out of the country, provided the author comes within the requirements of the law as to citizenship or residence. Nor, if the author be a citizen of the United States, can it be material whether he is or is not resident in the country when his book is published and the copyright entered. Whether the book must be printed in the United States is a question which is elsewhere considered.¹

Foreign Assignee of Native Author. — The question may arise whether a foreign assignee of a native author is entitled to the privileges of the statute. On this point there is no judicial light. The act confers copyright upon an author or owner of a book who is a citizen of the United States or resident therein, and upon the assignee of such author or owner. It does not prescribe that the assignee shall be a citizen or a resident. Nor does its general spirit or object demand that such restriction shall be made. The purpose of the legislature is to foster native literature by encouraging native authors. This object is secured by protecting the works of such authors; and is in no degree defeated by permitting them to transfer their productions, either before or after publication, to foreign buyers. Indeed, the value of the property to the author is increased by such enlarged facilities for disposing of it. It will hardly be contended that, when a native author has published his work and secured statutory copyright, such copyright will become void by being transferred to a foreigner. The principle is the same when the author assigns his work before publication, and the assignee seeks to secure the copyright in his own name. In neither case is the object of the statute promoted by excluding a foreign assignee from its privileges. It is foreign authorship, not ownership, which the law refuses to protect.²

¹ See *post*, p. 296.

² To this construction there is an apparent, but not a real, objection. The statute, as has been seen, declares that the "proprietor" of a book who is a citizen of the United States, or resident therein, shall be entitled to copyright. Now, it is clear that an assignee is a proprietor, and, therefore, it might be urged, must also be a citizen or resi-

dent. But the act does not say that a proprietor who is not a citizen or resident shall not have copyright. On the contrary, its privileges are expressly extended to an assignee without restriction as to citizenship or residence; and this view, as shown in the text, is in entire harmony with the spirit and purpose of the law. It is true that this construction practically annuls

AUTHOR AND ASSIGNEE.

The various statutes of England and the United States have declared that the author of a literary work, or his assignee, shall have copyright therein for a named term from the time of first publication. It is also provided by the existing statutes that the copyright in a book published after the death of its author may be secured in England by the owner of the manuscript,¹ and in the United States by the executors and administrators of the author.² It now becomes necessary to consider who may be an author within the meaning of the law, and what persons may be assignees entitled to copyright.

Who is Author.—A literary production is primarily the property of the author who has created it; and, until he has parted with it, he alone is entitled to the privileges given by the statute. When a person has conceived the design of a work, and has employed others to execute it, the creation of the work may be so far due to his mind as to make him the author.³ But he is not an author who “merely suggests the subject, and has no share in the design or execution of the work.”⁴ When the same work is the basis of two or more different copyrights, he is the author, within the meaning of the statute, who has produced that for which the copyright is granted. Thus, the author of a translation, dramatization, or abridgment, is the person who has translated, dramatized, or abridged a work of which he may or may not be the author.⁵ So, he who arranges music for any instrument is the author of such arrangement, though he may not be the composer of the music.⁶ In like manner, a person who has made and arranged selections from other works is the author of the compilation.

the restrictive force which the words, “citizen of the United States or resident therein,” might otherwise have on a “proprietor.” But there is no reason to believe that Congress intended to make such limitation; and, whether it did or not, the section cannot rightly be construed to have that effect.

The word proprietor was not used in this connection in any statute before the existing one passed in 1870.

For what purpose it was inserted in this is not apparent.

¹ 5 & 6 Vict. c. 45, s. 3.

² U. S. Rev. St. s. 4952. See *Folsom v. Marsh*, 2 Story, 100.

³ *Hatton v. Kean*, 7 C. B. n. s. 268.

⁴ *Shepherd v. Conquest*, 17 C. B. 427, 445.

⁵ See *ante*, p. 158.

⁶ *Wood v. Boosey*, Law Rep. 2 Q. B. 340, on ap. 3 *Id.* 223; *Boosey v. Fairlie*, 7 Ch. D. 301, 309.

But in these cases authorship alone does not create a title to copyright. The maker of such productions must have a right so to use the originals.

Joint Authors. — Copyright will vest in two or more joint authors of a work, who will thereby become owners in common of the undivided property.¹ “There may be a difficulty in some cases,” said Mr. Justice Smith, “in determining who are joint authors. But I take it that, if two persons agree to write a piece, there being an original joint design, and the co-operation of the two in carrying out that joint design, there can be no difficulty in saying that they are joint authors of the work, though one may do a larger share of it than the other.”² A person who had merely made certain alterations in a play without the co-operation of the author was held not to be a joint author. “I fail to discover any evidence,” said Keating, J., “that there was any co-operation of the two in the design of this piece, or in its execution, or in any improvements either in the plot or the general structure. All the plaintiff claims to have done is to vary some of the dialogue so as to make it more suitable for his company or for his audience. If the plaintiff and the author had agreed together to rearrange the plot, and so to produce a more attractive piece out of the original materials, possibly that might have made them joint authors of the whole. So, if two persons undertake jointly to write a play, agreeing in the general outline and design, and sharing the labor of working it out, each would be contributing to the whole production, and they might be said to be joint authors of it. But, to constitute joint authorship, there must be a common design. Nothing of the sort appears here. The plaintiff made mere additions to a complete piece, which did not in themselves amount to a dramatic piece, but were intended only to make the play more attractive to the audience.”³

¹ *Maclean v. Moody*, 20 Sc. Sess. Cas. 2d ser. 1154; *Levi v. Rutley*, *infra*; *Marzials v. Gibbons*, Law Rep. 9 Ch. 518. As to owners in common of a copyright, see *Carter v. Bailey*, 64 Me. 458.

² *Levi v. Rutley*, Law Rep. 6 C. P. 523, 530.

³ *Ibid.* 529. “It is not pretended

here,” said Smith, J., “that there was any original joint design. Wilks was employed by the plaintiff to write the play. Wilks invented the plot and wrote the whole dialogue complete. The plaintiff and some members of his company thought the play might be improved. Accordingly, the

Who is Assignee. — An author who has not parted with the property in his production is empowered by the statute to secure copyright in his own name; and at any time afterward to transfer it to an assignee, who thereby becomes vested with the same right. But the meaning of assignee, as used in the act, is not restricted to an assignee of the privilege created by the statute. It embraces also a person to whom an author has transferred his unpublished work, before statutory copyright has attached to it. In other words, statutory copyright will vest *ab initio* in an assignee, as well as in the author himself. Both the English¹ and the American statutes² expressly recognize the right of the “proprietor” of an unpublished work to enter the copyright in his own name; and the law has been repeatedly construed to this effect by the courts.³

plaintiff either himself wrote or procured some one else to write for him a new scene, and made several other alterations in the incidents and in the dialogue; and the question is whether that constituted the plaintiff a joint author of the play with Wilks. The plot remains. The additions do not disturb the drama composed by Wilks; they were made for the mere purpose of improving or touching up some of its parts. It would be strange indeed, if not unjust, if the author's rights could be thus merged into a joint authorship with another. There are probably very few instances, — at least in modern times, — of a play being put upon the stage without some alteration by the manager. It is, no doubt, difficult to draw the line; but it never could be suggested that, when an author submits his manuscript to a friend, and the friend makes alterations and improvements, the latter would thereby become a joint author of the work. If, when the piece was brought to the plaintiff, he had said to Wilks, ‘This thing requires to be remodelled, and you and I will do it together,’ and Wilks had assented, possibly a case of joint authorship might have been set up. But the evidence here falls very short of that.” *Levy v. Rutley*, Law Rep. 6 C. P. 530. See also *Steele v. Ross*,

Ibid. 531, note; *Delf v. Delamotte*, 3 Jur. n. s. 933.

¹ 5 & 6 Vict. c. 45, s. 3.

² U. S. Rev. St. s. 4952; also, statute of 1831, s. 4; 4 U. S. St. at L. 436.

³ *Cocks v. Purday*, 5 C. B. 860; *Folsom v. Marsh*, 2 Story, 100; *Pulte v. Derby*, 5 McLean, 328; *Little v. Gould*, 2 Blatchf. 165, 362; *Cowen v. Banks*, 24 How. Fr. 72; *Paige v. Banks*, 7 Blatchf. 152, on ap. 13 Wall. 608; *Lawrence v. Dana*, 2 Am. L. T. R. n. s. 402. In *Jefferys v. Boosey*, Mr. Justice Crompton said: “The statute of Anne clearly contemplates a first publication by the assignee as sufficient to give him the monopoly — and, in point of fact, I believe that nothing is more common than that the booksellers should take an assignment of the copyright, and publish themselves as proprietors, so as to vest the monopoly in them during the term. The words of the statute, that the author or his assignee shall have the sole liberty, &c., from the day of the first publication, seem to me to show that the assignee may himself publish, so as to acquire the copyright.” 4 H. L. C. 853. In *D’Almaine v. Boosey*, where it appeared that the plaintiff had published and copyrighted a musical composition which he had bought in manuscript from a foreign author, the court

Owner of Manuscript may Secure Copyright. — An assignee, therefore, in the meaning of the statute, may be a person who has acquired his title either before or after the copyright has been secured; that is, either before or after the work has been published. Here is presented a distinction of importance. The literary property which an author has in his manuscript exists by the common law. The common-law right is lost when the manuscript is published. Statutory copyright begins with publication. There can be no common-law property in a published, and no statutory copyright in an unpublished, book. When, therefore, the author secures to himself the copyright, and assigns it after publication, what is transferred is the statutory copyright. But, when he disposes of his property in an unpublished work, he does not assign the statutory copyright; because that does not then exist, and hence cannot be assigned.¹ Nor can it be said that in this case it is the inchoate copyright, or merely the right to secure the copyright, which is transferred. What is passed is the common-law

said: "If he is the owner of the work, it makes no difference whether he composed it himself or bought it from a foreigner." 4 Y. & C. Exch. 300. This was true on the assumption that the *status* of a foreign author under the copyright law was the same as that of an Englishman. But the doctrine was afterward affirmed that copyright would not vest in the work of an alien, except on certain conditions.

In *Cumberland v. Planché*, 1 Ad. & El. 580, it was expressly held that an assignee is not necessarily an assignee of the privilege created by the statute. It appeared that the defendant had sold a farce, of which he was the author, to the plaintiff, who published it and secured the copyright. Afterward was passed the 3 & 4 Will. IV. c. 15, which gave for the first time, to the author or his assignee, the exclusive right to represent a dramatic composition. This right had not been created when the transfer was made. But the court held that the plaintiff had become the absolute owner of the play, and was entitled, as such owner, to secure the

right of representation conferred by the statute of William. "We cannot therefore," remarked Littledale, J., "say that 'assignee' means the assignee of the privilege created by the act." *Ibid.* 587.

¹ *Colburn v. Duncombe*, 9 Sim. 151; *Sweet v. Shaw*, 3 Jur. 217; *Pulte v. Derby*, 5 McLean, 328; *Lawrence v. Dana*, 2 Am. L. T. R. N. S. 402. This view of the law was expressed by Mr. Justice Wightman in *Jefferys v. Boosey*. "The statute [8 Anne, c. 19] gives the author or his assignee copyright, properly so called, from the time of the first publication in England. From the expressions used in it, there is a recognition of proprietors of literary works, independently of the statute, and it enables the author to give to an assignee the same power to obtain a copyright that he possessed himself; but neither he nor his assignee would be entitled to copyright until publication. Whatever right the author may have possessed before publication must have been at common law." 4 H. L. C. 886.

property in the manuscript. Of this the assignee, unless the assignment be of a qualified interest, becomes the absolute owner. He succeeds to all the rights which were vested in the author. He acquires the right not only to publish and to secure the statutory copyright, but also to withhold from publication, or to publish without securing, the copyright; and thus, if he wishes, to abandon his property to the public.¹ In short, he becomes vested with all the rights of property which the common law recognizes in an unpublished composition, and which are more extensive than the right to secure statutory copyright.

A person, then, who is an assignee at common law of the author's rights is recognized by the statute as an assignee entitled to secure copyright. Whether a person who has derived a title at common law is or is not an assignee, and whether such title is or is not valid, is to be determined by the common law, and not by the statute. Now, at common law, neither a written nor a formal assignment is necessary to make a person an assignee. The owner of an unpublished work may sell it,² exchange it, or give it away;³ or it may be transferred by operation of law.⁴ The ownership of the property may be lawfully acquired in any of these ways; and there is no reason why a person who thus derives title from the author may not be an assignee in a broad and proper meaning of the word. The essential qualities of an assignee are found in an owner who has derived a lawful title from the author, and such owner is properly within the meaning of assignee as used in the statute. Indeed, this comprehensive meaning is expressly given to the word by the existing English statute, which declares that "the word 'assigns' shall be construed to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or other-

¹ See language of Blatchford, J., *Paige v. Banks*, 7 Blatchf. 156, quoted *post* 329, note 2.

² *Parton v. Prang*, 3 Cliff. 537.

³ *Lawrence v. Dana*, 2 Am. L. T. R. N. S. 402.

⁴ *Little v. Gould*, 2 Blatchf. 165, 362; *Folsom v. Marsh*, 2 Story, 100. See *ante*, p. 104.

wise.”¹ This language is clearly broad enough to make the meaning of “assign” as comprehensive as that of owner, and to enable any person who is the lawful owner of an unpublished work to secure statutory copyright therein.² Congress has expressly given the same broad scope to the statute now in force, by enacting that the author or the *proprietor* of a book may obtain copyright.³ Moreover, if it was necessary under the act of 1831 that a person who was not the author should show a title derived from the author, that requirement cannot be regarded as now existing. There is no reason why a person who is the owner of an unpublished manuscript or work of art which has been found, or otherwise brought to light, may not obtain a copyright therein, although the name of the author be unknown.

Assuming the principles above explained to be correct, statutory copyright, either in England or in the United States, may be secured in the first instance not only by the author, but also by the owner of an unpublished work who has derived his title from the author; and it is immaterial in what way, provided it be lawful by the common law, the owner has acquired the property in such unpublished work. In the United States, this doctrine in its full scope has neither been expressly affirmed nor denied by the courts; but it is supported by the leading decisions in *Little v. Gould*,⁴ and *Lawrence v. Dana*,⁵ both of which were rendered before all doubt concern-

¹ 5 & 6 Vict. c. 45, s. 2.

² *Cocks v. Purday*, 5 C. B. 860. In *Jefferys v. Boosey*, Mr. Justice Erle expressed the opinion that the bookseller who had obtained ancient manuscripts “brought to light from unburied cities” would be entitled to secure copyright therein. 4 H. L. C. 880. In *Macleane v. Moody*, Lord Deas said: “A person may find a manuscript in his ancestor’s repositories, or get a gift of it, and publish it, and he may be entitled to copyright, although he cannot tell who was the author, nor whether the author is living or dead. . . . That the first publisher may have copyright in the work, although he cannot point out the author, appears

to me to be implied in section 16 of the statute [5 & 6 Vict. c. 45], which requires the defendant, ‘if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book’ to give notice of ‘the name of the person whom he alleges to have been the author or first publisher.’ I think it is here assumed that there may be cases in which, if the plaintiff be ‘the first publisher,’ he may be entitled to copyright, although no author has been or can be named upon either side.” 20 Sc. Sess. Cas. 2d ser. 1163.

³ U. S. Rev. St. s. 4952.

⁴ 2 Blatchf. 165, 362.

⁵ 2 Am. L. T. R. N. s. 402.

ing the law on this point was removed by the use of the word proprietor in the existing statute.¹

The English courts have conceded that copyright will vest *ab initio* in an assignee; but they have held that statutory copyright can be assigned only by a writing, and have drawn no distinction between transfers made before and those made after publication.² According to this doctrine, only an assignee who has derived his title by a written assignment would be entitled to secure copyright. The fallacy of this theory has already been shown to be the false assumption, that the statute recognizes no other assignee than one to whom the statutory copyright has been transferred, and that this right can be assigned before it has any existence. The important fact has been overlooked, that, when an author disposes of an unpublished work, he does not convey any statutory copyright therein, because there is no statutory copyright to convey. The only rights which then exist, and which alone can be transferred, are common-law rights. When a person has acquired these rights from the author by any method recognized by the common law, whether by parol agreement or otherwise, he is the lawful owner of the unpublished work, and an assign within the meaning of the statute entitled to secure the copyright conferred by the statute. I have endeavored elsewhere to show more fully that the theory here criticised is contrary to sound principles and to the definition of assignee given by the statute of Victoria, and that in but one case³ yet reported it has been applied to the construction of that statute.⁴

The doctrine that copyright will vest, in the first instance, in the owner of a manuscript, is limited by the consideration that the author must be a person entitled to copyright. Thus, when the work of a foreigner is excluded from protection, neither the author nor his assignee can acquire valid copyright for it.

A manuscript or a copyright may be owned by the government or a corporation as well as by an individual, and the

¹ See *post*, p. 319, where it is maintained that the statute of the United States does not require an assignment to be in writing when the transfer is made before publication.

² See *post*, pp. 302-304.

³ *Leyland v. Stewart*, 4 Ch. D. 419.

⁴ See *post*, pp. 304 *et seq.*

rights of the government or corporation are governed by the same principles as those of an individual owner.¹

RIGHTS OF EMPLOYER AND AUTHOR EMPLOYED.

Assuming that the law is rightly expounded above, to the effect that copyright will vest *ab initio* in the owner of an unpublished production, it follows that any person may secure statutory copyright for a work which he has employed another to write. The produce of labor may become the property of him who has employed and paid the laborer. Literary labor is no exception to this universal rule. When an author is employed on condition that what he produces shall belong to the employer, the absolute property in such production vests in the employer by virtue of such employment and by operation of law. This mode of acquiring property in an unpublished work is as lawful as any other, and such owner is as clearly entitled as any other owner of an unpublished work to secure the privileges granted by the statute. Indeed, if the law were otherwise, there would be no copyright in many works already published, and it would be often impracticable to secure copyright for such works to be hereafter published. Thus, cyclopædias, gazetteers, directories, maps, charts, photographs, &c., are in many instances produced by persons employed on the condition that the results of their labor shall belong to their employers; and they are copyrighted and published as the property of such employers.

Cyclopædias and Periodicals in Great Britain. — In England, the owners of certain publications are expressly empowered to secure copyright in compositions which they have employed others to write. Section 18 of 5 & 6 Vict. c. 45, declares that when "the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever," has employed and paid a person to prepare articles for any such publication on the terms that the copyright shall belong to the proprietor, the copyright shall vest in the proprietor, "who shall enjoy the same rights as if he

¹ *Little v. Gould*, 2 Blatchf. 165, 362; *Marzials v. Gibbons*, Law Rep. 9 Ch. 518. See *ante*, pp. 161-164.

were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this act." It is, however, provided that the author may, by "any contract, express or implied," reserve to himself the right to publish his production in separate form, and, in case of such reservation, he will be the owner of the copyright in the separate publication.

The owner of any publication embraced within this section of the statute is thus expressly empowered to employ a person to write the whole or a part of it, and to acquire by virtue of the contract of employment either the absolute copyright in what is so written, or simply the right to use it in that special publication. Whether he acquires the one or the other of these rights will depend on the nature of the agreement, which need not be in writing nor in express words, but may be verbal and implied.¹ The copyright remains in the author, unless he has consented to part with it;² but, in the absence of an express agreement, such consent may be implied from the attending circumstances.³ If the absolute copyright vests in the owner,

¹ *Bishop of Hereford v. Griffin*, 16 Sim. 190; *Sweet v. Benning*, 16 C. B. 459; *Strahan v. Graham*, 16 L. T. N. S. 87, on ap. 17 Id. 457.

² *Bishop of Hereford v. Griffin*, *supra*; *Mayhew v. Maxwell*, 1 Johns. & H. 312; *Smith v. Johnson*, 4 Giff. 632; *Strahan v. Graham*, *supra*; *Delf v. Delamotte*, 3 Jur. N. S. 933.

³ *Sweet v. Benning*, *supra*. The plaintiffs were publishers of *The Jurist*, and had employed various lawyers to prepare reports of cases for that periodical. Nothing was said as to the copyright. The Court of Common Pleas held that there must be presumed an implied agreement that the copyright was to be the property of the employers. "It was urged," said Maule, J., "that these reports were not written 'on the terms that the copyright therein should belong to the proprietors' of *The Jurist*, because there were no express words in the contract under which they were written, conferring upon them the right to the copy. But, though no express words to that effect are stated in this special case, I think, that, where a man em-

plloys another to write an article, or to do any thing else for him, unless there is something in the surrounding circumstances, or in the course of dealing between the parties, to require a different construction, in the absence of a special agreement to the contrary, it is to be understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer — subject, of course, to the limitation pointed out in the 18th section of the act." 16 C. B. 484.

In the *Bishop of Hereford v. Griffin*, where it appeared that the plaintiff, at the request of the publishers, had written an article on Thomas Aquinas for the *Encyclopædia Metropolitana*, and no special agreement had been made as to the copyright, Vice-Chancellor Shadwell held that the publishers had acquired merely the right to publish the article in the cyclopædia. He said: "Then the defendants say that they believe that the ordinary terms of contract were adopted between the plaintiff and the publishers of the cyclopædia, and that no special agreement was entered into with respect to the

he alone is entitled to publish the production in a separate form.¹ If he has acquired merely the right of publication in a specified work, the ownership of the copyright continues in the author, and the owner is a mere licensee, without authority to publish the production in a separate form.²

There is, however, a special proviso "in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature," to the effect, 1, that at the end of twenty-eight years the right of publication in a separate form shall revert to the author, for the remainder of the term given by the statute; 2, that the owner shall not at any time publish the composition "separately or singly without the consent, previously obtained of the author thereof, or his assigns." The owner of a review, magazine, or like periodical, as well as the owner of any other publication embraced within the section, as a cyclopædia or a "work published in a series of books or parts," may acquire, by virtue of the contract of employment, the copyright in an article. This copyright will embrace all rights of publication, and is not restricted to the right to use the article in the periodical for which it is written. But, pursuant to the proviso just cited, the copyright in the case of a magazine or like periodical will revert to the author at the end of twenty-eight years; whereas, in the case of any work not included in the proviso, the copyright will continue in the owner during the entire statutory term. This appears to be the only respect in which the law in the case of "reviews, magazines, or other periodicals of a like nature," is different from that governing other publications within the purview of the section.³

reservation of any right of publication by the plaintiff. But, it must be observed that, according to the law, the copyright was in the plaintiff except so far as he parted with it; therefore no reservation was necessary to constitute a right in him." 16 Sim. 196.

These two authorities are not necessarily conflicting. The sound doctrine is that the copyright is in the author, unless he has consented to part with it. The court was of opinion that an implied consent to part with the copyright was created by the circumstances

attending the agreement in *Sweet v. Benning*, but not in the *Bishop of Hereford v. Griffin*. As these circumstances were not precisely the same in the two cases, the decisions may properly be different, and yet based on the same principles.

¹ *Sweet v. Benning*, 16 C. B. 459.

² See authorities cited *ante*, p. 244, note 2. As to what is a separate publication, see *Smith v. Johnson*, 4 Giff. 632; *Mayhew v. Maxwell*, 1 Johns. & H. 312.

³ That part of the proviso relating

The question may arise, whether in all cases the copyright in articles published in reviews, magazines, and like periodicals, is governed by section 18 of the statute. If so, the copyright, though it has vested in and become the property of the publisher, will revert to the author at the end of twenty-eight years. Whereas, by the general provisions of the statute, no distinction is made between periodicals and books in general; and, when the publisher acquires the copyright in an article first published in a periodical, he becomes the absolute owner of it for the full statutory term. The natural construction of the section under consideration would seem to be, that its provisions were intended to apply only to cases wherein authors have been expressly employed to prepare articles or other matter, and not to ordinary agreements concerning compositions, which the author has not been specially employed to write. In some cases, this distinction may be vague and unsatisfactory. But it would seem that, when an author has lawfully transferred to the publisher of a periodical the copyright in an article which he has not been specially employed to write, the respective rights of the parties are properly governed by the general provisions of the statute, and not by the special provisions of section 18. Indeed, the language of this section has been so strictly construed that actual payment for the article has been held essential to the vesting of the right of publication in the owner of the periodical.¹

to reviews, magazines, and periodicals, which prohibits the owner from publishing separately without the consent of the author, is, in my judgment, superfluous, unless it is to be construed as requiring for a separate publication a special consent apart from the original contract of employment. But it is not reasonable to suppose that this is its object or effect. By virtue of section 18 of the statute under consideration, if an author writes an article for a magazine or other periodical, under an agreement that the copyright shall belong to the owner, the latter thereby acquires all rights of publication during twenty-eight years, including the right of publishing separately; and he acquires such rights by consent

of the author. If, on the other hand, the agreement is that the owner shall have only the right to use the article in a named publication, he is not entitled to publish it in any other form, for the reason that he has not acquired that right, nor received the author's consent for a separate publication. Now, excepting the division of the term of the copyright between the owner and the author, this, as shown in the text, is precisely the law in the case of a cyclopædia, or other work to which the special proviso under consideration does not apply.

¹ *Brown v. Cooke*, 11 Jur. 77; *Richardson v. Gilbert*, 1 Sim. n. s. 336. In most of the cases which have been decided under section 18 of the statute,

It has not been judicially determined what classes of publications are embraced within section 18 of the statute of Victoria. That section was manifestly intended to empower the owners of cyclopædias, periodicals, and works published in parts, to acquire the copyright in the matter which they have employed others to write. But the language used embraces not only such owners, but also the owner of "any book whatsoever." This language would seem to be sufficiently comprehensive to include any literary composition which one person has employed another to write, and there seems to be no good reason why it should have a more restricted meaning.¹

General Publications in Great Britain. — But without regard to section 18, the statute rightly construed must be taken to vest copyright in any person who has employed another to produce a literary work. As has been shown,² an assignee is empowered by the statute to secure copyright, and by the comprehensive definition contained in the statute, such assignee may be a person who, "by operation of law, or otherwise," has acquired the interest of the author in an unpublished work. There can be little ground for doubt that this provision is broad enough to embrace a person who has become the owner of a literary

it appeared that the articles had been written by authors in the employment of the owners. Such was not the case, however, in *Strahan v. Graham*; yet this case was decided under this section. 16 L. T. n. s. 87, on ap. 17 Id. 457.

¹ In *Shepherd v. Conquest*, Jervis, C. J., referring to *Sweet v. Benning*, said *obiter*: "The decision there turned upon the construction of the peculiar provisions of the 18th section of the 5 & 6 Vict. c. 45, relating to periodical works, and it has no bearing upon the present case." 17 C. B. 445. But it was immaterial whether this section of the statute did or did not apply in *Shepherd v. Conquest*. Nor did the Chief Justice say what publications were within that section, or refer to the important words, "any book whatsoever," there used.

In *Delf v. Delamotte*, where it appeared that the plaintiff had written, and the defendant published, a book

called *The Practice of Photography*, Lord Campbell said: "I do not say that under the 5 & 6 Vict. c. 45, s. 18, it is impossible that the property of the copyright might be conveyed to and invested in a person for whom an author had undertaken to write. It was argued that section 18 only applied to copyright in articles furnished for magazines, periodicals, &c. Without saying how that is, it is quite clear that the property can only be so conveyed when, according to the act of Parliament, it is written on such terms, *i. e.*, on the terms that the copyright in the article shall belong to the proprietor, publisher or conductor, and where it has been paid for by such proprietor, publisher or conductor. Now it is clear that this book was not written with a view to the copyright being vested in Mr. Cundall." 3 J. n. s. 933.

² *Ante*, p. 238.

work by virtue of having employed and paid another to produce it.¹

But it may be going too far to say that the law to this effect is judicially settled. It is conceded that, when one person has employed and paid another to write a work, with the mutual understanding that it shall be the property of the employer, the latter acquires an equitable title which will enable him in a court of chancery to assert his rights in the published production against either the person employed or others.² Whether a complete legal title to the copyright will vest *ab initio* in such employer without the necessity of a written assignment, is a point on which the law has not been expressly declared by the courts of law; but the decisions in the chancery courts, though not in entire harmony, support the doctrine that an employer is capable of securing in his own name a valid copyright at law. And this doctrine has not been contradicted in any case decided since the statute of Victoria was passed. Lord Eldon held that the owner of a periodical had a valid copyright in translations which he had employed another to make;³ and Vice-Chancellor Leach ruled that the publisher of a dictionary of architecture was the owner of the copyright in the articles written by persons employed by him.⁴ In the recent case of *Grace v. Newman*, where it appeared that the plaintiff had hired a person to compile a collection of monumental designs taken from tombstones in cemeteries, and had published them in a book, and registered himself as the owner of the copyright, Vice-Chancellor Hall said: "Next, it was

¹ The proviso in section 18 may, however, operate in the case of articles written under employment for reviews, magazines, and similar periodicals, to limit the term of the copyright in the employer to twenty-eight years.

² *Wyatt v. Barnard*, 3 Ves. & B. 77; *Barfield v. Nicholson*, 2 L. J. (Ch.) 90, 102; s. c. 2 Sim. & St. 1; *Sweet v. Shaw*, 3 Jur. 217; *Grace v. Newman*, Law Rep. 19 Eq. 623.

³ *Wyatt v. Barnard*, *supra*.

⁴ *Barfield v. Nicholson*, *supra*.

Referring to the statute of Anne, the Vice-Chancellor said: "I am of opinion, that, under that statute, the

person, who forms the plan and who embarks in the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own peculiar acquirements—that he the person who so forms the plan and scheme of the work, and pays different artists of his own selection, who, upon certain conditions, contribute to it, is the author and proprietor of the work, if not within the literal expression, at least within the equitable meaning of the statute of Anne, which being a remedial law is to be construed liberally." 2 L. J. (Ch.) 102.

contended that the plaintiff is not entitled to a decree, because he has not brought himself within the section of the act which refers to authors and their assignees; but I think the words of the section are wide enough to embrace the case of a person employing another person and remunerating that person for the work done. The person remunerated has no claim to the copyright; but it is the property of the person who remunerates him, and in this court the person who remunerates must be taken to be the equitable assignee and the publisher within the meaning of the act."¹

In harmony with this doctrine is the decision of the court of Common Pleas in *Hatton v. Kean*, where it appeared that the defendant had designed a dramatic representation, consisting of

¹ Law Rep. 19 Eq. 626. To the same effect are *Nicol v. Stockdale*, 3 Swans. 687; *Cary v. Longman*, 1 East, 358; *Sweet v. Maugham*, 11 Sim. 51; *Hatton v. Kean*, 7 C. B. n. s. 268; *Wallenstein v. Herbert*, 16 L. T. n. s. 453; *Marzials v. Gibbons*, Law Rep. 9 Ch. 516, opinion of Lord Deas in *Maclean v. Moody*, 20 Sc. Sess. Cas. 2d ser. 1163. See also *Leader v. Purday*, 7 C. B. 4; *Stevens v. Wildy*, 19 L. J. n. s. (Ch.) 190.

Shepherd v. Conquest, 17 C. B. 427, and *Levi v. Rutley*, Law Rep. 6 C. P. 523, are not opposing authorities, for the reason that in neither was there an agreement, express or implied, that the production should become the property of the employer. In the former case, *Jervis, C. J.*, said: "We do not think it necessary in the present case to express any opinion whether, under any circumstances, the copyright in a literary work, or the right of representation, can become vested *ab initio* in any employer, other than a person who has actually composed or adapted a literary work." *Supra*, 444.

To the contrary, see *Jefferys v. Baldwin*, Amb. 164; *Storace v. Longman*, 2 Camp. 27, note; *Cary v. Kearsley*, 4 Esp. 168; *Sweet v. Shaw*, 3 Jur. 217. In the last-named case, the plaintiffs claimed copyright in law reports which had been prepared for them by persons

employed for that purpose. Vice-Chancellor Shadwell said: "I think that they have in equity, but I cannot understand how they have got the copyright at law; because I cannot see how at law the agreement that persons shall prepare a work for the plaintiffs gives the plaintiffs a copyright at law, for nothing can pass at law except that which actually exists."

The fallacy of this reasoning is the assumption that what passed from the reporters to the plaintiffs was the statutory copyright. The reporters prepared and delivered the manuscript reports under an agreement that they should be the absolute property of the plaintiffs. The transfer was of common-law rights, and hence embraced property in existence. Its validity was not affected by the fact that no statutory copyright was in existence, because this was not the subject of the transfer.

In *Hazlitt v. Templeman*, 13 L. T. n. s. 593, the court expressed the opinion, but did not decide, that the copyright would have vested in the author, and not in the employer. But as the defendant had registered the copyright in her own name, it was held that such registration was *prima facie* evidence of her title, which was not rebutted by the absence of proof of a written assignment.

a play of Shakespeare, with certain changes made by Kean, and with costumes, properties, scenery, dances, and music prepared by others under his direction. The plaintiff had been employed to compose the music, and afterward claimed that the property in it belonged to him. The court found that the defendant was the author and designer of an entire dramatic representation, and that the plaintiff had been hired to compose the music with the distinct understanding, and on the terms, that it should become a part of the entertainment, and that the defendant should have the sole liberty of performing it. It was therefore held that the music became the property of the defendant.¹ It could not have been successfully maintained that the defendant, though the designer of the entire representation, was the author of the music. Nor does music become a mere accessory or inseparable part of a drama merely because it is specially composed for such drama. It may have an independent existence and a value apart from the literary composition, as in the case of Locke's music to Macbeth, and Mendelssohn's music to the Midsummer Night's Dream. The true ground on which the decision rests is that the composer had been employed with the understanding and on the con-

¹ 7 C. B. N. S. 208.

"It appears to me," said Erle, C. J., "upon the facts thus admitted upon the record, that the defendant was the author and designer of an entire dramatic representation or entertainment, with respect to part of which, a small accessory, viz., the music, he employed the plaintiff upon the terms set out in the plea, — that, in consideration of certain reward paid by the defendant to the plaintiff, the music should become part of such dramatic piece as designed and adapted for representation by the defendant, and that the defendant should have the sole liberty of representing and performing, and causing and permitting to be represented and performed, the said musical composition with the said dramatic piece, and as an accessory thereto, and as part thereof. I am of opinion that the music so composed by the direction and under the superintendence of the de-

fendant, and as part of the general plan of the spectacle, must, as between him and the plaintiff, become the property of the defendant; and that, consequently, the defendant has violated no right of the plaintiff in causing it to be represented in the manner alleged. One cannot but perceive, that, if the plaintiff were right in his contention, the labor and skill and capital bestowed by the defendant upon the preparation of the entertainment might all be thrown away, and the entire object of it frustrated, and the speculation defeated, by any one contributor withdrawing his portion. As between these parties, and under the circumstances, it seems to me very clearly that the musical composition in question became the property of the defendant, and that the plaintiff never was within the language of the statute the owner or proprietor thereof." *Ibid.* 279, 280.

dition that the music should be the property of his employer.

Wallenstein v. Herbert Criticised. — The doctrine of *Hatton v. Kean* was misunderstood and misapplied by the Queen's Bench in the following case of *Wallenstein v. Herbert*.¹ The governing principle was the same in both cases; but the controlling facts were so vitally different that the decisions could not rightly be alike. It appeared in evidence that Matthews, the manager of St. James's Theatre, in London, had employed Wallenstein to furnish music for that theatre. The latter engaged and paid the musicians, supplied the instruments and compositions, and conducted the orchestra. Besides playing general orchestral music for the theatre, it was his duty to provide incidental music for dramas, when necessary; and such music he might either select or compose. In performance of this duty, he composed incidental music for *Lady Audley's Secret*, a drama brought out by Matthews, but of which the latter was in no sense the author, and at that time was not even the owner. In composing the music, the plaintiff had received no assistance from the manager, and had himself found the paper on which the music was written and employed a person to copy the various orchestral parts from the original score. These parts the composer kept in his own possession; nor did the theatre have a library of music. When the engagement between Matthews and Wallenstein had ended, the former obtained from the latter a duplicate copy of the music, with permission to use it "on a provincial tour." Afterward, when the defendant, Miss Herbert, had succeeded Matthews in the management of St. James's Theatre, and Wallenstein had ceased to be the musical director, she obtained permission from Matthews to represent *Lady Audley's Secret*, of which play he was now the owner, and received from him the duplicate copy of the music which Wallenstein had made for him. The original score was still in the possession of the composer, who had given no consent either to Matthews or to Miss Herbert to use the music in London.

The court, without deciding in whom the copyright vested, held that the controlling facts in this case were not different

¹ 15 L. T. N. S. 364, on ap. 16 Id. 453.

from those in *Hatton v. Kean*; that the music became an inseparable part of the drama, and was not an independent composition; that Matthews, by virtue of the contract of employment, had acquired an unlimited right to use the music; and that the defendant, as the licensee of Matthews, was also entitled to use it.

This decision was avowedly based on the authority of *Hatton v. Kean*. But the difference between the governing facts in the two cases is vital. The only ground, as has been seen, on which the decision in *Hatton v. Kean* can be sustained, is that the music was composed under an agreement that it should be the property of the employer; and this is the principle by which the judgment in *Wallenstein v. Herbert* is to be tested. It was not seriously claimed that Matthews was the author of the music; and the judgment of the court cannot be defended on the ground that the music became an inseparable part of the play, and could have no independent existence. Music and literature cannot be so closely blended but that the former may exist and have a value independently of the latter. In *Hatton v. Kean*, the plaintiff was not in the regular and general employment of the defendant, but had been expressly engaged to compose certain music; and there was a special agreement, as the court found, that the property therein should belong to the defendant. In *Wallenstein v. Herbert*, the plaintiff had written the music in the discharge of his ordinary duties, and there was no distinct agreement as to whose property it should be. It is conceded that it might have become the absolute property of the employer by an implied agreement, or a mutual understanding to that effect, created by the terms and conditions of the general employment, and without the necessity of an express or a special agreement. But such implied agreement or mutual understanding is not necessarily created by the mere circumstance of employment; and the facts established by the evidence in this case do not support the conclusion that there was any agreement or understanding between the parties that the music should become the property of the manager. Mr. Justice Shee said that it was "incumbent upon the plaintiff to show that he retained an independent right to the music."¹

¹ 16 L. T. N. S. 454.

But the property was in the person who created it, until he consented to part with it; and it was for Matthews to show that such consent had been given.

Wallenstein had agreed to play the usual orchestral music for the theatre, and also such music as might be specially required in the production of any drama. He was not bound to compose the latter, but was at liberty to make selections for that purpose. The theatre owned no musical compositions, and, it appears, paid no money for the purchase of any. Those which were not original were bought by Wallenstein, and it appears were kept by him as his own property; and no interest in their ownership was claimed by the theatre. It was the playing of the music and the use of the compositions, not the property in them, for which the manager contracted and paid; and, when Wallenstein had played the required music, he had performed his part of the contract. If Wallenstein had bought selections for, or paid another composer to write, the incidental music for *Lady Audley's Secret*, it would hardly have been contended that the manager had any rightful claim to the property in such music. Yet the principle is the same whether Wallenstein composed or selected the music. The manager acquired by the contract of employment no more property in the music composed by Wallenstein than in that bought by him; and he had no better title to either than to the instruments with which the music was played. Wallenstein was bound to furnish music for the drama, and Matthews was entitled to the use of it while the former was in his employment. But the property remained in the composer.

Nor did Matthews, as the court held, acquire the unlimited right to use the music. While the engagement lasted, the conductor was bound to supply the necessary music for the theatre, and the manager was entitled to the use of his compositions. But, when the former ceased to be employed, the latter had no more claim to the use of his music than to his services as conductor.

The controlling principle in this case is the same as in *Boucault v. Fox*,¹ where it appeared that the plaintiff had been

¹ 5 Blatchf. 87. See *post*, p. 257.

employed to write a play under an agreement that it should be performed at a certain theatre as long as it would run. The Circuit Court of the United States soundly construed the law to the effect, that, while the manager of the theatre might be entitled to the use of the play for the time contemplated in the agreement, he had no claim to its use beyond that time, and no interest in the property in the play, for the reason that there was no agreement, express or implied, to that effect.¹

Works of Art in Great Britain. — By the 7 Geo. III. c. 38, copyright is secured to any person “who shall invent or design, engrave, etch, or work, . . . or from his own work, design, or invention shall cause or procure to be designed, engraved, etched, or worked,” prints, engravings, &c.² Where a person had designed a map, and furnished the materials for preparing it, but had employed another to make the drawing, the former was held to be the author within the meaning of the statute.³

¹ In harmony with this doctrine are *Roberts v. Myers*, 13 Monthly Law Reporter, 396; *Shepherd v. Conquest*, 17 C. B. 427; *Levy v. Rutley*, Law Rep. 6 C. P. 523.

² The language of the American statute of 1802 was similar; 2 U. S. St. at L. 171. See *Binns v. Woodruff*, 4 Wash. C. C. 48.

³ *Stannard v. Harrison*, 24 L. T. N. S. 570. “Then,” said Vice-Chancellor Bacon, “as to whether the design or invention is that of the plaintiff or not is a mere matter of character. Mr. Concanen has been examined. He has proved that it is the design of the plaintiff; that the plaintiff brought to him his rough sketch or draft, a drawing of the same size as the stone upon which it was to be engraved, pointing out, as Mr. Concanen had said, ‘A rough sketch of the forts and town to give me an idea; he furnished me also with a large French map, and some maps published in the *Times* and *Daily Telegraph*; he gave me notice also daily of the earthworks that were made, and produced, besides, a picture published in the *Illustrated London News*.’ That the plaintiff cannot draw himself is a matter wholly

unimportant if he has caused other persons to draw for him. He invents the subject of the design beyond all question. He prescribes the proportions and the contents of the design; he furnishes a part of the materials from which the drawing has to be made in the first instance, and afterwards collects daily from the proper sources, and even if it be necessary to say so, from official sources, the decrees, the reports, the bulletins, and accounts contained in the newspapers of the different phases of the war, and especially of the places in which earthworks are thrown up. These he communicates to the man whom he has employed to make a drawing for him. Not having the skill to do it himself, he stands by, and, as Mr. Concanen says, comes to him daily with materials from which the lithograph is to be compiled. Can there be any thing more plainly within the words of the act of Parliament than that Mr. Stannard did himself invent, that he did procure another person to design and draw for him, and do that which he himself could not do?” *Ibid.* 572. See also *Stannard v. Lee*, 23 L. T. N. S. 306, on ap. Law Rep. 6 Ch. 346.

So copyright is given to any person "who shall make or cause to be made," a work of sculpture.¹

The 25 & 26 Vict. c. 68, s. 1, provides that, when any painting, drawing, or the negative of any photograph, "shall be made or executed for or on behalf of any other person" than the author, the copyright shall not be acquired by such person, nor shall it be kept by the author, except by an agreement in writing, signed by him who relinquishes the copyright. The effect of this provision must be that, when no such agreement is made, the copyright is not secured to any person.

Employer may Secure Copyright in United States.—In this country, the doctrine that a person may secure copyright for a work which he has employed another to write, though opposed by two decisions,² is supported by the weight of judicial authority.³ In *Little v. Gould*,⁴ it appeared that a reporter had been employed and paid a salary by the State of New York to prepare reports of decisions under a law that the copyright therein should be the property of the State. The copyright was entered in the name of the Secretary of State, "in trust for the State of New York;" and its validity was sustained, although no formal assignment had been made by the author. The State became the owner of the manuscript by virtue of having employed and paid the reporter, and, as such owner, was entitled to secure the statutory copyright.⁵ And so in *Lawrence v. Dana*, where it appeared that the com-

¹ 54 Geo. III. c. 56, s. 1.

² *Pierpont v. Fowle*, 2 Woodb. & M. 23, 46. *Atwill v. Ferrett*, 2 Blatchf. 39. *Binns v. Woodruff*, 4 Wash. C. C. 48, was decided under a special statute. See *ante*, p. 254, note 2.

³ *Little v. Gould*, 2 Blatchf. 165, 362; *Heine v. Appleton*, 4 Blatchf. 125; *Lawrence v. Dana*, 2 Am. L. T. R. N. s. 402. See also *Keene v. Wheatley*, 9 Am. Law Reg. 33; *Commonwealth v. Desilver*, 3 Phila. (Pa.) 31; *Siebert's Case*, 7 Op. Atty.-Gen. 656.

⁴ *Supra*.

⁵ "I am of opinion," said Nelson, J., "that the interest of the reporter in this third volume of his Reports, as an author, passed to the Secretary of State, in trust for the benefit of the

State, and that it was competent for that officer to take out the copyright in pursuance of the provisions of the act of Congress of 1831, securing to the State the exclusive right of proprietorship in the work. The reporter must be deemed to have accepted the terms and conditions of the acts of the legislature of April 11, 1848, and April 9, 1850, the effect of which was to vest the interest in the State, he receiving a compensation for his labors by way of annual salary." 2 Blatch. 365.

Mr. Justice Conkling thought that the relations between the reporter and the State might be regarded as creating "an assignment by operation of law." *Ibid.* 183.

plainant had gratuitously prepared notes for two editions of Wheaton's Elements of International Law, with the understanding that the property therein, as far as those two editions were concerned, should belong to Mrs. Wheaton, the court held that such property vested in her, as the work was done and delivered, without the necessity of a formal assignment, and that she was a proper person to take out the statutory copyright. Here the complainant, though receiving nothing for his services, was in the position of an author employed, and Mrs. Wheaton in that of an employer. By virtue of such relation, she became the owner of the property in the manuscript notes to the extent of the gift, and was entitled to secure the statutory copyright for the protection of such property.¹

¹ 2 Am. L. T. R. n. s. 402. Mr. Justice Clifford said: "Although the services were gratuitous, the contributions of the complainant became the property of the proprietor of the book, as the work was done, just as effectually as they would if the complainant had been paid daily an agreed price for his labor. He gave the contributions to the proprietor for those two editions of the work, and the title to the same vested in the proprietor, as the work was done, to the extent of the gift, and subject to the trust in favor of the donor, as necessarily implied by the terms of the arrangement. Delivery was made as the work was done, and the proprietor of the book needed no other muniment of title than what was acquired when the agreement was executed. Vested as the title and property of the contributions were in Mrs. Wheaton, she would not acquire any thing by an assignment from the contributor, as he had neither the immediate title to the contributions nor any inchoate right of copyright in those editions. He could not assign any thing, because he owned nothing *in presenti*, as the title to his contributions, and the inchoate right of copyright for those editions, had become vested in Mrs. Wheaton as proprietor of the book. Guided by these views, the court is of the opinion that none of the authorities cited by the respondents

to show that a written assignment from the complainant to Mrs. Wheaton was necessary have any proper application to the question under consideration, because the complainant never acquired any right to demand a copyright in his contributions to those two editions, but the contributions as they were made and composed, or put in form, became vested in the proprietor."

" . . . Literary property, even when secured by copyright, differs in many aspects from property in personal chattels, and the tenure of the property is governed by somewhat different rules; but the difference in the nature and tenure of the property is much greater before copyright is taken out, and while the right to that protection for the same remains entirely inchoate. Title to the notes or improvements prepared for a new edition of a book previously copyrighted may, in certain cases, be acquired by the proprietor of a book from an employé, by virtue of the contract of employment, without any written assignment; and, when so acquired, the tenure of the property depends upon the terms of the contract, but it cannot be held to be a mere license where, as in this case, the contract was that the proprietor of the book should take the exclusive right to the contributions for two successive editions, together with the right to copyright the same for the protection

The decisions which have been cited on this subject were rendered before the statute now in force was passed. As has been seen, this act expressly empowers the "proprietor" of a work to secure copyright;¹ and there can be no reasonable doubt that an employer may become such proprietor by virtue of the contract of employment.

No Copyright in Work of Foreign Author Employed.—No person can secure copyright for what he has employed a foreigner to write, unless the latter be a resident within the meaning of the law. For the statute expressly declares that the production of an alien author shall not be entitled to protection.

Employer not Entitled to Copyright by Mere Fact of Employment.—The mere fact of employment does not make the employer the absolute owner of the literary property created by the person employed. Where there is no agreement or implied understanding that what is produced shall belong to the employer, it is clear that the latter acquires no title to the copyright. For the property is in the author, unless he has consented to part with it.² In *Boucicault v. Fox*, it appeared that the plaintiff, while employed as an actor and stage-manager at the Winter Garden Theatre in New York, of which William Stuart was owner, had written the *Octoroon* under an agreement with Stuart that it should be performed as long as it would run at that theatre. It was afterward claimed that Stuart had become the owner of the play by virtue of such employment.

of the property, as the inchoate right of copyright unquestionably passed to the proprietor of the book by the same arrangement. Such inchoate right is incapable of any other limitation than that prescribed by the copyright act, so that the proprietor of the book necessarily took out the copyright in the usual form. Beyond controversy, she took it out by the consent of the complainant; and it is equally clear, in the judgment of the court, that she took it out for the protection of her own property in the notes, and in trust for the complainant when her property in the notes should cease. Arrangements of the kind, it is believed, are

frequently made between the proprietors of books and editors employed to prepare notes or other improvements to successive editions; and it is not perceived that there is any legal difficulty in upholding such a contract where, as in this case, it violates the rights of no one, and is entirely consistent with the public right." 2 Am. L. T. R. n. s. 414, 419.

¹ U. S. Rev. St. s. 4952.

² *Bishop of Hereford v. Griffin*, 16 Sim. 190; *Shepherd v. Conquest*, 17 C. B. 427; *Levi v. Rutley*, Law Rep. 6 C. P. 523; *Roberts v. Myers*, 13 Monthly Law Reporter, 396; *Boucicault v. Fox*, 5 Blatchf. 87.

But the court properly held that he had acquired no property in the piece, for the reason that there was no agreement, and nothing in the circumstances of the case, to create an implied understanding to that effect.¹

Copyright Vests in Employer only by Agreement. — To vest the employer with the literary property and a right to secure the copyright, there must be an agreement that he, and not the person employed, is to be the owner of the work produced. But such agreement need not be express. It may be implied from the terms and conditions of the employment.² A mutual understanding to that effect may be created by the relations of

¹ 5 Blatchf. 87. "Our next inquiry," said Mr. Justice Shipman, "is — was the literary property in the composition, and the exclusive right to its representation, in the plaintiff? The questions, under this head, relate to the bearing, on the plaintiff's title, of the fact, that he wrote the drama while in the employ of Stuart and for hire, and also to the proof of his copyright. It is proper here to revert to the agreement under which this play was produced by the author. That agreement was, that he should write this play, and perhaps some other plays, and that he should contribute his and his wife's services at the Winter Garden Theatre as long as the plays would run there, and receive half the profits, as a compensation. This cannot be construed into a contract conferring upon Stuart, or any one else, the legal or equitable title to this drama. The title to literary property is in the author whose intellect has given birth to the thoughts and wrought them into the composition, unless he has transferred that title, by contract, to another. In the present case, no such contract is proved. The most that could possibly be said, in regard to the right of Stuart, or his trustee, in the play, is, that the arrangement entitled them to have it performed at the Winter Garden as long as it would run. There is not the slightest foundation upon which they, or either of them, can rest a claim to the literary property in the manuscript. That property was in the plaintiff, sub-

ject, at most, to a license or privilege, in favor of Stuart and Fields, to have the piece performed at the Winter Garden. Whether the plaintiff was guilty of a breach of that part of his agreement which bound him to bestow his own and his wife's services, we need not inquire here. Such a breach, if proved, would not vest the proprietors of the theatre with the title to the Octoroon.

"A man's intellectual productions are peculiarly his own, and although they may have been brought forth by the author while in the general employment of another, yet he will not be deemed to have parted with his right and transferred it to his employer, unless a valid agreement to that effect is adduced. Publishers, when they employ authors in particular literary enterprises, of course settle, in the terms of their contracts, the rights of each party and the ownership of the copyright. This was not the case of writing a book for publication and general circulation. The play was to be produced, so far as Stuart and Fields were concerned, for a special purpose, which was that the play should be brought out by the plaintiff at the Winter Garden, and be performed as long as it would run. The contract cannot, by the most liberal construction, be expanded beyond this. Under these circumstances, the plaintiff was entitled to the copyright which he obtained." *Ibid.* 95.

² *Sweet v. Benning*, 16 C. B. 459.

the parties, and the circumstances attending the agreement. But the employer cannot be considered as the owner of what is written by an author independently of the duties for which the latter is employed and paid. Thus, as in *Boucicault v. Fox*, a manager has no property in a play written by a person whom he has employed as an actor. So statutes, judicial decisions, public documents, official reports, and productions which are the direct results of official labors, may naturally become the property of the government which pays for such services. But the government can have no rightful claim to the literary property in a work produced by an officer independently of his official duties.

A case might arise wherein a writer follows so closely the directions given by his employer that the creation of the work may be due to the mind of the latter, and he may properly be regarded as the author. But the employer cannot be considered the author when he "merely suggests the subject, and has no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed."¹

Cyclopædias and Periodicals in United States. — In the United States, there is no special statutory provision concerning the copyright in articles first published in cyclopædias, magazines, and other periodicals. The ownership of the property in these cases is governed by the same principles that apply in the case of books in general. An author may be employed to prepare an article for a publication of this kind on condition, either that the publisher is to be the absolute owner of the copyright, or that he is simply to have the right of using the article in the special work for which it was prepared. The respective rights of the parties will be determined by their agreement, which, if not express, may be implied from the terms and conditions of the employment and the attending circumstances. Where an author is expressly employed to write such articles, and, especially if he be regularly employed and paid a salary, these circumstances, in the absence of an express agreement, will go far toward supporting, and in some cases will be

¹ Jervis, C. J., *Shepherd v. Conquest*, 17 C. B. 445. See also *Levi v. Rutley*, Law Rep. 6 C. P. 523.

enough to establish, an implied agreement that the publisher is to be the absolute owner of the copyright.¹ But when a writer who is not specially employed for that purpose contributes an article to a cyclopædia, magazine, or other periodical, the natural presumption would be, in the absence of an express agreement or circumstances to the contrary, that he intended to give the right of using it only in that special publication; and, to establish a title to the copyright, it would be for the publisher to show that the author had consented to part with the absolute copyright.² If the publisher has acquired merely the right of publication in a special work, the right of publishing in any other form continues in the author. But the author would doubtless be barred from publishing at such a time as would defeat the advantages for which the publisher had paid.

Copyright in Person in whose Name entered. — In the United States, the legal copyright will vest in the person in whose name it has been entered. Whether or not he is the lawful owner will depend on his title to the work. A person who is not the author or owner of a work may take out the copyright in his own name, and hold it in trust for the rightful owner.³ Thus, when

¹ Sweet *v.* Benning, 16 C. B. 459.

² Bishop of Hereford *v.* Griffin, 16 Sim. 190.

A large part of the American Cyclopædia was prepared by writers regularly employed, and paid salaries. They worked in a place provided by the publishers, who also supplied books of reference, stationery, and all other things necessary to the prosecution of the work. No words passed between the publishers and the writers as to copyright in the articles; but there was a mutual understanding that this was to belong to the publishers. There can be no reasonable doubt that they became the absolute owners of the copyright in the articles written under these circumstances. On the other hand, many important articles were written by persons who were not thus regularly employed, but had been specially engaged to prepare certain articles for the cyclopædia. Whether the absolute property in such contributions vested in the publishers would depend

on the intention of the parties, to be determined by the nature of the agreement and the attending circumstances.

³ Little *v.* Gould, 2 Blatchf. 165, 362; Pulte *v.* Derby, 5 McLean, 328; Lawrence *v.* Dana, 2 Am. L. T. R. n. s. 402. In Little *v.* Gould, Nelson, J., said: "It has been argued by the counsel for the defendants, that the copyright in this case is void, on the ground that no authority is given by the act of Congress of 1831 for taking out the copyright in the name of a trustee, for the benefit of another. But, it may be answered, that there is nothing in the act forbidding it. The party to whom the assignment is made, whether for the benefit of another or not, holds the legal interest in the work as assignee of the author, and comes therefore within the very words of the law entitling him to the copyright. Whether a third person has an equitable interest in the work, derived from the author or from the legal assignment, is a question be-

an article has first been published in a cyclopædia, magazine, or any other publication, the legal title to the copyright, if taken out in the name of the publisher, will vest in him. But it may be the property of the author, and held in trust for him. And the same is true when the copyright of a book which belongs to the author is entered in the name of the publisher. In such case, a court of equity, if called upon, may decree a transfer of the copyright to be made to the owner.¹

Extension for Author and Family. — Besides granting copyright to the author or owner of a work, and the assignee of such person, for twenty-eight years, the existing statute of the United States provides that, at the end of that term, the author, inventor, or designer, if living, or his widow or children if he be dead, may secure a renewal of the copyright for fourteen years.² As neither the owner of a work nor an assignee is mentioned in this section, it would seem that the copyright for this additional term will not vest *ab initio* in such person.³ But elsewhere the ground is taken, that when the renewed copyright has been secured by the author, or his widow or children, it may be transferred to an assignee.⁴ If the copyright granted for the original term is invalid, it will not become valid by being renewed for the additional term of fourteen years.⁵

tween those parties, in respect to which I do not see that the public interest or policy is at all concerned. The courts will take care of those equitable interests. The legal assignee of the author is competent to take out the copyright, and the Secretary of State must be regarded as standing in this position, under the act of the legislature of April 9, 1850." 5 Blatchf. 366.

¹ Lawrence v. Dana, 2 Am. L. T. R. n. s. 402. In the English case of Hazlitt v. Templeman, where it was a question whether the copyright belonged to the plaintiff or the defendant, Blackburn, J., said: "I do not wish to express a decided opinion; but my impression is that he [Hazlitt]

would have been the author, and that the copyright would have been in him, although a court of equity might have called on him to transfer the copyright to Templeman." 13 L. T. n. s. 595.

² U. S. Rev. St. s. 4954.

³ Pierpont v. Fowle, 2 Woodb. & M. 41-45. See also Marzials v. Gibbons, Law Rep. 9 Ch. 518.

⁴ See post, p. 333.

⁵ Wheaton v. Peters, 8 Pet. 591, 654, where the Supreme Court of the United States ruled that a valid copyright for the second term provided by the act of 1790 could not be secured when the copyright for the first term was void. See also Brooke v. Clarke, 1 Barn. & Ald. 396.

CHAPTER V.

STATUTORY REQUISITES FOR SECURING COPYRIGHT.

UNITED STATES.

THE several statutes of the United States have prescribed certain things to be done by a person seeking to obtain copyright; but there has been some diversity of opinion as to whether a compliance with all the conditions so imposed is essential to a complete title.

Requisites Prescribed by Acts of 1790 and 1802. — The act of 1790¹ provided that no person should be entitled to its privileges unless he should deposit, before publication, a printed copy of the title of the book in the clerk's office of the district court of the United States where the author or the owner resided;² and declared that the author or owner, within two months after making such deposit, should publish a copy of the record thereof in one or more newspapers, for four weeks;³ and, within six months after publishing the book, should deliver a copy of it to the Secretary of State of the United States.⁴ By the supplementary act of 1802,⁵ it was declared that every person, "before he shall be entitled to the benefit of the act" of 1790 "shall, in addition to the requisites enjoined in the third and fourth sections of said act," cause a notice of the entry of copyright to be printed on the title-page, or the page immediately following, of a book, or on the face of a map, chart, print, or engraving.⁶

Difference of Judicial Opinion as to Meaning of Acts of 1790 and 1802. — Construing these two statutes together, the Supreme Court of the United States held, in *Wheaton v. Peters*, that a performance of all the conditions prescribed by Congress

¹ 1 U. S. St. at L. 124.

² s. 3.

³ s. 3.

⁴ s. 4.

⁵ 2 U. S. St. at L. 171.

⁶ s. 1.

was essential to valid copyright.¹ Two of the judges² dissented from this judgment, and maintained that the only requirements essential to complete the copyright were deposit of the title, pursuant to the statute of 1790, and imprint of the notice in the book, as prescribed by the act of 1802; that the provisions concerning the publication of the record in a newspaper, and the delivery of a copy of the book to the Secretary of State, were merely directory; and that failure to comply with them did not affect the validity of the copyright. This opinion was based on the ground that the statute of 1790 expressly enacted that no person should be entitled to copyright, unless he should deposit a printed copy of the title before publication, but that its language relating to the other two requirements was merely directory, and not mandatory; and, while the act of 1802 had added a condition whose observance was essential, it could not be construed as changing the provisions in the earlier statute, to which it was merely supplementary.

This view of the act of 1790 had been taken by the Supreme Court of Errors of Connecticut,³ and by the Circuit Court of the United States in *Ewer v. Coxe*.⁴ But in the latter case the court held that the act of 1802 had not only prescribed an additional requisite, but had also made delivery of a copy of the book to the Secretary of State, and publication in a newspaper of the record of entry, essential to copyright, though they were not so under the statute of 1790. As has been said, the decision of the Supreme Court of the United States was based on the interpretation of the two statutes; and it does not appear what construction would have been given to the first one alone.⁵

While there has been this diversity of opinion as to whether delivery of copies and publication of the record in a newspaper were necessary to a complete title, it has never been questioned that the language used in the acts of 1790 and

¹ 8 Pet. 591, 654. See also *King v. Force*, 2 Cranch C. C. 208; *Clayton v. Stone*, 2 Paine, 382.

² *Thompson and Baldwin*.

³ *Nichols v. Ruggles*, 3 Day, 145.

⁴ 4 Wash. C. C. 487.

⁵ Mr. Justice McLean, who deliv-

ered the judgment of the court, said that his opinion was founded chiefly on the act of 1790. 8 Pet. 665. But it does not appear what were the views on this point of the other judges in the majority.

1802 made the deposit of the title-page before publication, and the imprint of the copyright notice in the book, essential to copyright.

Requisites Prescribed by Statute of 1831.— The act of 1831,¹ which repealed the statutes then existing, expressly declared that no copyright should be secured without depositing, before publication, a printed copy of the title of the book in the clerk's office of the district court,² and printing the prescribed notice on the title-page or that next following.³ The language in which these requirements were prescribed leaves no room for doubt that without their performance no copyright could be acquired. The provision, however, requiring a copy of the book to be delivered to the clerk of the district court, within three months after publication,⁴ followed the form used in the act of 1790. But it has been seen that, while Mr. Justice Washington in *Ewer v. Coxe*, and the minority of the Supreme Court in *Wheaton v. Peters*, maintained that the provision in the statute of 1790 was merely declaratory, and did not affect the validity of the copyright, that doctrine is not supported by authority.

Judicial Construction of Statute of 1831.— The meaning of the statute of 1831 on the points under consideration has been fully considered by the courts. And it is now well established that a performance of the three requisites prescribed by that act were essential to the vesting of copyright.⁵ Even where the notice in the book was to the effect that the copyright had been entered in 1847, whereas in fact it had been entered in 1846, the error, whether it arose from mistake or otherwise, was held to defeat the copyright.⁶ So also the copyright was rendered invalid by the fact that the title-page had been deposited not before, but after, publication.⁷ Printing the copyright notice on the margin of an engraving, where it would be visible when the picture was framed, was held to be a com-

¹ 4 U. S. St. at L. 436.

² s. 4.

³ s. 5.

⁴ s. 4.

⁵ *Baker v. Taylor*, 2 Blatchf. 82; *Jollie v. Jaques*, 1 Id. 618; *Pulte v. Derby*, 5 McLean, 328; *Struve v. Schwedler*, 4 Blatchf. 23; *Lawrence v. Dana*, 4 Am. L. T. R. n. s. 402; *Farmer v. Calvert Lithographing, Engraving*

& Map-Publishing Co., 5 Am. L. T. R. 168; *Osgood v. Allen*, 1 Holmes, 185; *Chase v. Sanborn*, 6 U. S. Pat. Off. Gaz. 932.

⁶ *Baker v. Taylor*, *supra*.

⁷ *Baker v. Taylor*, *Struve v. Schwedler*, *supra*.

not?

pliance with section 5 of the act which required such notice "to be imprinted on the face" of the work.¹ The name of the publishers and the date and place of publication were held not to be a part of the title of a map to be recorded.²

The delivery of a copy of the book to the Smithsonian Institution, and one to the library of Congress, pursuant to section 10 of the act of 1846³ establishing that institution, was not essential to copyright.⁴

What must be done to Secure Copyright under Statute now in Force. — Whatever grounds there may have been for doubt concerning the meaning of the earlier acts on the points under consideration are removed by the language used in the statute now in force,⁵ which grants copyright to such persons only as shall comply with its provisions, and expressly declares that no person shall be entitled to copyright or maintain an action for infringement unless he shall first do three things: 1, before publication mail to the Librarian of Congress, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or a description of the painting, drawing, chromo, statue, statuary, or model or design for a work of the fine arts;⁶ 2, within ten days after publication, deliver or mail to the same officer two copies of such book or other article, or a photograph of the painting, drawing, statue, statuary, model or design;⁷ 3, print on the title-page, or the page next following, of every copy of a book, or in the case of a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, model or design, inscribe on some visible part of it, or on the substance on which it is mounted, the notice of entry of copyright in the prescribed form.⁸

Compliance with Statutory Requisites Essential to Copyright. — "There is," said Mr. Justice Sawyer, "no possible room for

¹ *Rossiter v. Hall*, 5 Blatchf. 362.

² *Farmer v. Calvert Lithographing, Engraving & Map-Publishing Co.*, 5 Am. L. T. R. 168.

³ 9 U. S. St. at L. 106.

⁴ *Jollie v. Jaques*, 1 Blatchf. 618.

⁵ U. S. Rev. St. ss. 4948-4971.

⁶ s. 4956.

⁷ *Id.*

⁸ s. 4962. Two forms are prescribed, either of which may be used: 1. "Entered according to act of Congress in the year—, by A. B., in the office of the Librarian of Congress at Washington." U. S. Rev. St. s. 4962. 2. "Copyright 18—, by A. B." Act of June 18, 1874, s. 1; 18 U. S. St. at L. 78.

construction here. The statute says no right shall attach until these acts have been performed; and the court cannot say, in the face of this express negative provision, that a right shall attach unless they are performed. Until the performance as prescribed, there is no right acquired under the statute that can be violated.”¹

¹ *Parkinson v. Laselle*, 3 Sawyer, 333. To the same effect are *Boucicault v. Hart*, 13 Blatchf. 47; *Carillo v. Shook*, 22 Int. Rev. Rec. 152; *Marsh v. Warren*, 4 Am. L. T. n. s. 126; s. c. 9 Chic. Leg. News, 395; *Centennial Catalogue Co. v. Porter*, 2 Weekly Notes of Cases, 601; *Benn v. LeClercq*, 18 Int. Rev. Rec. 94.

In *Parkinson v. Laselle*, Sawyer, J., said: “It is settled by the Supreme Court in *Wheaton v. Peters*, that every act required by the act of Congress of May 3, 1790, and of April 29, 1802, relative to copyright, is essential to the title derived under those acts. Unless he performs every act required by these statutes, the author acquires no exclusive right. See also *Jollie v. Jaques*, 1 Blatchf. 618, and *Baker v. Taylor*, 2 Id. 82. The authority of these decisions is not questioned by complainant, but it is insisted that the present statute is different and requires a different construction. On the contrary, it appears to me to be more difficult under the present statute to escape the construction adopted by the Supreme Court in *Wheaton v. Peters* than under the former acts.

“Under section 3 of the act of 1790, there was some ground for claiming that it was only necessary to deposit a printed copy of the title to a book or map, in order to secure a copyright; and that the provisions of the latter part of this section, and in section 4, for publication of a copy of the record, and the delivery of the copy of the work, were merely directory, or at most conditions subsequent. But there is no ground for such claim under the present act. Under section 4952 of the Revised Statutes, an author of a book or map is to have ‘the sole liberty of printing . . . and vending the same,’

only ‘upon complying with the provisions of this chapter;’ that is to say, all the provisions, for no exception is made. No one provision is referred to rather than another. As the statute has not limited the acts to be performed to any one provision less than the whole, the courts have no authority to say that any one rather than another, less than the whole is sufficient. Section 4956 in express terms declares that ‘no person shall be entitled to a copyright unless he shall before publication deliver at the office of the Librarian of Congress, or deposit in the mail addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book or other article, &c.; nor unless he shall also, within ten days from the publication thereof, deliver at the office of the Librarian of Congress, or deposit in the mail addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of such book, or other article,’ &c. There is no possible room for construction here. The statute says no right shall attach until these acts have been performed; and the court cannot say, in the face of this express negative provision, that a right shall attach unless they are performed. Until the performance as prescribed, there is no right acquired under the statute that can be violated.

“It is claimed by the complainant that section 4962 prescribes the essentials necessary to authorize the maintenance of the action; and that the court cannot add others. It is upon this section that it is sought to distinguish this case from those arising under former acts, which did not contain the provision. The provision relied on is, that ‘no person shall maintain an action for the infringement of his copyright, unless he

Section 4953 of the existing statute grants copyright for twenty-eight years "from the time of recording the title," and section 4964 gives the owner of the copyright a right of action against every person who, "after the recording of the title of any book," shall without authority publish or sell copies. Similar provisions were contained in the earlier statutes. They do not, as has been erroneously held,¹ enable a person to maintain an action at law for the violation of copyright before that right has been completely secured by performance of all the statutory requisites. The right which accrues to the author on recording the title has been described as an incomplete one which becomes perfect when the other acts prescribed by the statute are performed. "The right," said Mr. Justice McLean, in pronouncing the judgment of the Supreme Court of the United States, "undoubtedly accrues on the record being made with the clerk, and the printing of it as required; but what is the nature of that right? Is it perfect? If so, the other two requisites are wholly useless."²

shall give notice thereof by inserting in his several copies of every edition published . . . if it be . . . a map . . . by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: "Entered according to act of Congress, in the year . . . by A. B., in the office of the Librarian of Congress, at Washington." But the difficulty in adopting the complainant's view is, that a cause of action must exist before an action can be maintained; and there can be no cause of action till a right exists, and that right has been violated.

"Under sections 4952 and 4956 the plaintiff can have no copyright till he has performed the prescribed conditions; and until he has acquired his copyright, there can be no violation of that right at all which can afford a ground of action. Instead of section 4952 being a limitation of the acts to be performed, or alleged in order to entitle a party to maintain an action, it imposes an additional duty upon him as a prerequisite to its maintenance. He must first acquire a copyright under

the other provisions of the act, and then, in order to enforce his right against infringers, he must also give notice of his right by the means prescribed by section 4962, so that other parties may not copy his work in ignorance of his rights. This seems to be the object of the provision. An analogous provision, and for a similar purpose, copied from previous acts, is found in section 4900, relating to patent rights.

"The complainant's claim can derive no argumentative support against the express negative provisions of the statute already cited and discussed, from section 4960, providing for a penalty to be recovered from the author on failure to perform all the conditions prescribed. This seems to be intended to furnish additional guarantees against attempts of parties to avail themselves of the benefits of a copyright without first performing all the conditions prescribed in order to confer the right." 3 Sawyer, 832.

¹ *Boucicault v. Wood*, 2 Biss. 34. See this case criticised in Chap. XV.

² *Wheaton v. Peters*, 8 Pet. 664.

Not until all the acts prescribed by the statute are performed is the copyright perfected, and not until then can an action at law be maintained for its violation.¹ But the copyright, when completed, dates from the time of recording the title, and from that time the work is under the protection of the law. Otherwise, there might be a period between the first and the last acts necessary to perfect the copyright, during which the author's property would be exposed to piracy without any present or future remedy. Hence, a wrong-doer is made liable for a wrongful act done at any time after the recording of the title. But the remedy at law for such wrongful act does not exist until the copyright is perfected.² In equity, however, the author may be

"Although a printed copy of the title of such book is required before the publication to be sent to the Librarian of Congress, yet this is only as a designation of the book to be copyrighted; and the right is not perfected under the statute until the required copies of such copyright book are after publication also sent." *Shepley, J., Osgood v. Allen*, 1 Holmes, 192.

¹ Concerning one of the prescribed requisites, viz., printing the copyright notice in the book, the statute expressly declares that, unless this is done, no person shall maintain an action for infringement. s. 4962.

² "The acts required to be done by an author to secure his right, are in the order in which they most naturally transpire. First, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page; then the public notice in the newspapers is to be given; and, within six months after the publication of the book, a copy must be deposited in the Department of State.

"A right undoubtedly accrues on the record being made with the clerk, and the printing of it as required; but what is the nature of that right? Is it perfect? If so, the other two requisites are wholly useless. How can the author be compelled either to give notice in the newspaper, or deposit a copy in the State Department? The statute affixes no penalty for a failure to perform either

of these acts; and it provides no means by which it may be enforced. But we are told they are unimportant acts. If they are indeed wholly unimportant, Congress acted unwisely in requiring them to be done. But whether they are important or not is not for the court to determine, but the legislature; and in what light they were considered by the legislature, we can learn only by their official acts. Judging then of these acts by this rule, we are not at liberty to say they are unimportant, and may be dispensed with. They are acts which the law requires to be done, and may this court dispense with their performance? But the inquiry is made, Shall the non-performance of these subsequent conditions operate as a forfeiture of the right? The answer is, that this is not a technical grant of precedent and subsequent conditions. All the conditions are important; the law requires them to be performed, and consequently their performance is essential to a perfect title. On the performance of a part of them the right vests, and this was essential to its protection under the statute; but other acts are to be done, unless Congress have legislated in vain, to render the right perfect. The notice could not be published until after the entry with the clerk, nor could the book be deposited with the Secretary of State until it was published. But these are acts not less important than those which are re-

entitled to protection as soon as the title-page is recorded, and before the copyright is completely secured, provided he has not been guilty of negligence in completing his title.¹

It was held under the act of 1790, that the copyright was not defeated by failure to deliver a copy of the book within the time prescribed, provided such delivery was made before the beginning of the action.² This doctrine is clearly wrong. The statutes have expressly named the time within which copies shall be delivered, and the courts have repeatedly held that a strict compliance with the statutory requirements is essential. In the recent case of *Chase v. Sanborn*, the Circuit Court of the United States held that it was not enough, under the act of 1831, to show that a copy of the work had been delivered to the clerk of the District Court, but that it must appear that such delivery had been made within the prescribed time of three months.³

Requisites in Case of New Editions. — Successive editions of a book which are mere reprints of the first edition will be protected by the copyright obtained for the first edition without the title being recorded anew or additional copies delivered. The original copyright notice, however, must appear in each copy of every edition.⁴ But if a subsequent edition contains new matter, or substantial changes in the old, it will be necessary, in order to protect such additions or alterations, to obtain a new copyright; in which case all the requirements of the statutes must be observed, including a notice of the new entry of copyright to be printed in such edition.⁵

quired to be done previously. They form a part of the title, and until they are performed, the title is not perfect. The deposit of the book in the Department of State may be important to identify it at any future period, should the copyright be contested, or an unfounded claim of authorship be asserted." *McLean, J., Wheaton v. Peters*, 8 Pet. 664.

¹ *Pulte v. Derby*, 5 McLean, 328. "Until these things [required by the statute] are done," said Mr. Justice McLean, "the copyright is not perfect; although by taking the incipient step, a right is acquired which chancery will

protect until the other acts may be done." *Ibid.* 332.

² *Dwight v. Appleton*, 1 N. Y. Leg. Obs. 195. The work was in five volumes; the first and third, but not the others, had been delivered to the Secretary of State within the prescribed time. See also opinion of Attorney-General Wirt, in *Daboll's Case*, 1 Op. Atty.-Gen. 532.

³ 6 U. S. Pat. Off. Gaz. 932.

⁴ U. S. Rev. St. s. 4962; act of June 18, 1874, 18 U. S. St. at L. 78.

⁵ *Lawrence v. Dana*, 2 Am. L. T. R. n. s. 402, 417-418; *Farmer v. Calvert Lithographing, Engraving, & Map-*

Must Original Copyright Notice be Printed in Revised Edition?
 — In *Lawrence v. Dana*, the Circuit Court of the United States held that it is not necessary to print in a revised edition the notice of the original entry of copyright, in addition to the notice of the new entry.¹

Publishing Co., 5 Am. L. T. R. 168; *Banks v. McDivitt*, 13 Blatchf. 163, 169.

¹ 2 Am. L. T. R. n. s. 402, 417-418. The same question was raised, but not judicially discussed or decided, in *Banks v. McDivitt*, 13 Blatchf. 163, 169. In *Lawrence v. Dana*, Mr. Justice Clifford said: "Second defect in the copyright, as alleged in argument by the respondent, 'consists in the omission to give notice in said editions of the copyright secured in the original edition.' Persons desirous of securing a copyright must comply with the conditions of the copyright act, and if they fail to do so they are not entitled to the benefit of its provisions. Authorities to support that proposition are not necessary, as those conditions are prescribed by an act of Congress. Deposit must be made before publication, if the subject-matter is a book, of a copy of such book in the clerk's office of the district court, as before explained; and the applicant must give information of copyright being secured, by causing to be inserted, in the several copies of each and every edition published during the term secured, on the title-page or the page succeeding, the following words, viz., 'Entered according to act of Congress in the year _____, by A. B., in the clerk's office of the district court of _____,' (as the case may be). Beyond doubt, the omission to comply with those requirements renders the copyright invalid, as the act provides that no person shall be entitled to the benefit of the act unless he fulfils those conditions; but the important inquiry arises, What are those conditions? Full compliance with the conditions prescribed in the fourth section of the act is conceded; but the theory of the respondents is that the fifth section of the act re-

quires that the same notice *in totidem verbis* must be inserted in the several copies of each and every edition published during the term secured, so that the second and every subsequent edition shall correctly specify the date of the original entry. They cite no authorities which support the proposition, and they assign no reasons in support of it, except that the act makes no provision for a change of the date in the successive notices to be given, and that the omission to give notice of the original copyright in subsequent editions tends to mislead the public. Acts of Congress are to be construed by the rules of the common law, and the construction should be such as will carry into effect the true intent and meaning of the legislature; but the province of construction can never extend beyond the language employed as applied to the subject-matter and the surrounding circumstances.

"Change of date in the notice required in case of successive editions of the same book, it may be conceded, is not contemplated by the fifth section of the copyright act; but the meaning of the provision is that a new notice in the same prescribed form shall be given in every improved edition published during the term. Compliance with that requirement, when the original edition is published, is a full protection for that edition throughout the term; but it is no protection to a second edition with notes, nor to any succeeding edition with improvements, because the requirement is that the 'information of copyright secured' shall be 'inserted in the several copies of each and every edition.' Neglect to comply with that condition in a second edition will not vitiate the copyright of the original edition, if it was regularly secured, nor will a valid copy-

In my judgment this is not the right interpretation of the law. The decision was rendered under the act of 1831.

right of a second edition cure material defects in the copyright of the original edition. Copyrights of the editions of a work other than the original edition are granted for additions to, emendations of, or improvements in the work, and every copyright should bear date of the day when it was secured.

“ Authors or proprietors of a book for which a copyright is secured are required by the second section of the act of the 3d of March, 1865, ‘ within one month of the date of publication ’ to transmit, free of postage or other expense, a printed copy of the book to the library of Congress at Washington, for the use of said library; and the fourth section provides that, in the construction of that act the word book shall be construed to mean every volume and part of a volume, together with all maps, prints, or other engravings belonging thereto, and shall include a copy of any second or subsequent edition which shall be published with any additions; but the proviso enacts that the author or proprietor shall not be required to deliver to the said library any copy of the second or any subsequent edition of any book, unless the same shall contain additions as aforesaid, nor of any book not the subject of copyright. Prior to the passage of that act, the courts had decided that the ‘ information of copyright being secured, ’ if duly entered in the first volume of a work of several volumes, was sufficient; but all the residue of the provision is merely in affirmance of the true intent and meaning of the copyright act. *Dwight v. Appleton*, 1 N. Y. Leg. Obs. 195. Subsequent editions without alterations or additions should have the same entry, because they find their only protection in the original copyright; but second or subsequent editions with notes or other improvements are new books within the meaning of the copyright acts, and the authors or proprietors of the same are required to

‘ deposit a printed copy of such book, ’ and ‘ give information of copyright being secured, ’ as if no prior edition of the work had ever been published; and the term of the copyright as to the notes or improvements is computed from the time of recording the title thereof, and not from the time of recording the title of the original work.

“ Copyrights, like letters-patent, afford no protection to what was not in existence at the time when they were granted. Improvements in an invention not made when the original letters-patent were issued are not protected by the letters-patent, nor are the improvements in a book not made or composed when the printed copy of the book was deposited and the title thereof recorded as required in the fourth section of the copyright act. Protection is afforded by virtue of a copyright of a book, if duly granted, to all the matter which the book contained when the printed copy of the same was deposited in the office of the clerk of the district court, as required by the fourth section of the copyright act; but new matter made or composed afterward requires a new copyright, and if none is taken out, the matter becomes public property, just as the original book would have become if a copyright for it had never been secured. Publishers may be in the habit of inserting more than one notice in new editions, but there is no act of Congress prescribing any such condition. Whenever a renewal is obtained under the second section of the copyright act, the requirement is that the title of the work so secured shall be a second time recorded, and that the applicant must comply with all the other regulations in regard to original copyrights; but there is nothing in any act of Congress to show that each successive edition must specify the date of the original copyright, as contended by the respondents. Tendency to mislead the public cannot be

But the provisions of the existing statute are substantially the same as those of the former one. I shall consider the statute now in force.

Section 4962 of the Revised Statutes enacts that "no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published" words showing in what year and by whom the copyright was entered.¹ Taken in connection with the entire statute, the object and effect of this provision are reasonably clear. The statute makes no express provision for securing new copyrights for successive editions of a book. If one edition does not differ from another, they are, as far as copyright is concerned, the same work. If any one contains new or revised matter, it is, as far as it differs from another, a new work within the meaning of the law. Copyright is secured in the same manner as in the case of a new work. Hence, there is no necessity for express statutory provision for editions differing from the original. Congress, then, in requiring the notice of entry to appear in each volume of every edition, had in view but one copyright and but one notice of entry; and these were the original ones. The statute had already, in a previous section, prescribed, as conditions of securing copyright, that the title of the book should be recorded before publication, and two copies delivered after publication.² Nothing would be gained by requiring these things to be done again, when a new edition of the work is published under cover of the original copyright. Hence, their repetition is not required. But the purpose of the copyright notice is to inform the public when and by whom the book was copyrighted; and it is evident that this object is not attained unless this information is given in every copy, not only of the first, but of every edition published. To make this requirement clear, and to prevent the construction that the copyright once secured could not afterward be forfeited by omission to print the copyright

successfully predicated of a copyright in due form of law, where it appears that the party who secured it complied with all the conditions prescribed in the copyright act, which is all that need be remarked in reply to the sug-

gestion of the respondents upon that subject." 2 Am. L. T. R. n. s. 418.

¹ Section 5 of the act of 1831 was substantially the same.

² s. 4956.

notice in any subsequent edition, Congress expressly declares that such notice shall appear in every edition. No mention is made of the notice of any new copyright obtained for a subsequent edition; and the statute cannot rightly be construed to the effect that Congress in making the provision under consideration had this notice in view. Such construction defeats the very object of requiring a notice to be given. For the notice of the new entry, while it gives the required information concerning the new copyright, does not show, what the statute expressly declares shall be shown, when and by whom was entered that copyright, which alone protects the greater part of the new edition. Moreover, to prescribe that the notice of entry of the new copyright in any edition shall be printed in that edition would be as unnecessary as it would be to re-enact the other statutory requisites essential to secure copyright in a new edition. Hence, as applied to any other than the original notice of entry, the provision of the statute under consideration is wholly superfluous. Applied to that notice, it is intelligible and useful.

It is conceded that the printing of the original notice, or the absence of it, in any subsequent edition can have no effect on the copyright in the new matter of that edition. Such matter is entirely distinct from the original work, and is protected by a copyright wholly independent of the original copyright. In other words, as has been said, the revised edition, to the extent that it differs from any preceding edition, is a new work within the meaning of the law. It is not less true that the copyright secured for a new edition extends only to what is new in that edition, and does not protect what was before published. The latter is protected by the copyright secured for it, and not by any copyright afterward obtained.

Whether, then, the original work, or any unchanged matter which appeared in it, is entitled to protection, is to be determined solely by the validity of the original copyright, and is in no wise affected by the fact whether another copyright for an improved edition has or has not been obtained. It is conceded that each copy of every edition which is not different from the original must contain the original notice, and that any copies published without such notice become common property.

The principle is the same when the original is reprinted with new matter in a new edition. The new copyright covers the new, but not the old, matter; the new notice of entry applies to what then first appears in print, but not to what was before published. In such case, the original work is reprinted without the notice of entry of that copyright by which alone it is protected. It must therefore become common property, not less than when it appears without the notice of a new entry of copyright.

I have given what in my judgment is the right construction of the statute. But it should be remembered that the contrary doctrine has been expressly affirmed by so learned a jurist as Mr. Justice Clifford.

Books in two or more Volumes. — When a book is published in more volumes than one, it is obvious that a copy of each volume must be delivered to the Librarian of Congress. If the several volumes are issued at the same time, there would seem to be no reason why the process of recording the title should be repeated in the case of each volume. But a different rule might be held to apply where the volumes are issued at considerable intervals of time. In a case decided in 1840, it was held that, where the notice of entry had appeared only in the first volume of a work in five volumes, the validity of the copyright in the other four was not thereby defeated.¹ The statute does not expressly prescribe that the copyright notice shall be printed in every volume. But, as the chief object of requiring the notice to be given is to inform and warn the public that the book is protected by a copyright, which cannot be infringed with impunity, it is clear that the intention of Congress may be often defeated, unless the prescribed notice appears in every volume of the work.

Newspapers and Magazines. — When the different parts or numbers of any publication can be regarded as independent and distinct productions, a separate copyright must be secured for each one, and all the requirements of the statute must be performed in the case of each one. Thus, each number of a newspaper, magazine, or other periodical, is a distinct publication, wholly independent of any other number. Hence, a dis-

¹ *Dwight v. Appleton*, 1 N. Y. Leg. Obs. 195.

tinct copyright must be obtained for each number. To secure copyright for an article published in a newspaper, or other uncopyrighted publication, the copyright notice printed at the head of the article, or in some other conspicuous place, would doubtless be a sufficient compliance with that provision of the statute which requires such notice to be printed on the title-page, or that next following, of a book.

Delivery of Copies to Librarian of Congress. — Section 4956 of the Revised Statutes provides, as has been shown, that no person shall be entitled to copyright unless he shall deliver or mail to the Librarian of Congress two copies of the book or article for which protection is claimed. Section 4959 declares that the owner of every copyright book or other article shall deliver or mail to the librarian “within ten days after its publication, two complete printed copies thereof, of the best edition issued, or description or photograph of such article as hereinbefore required, and a copy of every subsequent edition wherein any substantial changes shall be made.”¹ Failure to comply with this requirement will subject the owner of the copyright to a penalty of twenty-five dollars.² But there can be little doubt that copyright may be secured by delivering two copies of the work, pursuant to section 4956, although such copies may not be of “the best edition issued,” as required by section 4959.

Section 4960 provides that “the proprietor of any copyright” shall be liable to a penalty of twenty-five dollars for failure to deliver to the Librarian of Congress, within ten days after publication, two copies of the book or other article. This provision, as its language imports, doubtless applies only to publications which have been entered for copyright, and not to those for

¹ This section is an illustration of how loosely statutes are sometimes drawn. What purpose it was designed to serve is by no means clear. If it was intended to make the delivery of two copies of “the best edition” of a book a condition essential to copyright, that object would not only have been better secured by inserting the words best edition in section 4956, but it is defeated by the construction which must be given to the two sections taken together. The only effect of section 4959 is to secure for the library of Congress, under a penalty of twenty-five dollars for non-delivery imposed by section 4960, two copies of the best edition, instead of two copies of any edition, as required by section 4956. Moreover, the word description is carelessly and erroneously used in section 4959, as will be seen by a careful comparison of this with section 4956.

² s. 4960.

which the protection of the statute is not claimed. Surely, it is optional with an author or publisher either to accept or decline the privileges offered. In the former case, he is subject to the provisions of the statute. But when he chooses to publish his work without making any claim of copyright, and the statute grants him no privileges, there is no reason for believing that Congress intended to subject him to any statutory penalties.

Penalty for Falsely Printing Copyright Notice. — Any person who causes a copyright notice to be printed in a book, or on any other article, for which he has not obtained a copyright, is made “liable to a penalty of one hundred dollars, recoverable, one-half for the person who shall sue for such penalty, and one-half to the use of the United States.”¹

Fees for Securing Copyright. — The only fee charged for granting a copyright is one of fifty cents; to be paid to the Librarian of Congress for recording the title of a book or the description of a work of art.² A copy under seal of such record may be obtained from the librarian by paying fifty cents. But the taking of such copy is optional with the owner of the copyright. Its chief use seems to be as evidence in a court that the title of the work has been recorded in conformity with the law; and for this purpose a copy of the record may be obtained any time before it is needed.

Written assignments of copyright are required to be deposited in the office of the Librarian of Congress within sixty days after their execution.³ One dollar must be paid to the librarian for recording and certifying an assignment. A copy of the assignment, with a certificate under seal of the record, may be obtained by the payment of one dollar.⁴

How to Secure Renewal of Copyright. — In order to secure a renewal of copyright for the additional term of fourteen years, which is given to the author or his widow or children, such person is required to record “the title of the work or description of the article so secured a second time,” and to comply “with all other regulations in regard to original copyrights, within six months before the expiration of the first term. And such person shall, within two months from the date of said

¹ s. 4968.

² s. 4958.

³ s. 4955.

⁴ Act of June 18, 1874, s. 2; 18 U. S. St. at L. 79.

renewal, cause a copy of the record thereof to be published in one or more newspapers, printed in the United States, for the space of four weeks.”¹

GREAT BRITAIN.

In England, there are no statutory regulations whose observance is essential to the vesting of copyright in works of literature. Such works must be registered at Stationers' Hall before an action at law or a suit in equity can be brought for piracy; but the validity of the copyright is not affected by non-registration. Delivery of copies to certain libraries is required; but neither the copyright, nor the remedies for its invasion, are made dependent on such delivery.

Delivery of Copies to Libraries. — The present statute requires a copy of every book published to be delivered to the British Museum within a prescribed time after publication;² and, conditionally, to the Stationers' Company for each of the following libraries: the Bodleian at Oxford, the Public at Cambridge, the Library of the Faculty of Advocates in Edinburgh, and that of Trinity College in Dublin.³ The author or publisher is not bound to deliver a copy for any of the four libraries last mentioned, unless a written demand is made on behalf of the library within one year after the publication of the book; and the copy delivered need not be of the best edition. The delivery to the British Museum is necessary without demand, and the copy must be one of the best printed. The penalty for failure to deliver copies, either to the British Museum or the other libraries, is forfeiture of the value of the copy which should have been delivered, and a sum not exceeding five pounds to be recovered by the librarian or other officer of the library.⁴ The above provisions concerning the delivery of copies apply to all productions which may be regarded as books under the 5 & 6 Vict. c. 45;⁵ including dramatic and musical compositions, maps, and charts, but not prints, engravings, photographs, works of art, &c., unless published as part of a book.

¹ U. S. Rev. St. s. 4954.

² 5 & 6 Vict. c. 45, s. 6. Different times for delivery are prescribed for different places of publication.

³ s. 8.

⁴ s. 10.

⁵ See definition of book in s. 2.

Registration. — Books. — The statute of Anne provided that no person should be liable to its forfeitures or penalties for printing any book, unless the title thereof had been registered before publication at Stationers' Hall.¹ But this, as judicially construed, did not make registration necessary to complete the copyright, and did not bar the owner from bringing an action for damages, although the book had not been registered.²

The statute of Victoria now in force provides for the entry, by the owner of the copyright, in the registry book of the Stationers' Company, of the title of the book, and the time of first publication, and the name and the place of abode of the publisher and the owner.³ The charge for registration is five shillings. A certified copy of registration may be obtained for five shillings, and is *prima facie* proof of ownership, but subject to be rebutted by other evidence.⁴ The statute declares that no person shall maintain an action or suit, at law or in equity, for the infringement of copyright in a book, unless before the beginning of the action or suit the book has been registered; but "the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof."⁵

The utility of the provision requiring registration is not apparent. The validity of the copyright is in no wise affected

¹ 8 Anne, c. 19, s. 2.

² "It was always held," said Lord Mansfield, "that the entry in Stationers' Hall was only necessary to enable the party to bring his action for the penalty. But the property is given absolutely to the author, at least during the term." *Tonson v. Collins*, 1 W. Bl. 330. See also *Beckford v. Hood*, 7 T. R. 620; *Cadell v. Roberts*, 5 Pat. App. Cas. 493; *University of Cambridge v. Bryer*, 16 East, 317; *Rundell v. Murray*, Jac. 311; *Colburn v. Simms*, 2 Hare, 543; *Murray v. Bogue*, 1 Drew. 353. The report of *Blackwell v. Harper* in 2 Atk. 95, represents Lord Hardwicke as saying, "Upon the act of 8 Anne the clause of registering with the Stationers' Company is relative to the penalty and the property cannot vest without such entry." Doubtless

the words here italicized are incorrectly reported. According to the report of the same case in *Barnardiston*, Ch. 213, Lord Hardwicke said that registration "is only a provision that is necessary to be complied with when the penalty of that act is taken advantage of."

³ 5 & 6 Vict. c. 45, s. 13. In *Stevens v. Wildy*, 19 L. J. N. S. (Ch.) 190, the court expressed the opinion that the author, without making an assignment, may associate any person with himself as the registered owner of the copyright.

⁴ s. 11. See *Boosey v. Davidson*, 13 Q. B. 257; *Jeffreys v. Kyle*, 18 Sc. Sess. Cas. 2d ser. 906; *Hazlitt v. Templeman*, 13 L. T. N. S. 593; *Graves's Case*, Law Rep. 4 Q. B. 715.

⁵ s. 24.

by registration or its omission. Nor does registration serve as a notice to the public that the book is protected, and therefore cannot lawfully be reprinted without license. The owner is not required to show that the book was registered when the offence complained of was committed. Registration is merely a formal act which must be performed before the action or suit is brought, and may be done at any moment before that time. It is simply the first step in the legal proceedings against piracy.¹ But, to entitle a person to sue, a strict compliance with the requirements of the statute as to registration must be shown. A false entry of any fact required by the statute will defeat the registration.² It is not enough to register the month of publication; the day must be given.³ An error of two days in the date of publication, as entered in the registry, has been held to defeat the owner's right to sue.⁴ So also the registration was held to be vitiated by a slight error in the name of the firm registered as owners.⁵ But, while such defects in the registration will defeat a suit already begun, a new and correct entry in the registry may be made, and another action brought.⁶ No literary work can be lawfully registered before it is published; hence, an action at law or a suit in equity for the infringement of copyright cannot be brought until after the publication of the work. "It is inconsistent with the whole scheme of the Copyright Act," said Vice-Chancellor Wood, "that you should be able to register a book not published; as the act gives a right merely from the date of first publication, and it must, therefore, be idle to register a book, as it were, in embryo."⁷

¹ Murray v. Bogue, 1 Drew. 353; Stannard v. Lee, Law Rep. 6 Ch. 346; Hogg v. Scott, Law Rep. 18 Eq. 444; Goubaud v. Wallace, 36 L. T. n. s. 704. A different law has been made concerning paintings, drawings, and photographs, in which case the provisions of the statute relating to registration must be complied with before the offence is committed. See *post*, p. 281.

² Collette v. Goode, 7 Ch. D. 842.

³ Mathieson v. Harrod, Law Rep. 7 Eq. 270. See also remarks of Blackburn, J., Wood v. Boosey, Law Rep. 2 Q. B. 355.

⁴ Low v. Routledge, 33 L. J. n. s.

(Ch.) 717. See also Page v. Wisden, 20 L. T. n. s. 435.

⁵ Low v. Routledge, *supra*. But where the address of the publishers was given as the abode of the author, who did not reside in England, the registration was held to be good. Lover v. Davidson, 1 C. B. n. s. 182.

⁶ Low v. Routledge, Law Rep. 1 Ch. 42; Stannard v. Lee, 6 Id. 346; Hogg v. Scott, Law Rep. 18 Eq. 444.

⁷ Correspondent Newspaper Co. v. Saunders, 11 Jur. n. s. 540. See also Murray v. Bogue, 1 Drew. 353, and authorities cited p. 280, note 3.