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THE
LAW OF COPYRIGHT

BY

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J. B. RICHARDSON, M.A., LL.B. (CANTAB.)

OF THE MIDDLE TEMPLE AND THE NORTH EASTERN CIRCUIT

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INTRODUCTION

THE passing of The Copyright Act, 1911, has completely recast the Law of Copyright, at any rate those parts which depend primarily on Statute Law, such as the term of protection and ownership of copyright. Only those parts of the law which are practically judge-made—such as the questions as to infringement by a new work other than an exact copy—have remained to any great extent unaltered, and even they are not untouched. The new Act possesses many merits, and when the older law has been rendered obsolete by the lapse of time, it will largely simplify Copyright Law, but at present—like all Consolidation Acts dealing with subjects of the like nature—it has, for the time being, greatly complicated the law in many respects. In cases where from

the nature of things the new law cannot immediately render the old obsolete, even the most necessary and the best conceived reforms cause additional inconvenience when they first come into operation. In the history of real property law, the time when the law was most complicated and uncertain was not before the Reform Act; it was probably in the 'fifties and 'sixties, when the practitioner required full knowledge of the old law as it stood in 1830 and of all the changes made in it afterwards.

Besides this unavoidable cause of complication The Copyright Act, 1911, contains a more serious one. It was not content with consolidating and amending the old Copyright Law; it introduced the royalty system, a very doubtful experiment. The Copyright Commission of 1878 decisively condemned the royalty system as an alternative to copyright. Time alone can show how these two systems will work together. The truth is that the Act was passed too late or too soon for a scientific piece

of legislation; too late for pure copyright legislation, too soon for its supersession by the royalty system, or for a scientific combination of them.

In addition to the legislative alterations in the law, there has been a distinct change in the spirit in which the Courts have dealt with the claim of authors to be protected against unfair treatment of their works other than literal copying. Statements which were true even thirty years ago are true no longer. At one time the law as to infringement might be fairly summed up in the words "addition condones subtraction"; in later cases the chief stress is laid on the question of competition; then any derivative work of the same nature is forbidden; then The Copyright Act, 1911, protects the owner of copyright against reproduction by mechanical contrivances (subject to the royalty system). Practically every reproduction of which the author may reasonably complain is forbidden.¹

¹ Except so far as the royalty system is introduced; and perhaps a few instances under The Copyright Act, 1911.

The obvious method of dealing with a branch of law which has been codified is by way of commentary on the codifying Act, but after careful consideration this has been abandoned. In the first place the Act does not lend itself easily to commentary. Secondly, the method leads to unnecessary length, as lengthy provisions of the Act can be summarized very shortly. But the chief objection is the difficulty of working in the old law, if this method is followed. Knowledge of the old law is essential in dealing with copyright questions. Nearly all the questions of the present Copyright Law can be brought under the following heads:—

- (1) What intrinsic qualities must a work possess to be capable of copyright?
- (2) What steps must the author take to secure copyright?
- (3) Who is the owner of the copyright?
- (4) What acts will infringe the copyright?
- (5) What are the remedies for infringement?

In any actual case (1), (2), and (3) may depend solely on the old law; (4) depends mainly on

the present law, but that present law must be collected from decided cases under the old law; (5) alone depends purely on present law.

The method adopted in dealing with the subject in the present work is as follows:— A short outline of the history of Copyright is given first, chiefly dealing with the history of Literary Copyright, to give the reader an idea of the outline of the law on the eve of The Copyright Act, 1911, and including a short summary of the chief changes introduced by that Act (Chapter I.). In the General Part the system set up by the Act is considered (Chapter II.). In the Special Part the various branches of Copyright Law are separately discussed (Chapters III. to VII.). In these the old law as to each branch is discussed so far as it has not been rendered obsolete, and the chief changes in the law have been pointed out. All old law will be found under this head, and such of the present law as must be collected to any large extent from decided cases, notably

“Qualifications for Copyright” and “Infringement.” On the other hand, such subjects as “Remedies” will be treated in the “General Part.” Chapter VIII. deals with “Colonial Copyright.” Then follows the consideration of the International system set up by the Berlin Convention and The Copyright Act, 1911, in Chapter IX., dealing with the relations with Foreign States and also with the conditions requisite for securing copyright in the United States of America.

J. B. RICHARDSON.

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CHAPTER I.

HISTORY OF THE LAW OF COPYRIGHT.

Copyright at Common Law.

THE chief interest in the history of the Law of Copyright centres round the question, Was copyright known to the Common Law? or, in other words, Had the author of a published work the exclusive right of multiplying copies of it in perpetuity by the Common Law? For all practical purposes the question was settled in *Donaldson v. Becket*,¹ where it was decided by the House of Lords, in accordance with the opinion of a bare majority of the judges, that, whatever might have been the rights of the author at Common Law, such rights had been impliedly abolished by the Statute of Anne,² and that since then the Law of Copyright rested wholly on Statute. But on account of the great historical interest of the question, and also on account of the light which it throws on many decisions which are still good law, and (it is submitted) on the varying attitude of the Courts towards the claim of authors to be protected against unfair use of their works other than open or colourable piracy, it is advisable to consider briefly the facts which formed the subject of so much controversy during the eighteenth century.³

The question is greatly complicated by the fact that prior to the final expiration of the Licensing Act in 1694

¹ [1774] 2 Bro. P. C. 129; 4 Burr 2408; 17 Cobbett Parl. History 954.

² 8 Anne c. 19.

³ Later, if we include *Jefferys v. Boosey*, [1854] 4 H. L. C. 816, and the debates in Parliament in the years prior to the passing of The Copyright Act, 1842.

the rights of authors are almost lost sight of in the struggle for complete control over the press, first by means of the prerogative and afterwards by Acts of Parliament. Moreover down to 1640 this control was exercised exclusively through the Star Chamber. Under such conditions it was almost impossible for the private rights of authors to be considered in the Common Law Courts apart from the public question of licensing. Nor did the supposed owners of copyrights themselves desire it. They had "a much speedier and more effectual remedy than actions at law or bills in equity."¹ Usage and general opinion, as evidenced by the acknowledgment of "copy"² in Acts and Ordinances and other public documents and by the writings of Milton and others, are the only possible evidence of the Common Law at the time.

Introduction of Printing.

The history of copyright begins with the introduction of printing into England in the reign of Edward IV., according to the generally received story by Caxton in 1471, or by Corsellis at Oxford at the King's expense in 1468. Prior to that time there is no trace of copyright, the reason probably being that the multiplication of copies was so slow that the value of any one copy was not substantially affected by the making of others. From that point the history of copyright falls naturally into the following periods.

Period I.—From the Introduction of Printing to the Incorporation of the Stationers' Company in 1556.

At first there seems to have been perfect liberty to print any book whatsoever, and in 1483-4 an Act of Parliament³ was passed allowing the importation of books

¹ Per Willes, J., in *Millar v. Taylor*, [1769] 4 Burr, at p. 2313.

² The technical word for copyright at this time.

³ 1 Ric. III. c. 9, s. 12; repealed by 25 Henry VIII. c. 15, s. 1

printed abroad, but as the number of printers and the importance of the press increased the King assumed a general prerogative jurisdiction over the press.

Royal Prerogative.

As the Royal claims develop in the seventeenth and eighteenth centuries they appear to consist of two parts, one of which was allowed by the Courts and one disallowed. First, the King claimed complete control over certain classes of books, such as Acts of Parliament, Ordinances, Law Books, and Law Reports, as Head of the State; and the Bible and Book of Common Prayer as Head of the Church. These claims were afterwards partly based on the ground of property; that the King paid the judges who declared the law: that the Year Books were reported at his expense: that the translation of the Bible had been bought by him, and consequently that he had acquired the "copy" in them.¹ The other claim was a general property in the art of printing, on the ground that it had been introduced by Corsellis at the King's expense. This was plainly stated in the argument in *Atkins v. Stationers' Company*,² but there, according to Lord Mansfield, the claim was at once rejected. But these distinctions belong to a later age. During this period the assumption by the Crown of absolute power over the press was universally acquiesced in, although it was made a source of profit to the King and his courtiers.³

Privileges.

One William Faques, or Fakes, styles himself "Regius Impressor" in a proclamation issued in 1504.⁴ In 1518 Richard Pynson, the successor of William Faques, is granted an exclusive privilege of printing a particular

¹ *Millar v. Taylor*, [1769] 4 Burr 2303. Compare the dicta of Willes, J., at pp. 2315-7, and Lord Mansfield, at pp. 2401-5, with those of Yates, J., at pp. 2381-4.

² [1666] Carter's Reports 89; 4 Burr 2316.

³ See the instances collected in Scrutton, pp. 9-11.

⁴ Herbert's Ames Typographical Antiquities, vol. i., p. 308.

book for two years.¹ During the reign of Henry VIII. privileges were very freely granted to various printers for varying periods, generally seven years. These include a patent to Reginald Wolfe of the office of King's printer, coupled with a general prohibition to print such books as were therein specially assigned to him, or such books as "*propria sua industria diligentia atque labore conquisivit*"—the first acknowledgment of property in a literary work apart from the material form.² A little earlier occurs the first case of piracy on record. Peter Trevers, or Treveris, took the liberty of reprinting a Treatise on Grammar by Robert Witinton, first printed by Wynken de Worde in 1523; and in a second edition printed by de Worde in 1533 he is bitterly attacked by Robert Witinton for so doing. To prevent any further piracy a privilege is obtained for the second edition.³ About this time we find instances of privileges granted expressly in recompense of the labour which the author had bestowed on his work. In 1530 a privilege for seven years is granted to "*maistre Jehan Palsgraue Angloys natyf de Londres et gradue de Paris*" for a book to teach French in "*dewe consyderation of his sayd long tyme and great dyligence about this good and very necessary purpose employed, and also of his sayd great costes and charges bestowed about the imprintyng of the same.*"⁴ And in 1537 there is a letter from Grafton to Lord Cromwell asking for protection against attempts to reprint the Bible commonly known as Matthew's Bible, until he should have disposed of the copies already printed, on the following grounds:—

1. That he has been put to great cost in printing the work and will be ruined if other printers are allowed to print it in a cheaper form.

¹ Herb. Ames Typ. Ant., vol. i., p. 264.

² Rym. Foedera, vol. xv., p. 150. Lowndes, pp. 4-5.

³ Lowndes, pp. 6-8. Herb. Ames Typ. Ant., vol. i. 187.

⁴ Herb. Ames Typ. Ant., vol. i. 470-1.

2. That such cheaper copies will be worthless and inaccurate.

3. That it is unreasonable for others to reap the fruits of his labour and expenses.¹

During this period the only check on the complete freedom of the printers to print any book they desired was the Royal Prerogative; and this was afterwards seized upon by the enemies of copyright at Common Law as a clear proof of the non-existence of any literary property. The restraints imposed by the Royal Prerogative were stigmatized as usurpation and tyranny. But this is not in harmony with the political theory of the times. Down to the end of the Tudor period the King is regarded as possessing unlimited powers, save where he has expressly granted them away. He is entitled to full jurisdiction over any matter not expressly assigned to some other authority; he possesses not merely the "residuary Royal jurisdiction" in matters of law, but also powers of general supervision over trade, &c., as *parens patriae*.² It is not until the seventeenth century that a Coke can say, "The King hath no prerogative but what the Common Law allows him."³

Period II.—From the Incorporation of the Stationers' Company in 1556 to the Fall of the Star Chamber in 1640.

Incorporation of the Stationers' Company.

In 1556, avowedly for the purpose of suppressing "heretical and seditious" works, it was determined to unite all the printers into one body and make the heads of it responsible for the conduct of individual members. By letters patent, therefore, the Stationers' Company was

¹ Lowndes, 7-8.

² Bate's Case, 2 St. Trials 371.

³ Proclamations, 12 Coke's Rep. 74.

incorporated on the 4th May, 1556. By their Charter they were empowered to make bye-laws binding on their members, and the art or mystery of printing in England was strictly confined to their body. The Master and Wardens were authorised to search for and destroy all prohibited books, and to imprison anyone exercising the art of printing contrary to their direction. This Charter was confirmed by Elizabeth in 1559.¹

In exercise of this power the Company required everyone who printed a work to enter it first in their Register Book; and anyone omitting to do so, or printing a *book belonging to another member*, was fined.²

More than 2000 copies were thus entered as the property of particular persons between 1576 and 1595, and from 1582 onwards there are entries with the express proviso "that if it be found any other has right to any of the copies, then the licence touching such of the copies *so belonging to another* shall be void."³

Decrees of the Star Chamber.

During the reign of Queen Elizabeth the granting of patents to print books was greatly abused, often extending to the sole right to print all books of a particular class, such as all books of Common Law or all music books. These patents pressed so hard on the poorer printers that obtaining no redress by petitions to the Queen, they began to print in defiance both of the Queen's patents, and also of the laws of the Company.⁴ On her accession the Queen had strictly forbidden the printing of any book without a licence⁵; and by way of enforcing this a decree of the Star Chamber in 1566 enacted that "the printing of any book against the force and meaning of any

¹ Lowndes, p. 10; Maugham, *Literary Property*, p. 12.

² *Ibid.*, p. 11; per Willes, J., in *Millar v. Taylor*, [1769] 4 Burr, at p. 2314.

³ Carte; Maugham *Lit. Prop.*, p. 17.

⁴ Lowndes, p. 11.

⁵ *Ibid.*, p. 12.

ordinance, prohibition or commandment contained, or to be contained in any of the Statutes or laws of the realm, or in any injunctions, letters patent, or ordinances should be visited with the forfeiture of all such books and disability to exercise the art of printing, besides imprisonment for three months without bail or mainprize."¹ In 1586, in response to petitions by the Company for the enforcement of their bye-laws, another decree renews the directions as to licensing contained in the injunctions of 1559, and enacts "that no one shall print any book or other paper, contrary to any Statute, letters patent, &c., or *contrary to any allowed ordinance* set down for the good government of the Company of Stationers within the City of London."² A proclamation of the 25th September, 1623, recites the above decree, and states that it had been evaded "by printing beyond sea such books, works, or writings as had been imprinted within the realm by such to whom the sole printing thereof, by letters patent or *lawful ordinance or authority*" [clearly referring to the ordinances of the Stationers' Company] "did appertain," and subjects importers to the penalties appointed for persons offending against the decree of 1586.³ And by the decree of the 11th July, 1637⁴ [the last issued by the Star Chamber on the matter], no person is to print or import any book or copy "which the said Company of Stationers or any other person have or shall, by any letters patent, order, or entrance in their Register Book or *otherwise*,⁵ have the right, privilege, authority, or allowance solely to print" (Section 7); and by Section 2 all books and pamphlets are to be entered in the Register Book of the Company.

¹ Lowndes, p. 13; Luck, History of Printing, p. 104.

² Maugham, p. 13; Herb. Ames Typ. Ant. iii., p. 1668.

³ *Ibid.*, p. 13.

⁴ Middle Temple Library Tracts, vol. xlviii; Lowndes, p. 15.

⁵ Relied on by Willes, J., in *Millar v. Taylor*, 4 Burr, at p. 2314, as showing a right to exist at Common Law apart from patent, order, or entry on the Register of the Company.

During this period there are certain indications of a Common Law right on the part of the author, but the greatest part of the evidence is of a most unsatisfactory character. Its significance depends entirely on the answer to the question, What entitled a member of the Stationers' Company to enter a "copy" in his name on the Register? If purchase from the owner entitled him, copyright at Common Law is proved beyond a doubt; if not, it is practically disproved. This question is, however, unanswerable. The most that can be said is that there are certain indications that the former is the true view, and the expressions of opinion during the next period strongly confirm it.

**Period III.—From the Fall of the Star Chamber
in 1640 to the Final Expiration of the
Licensing Act in 1694.**

Ordinances of the Long Parliament.

In 1640 the Court of Star Chamber was abolished,¹ and all proclamations or decrees regulating the Press were treated as illegal. The two Houses made an Ordinance in 1641 prohibiting printing unless the book was first licensed and entered in the Register of the Stationers' Company. In this Ordinance occurs the first unequivocal recognition of an owner of the "copy"—the prohibition of printing or importing *without the consent of the owner* upon pain of forfeiting the same to the owner or owners of the copies of the said books.² Attempts were made in 1641 to procure the free printing of all works, but a protest was made by several divines, who were in favour of the prevailing party, against this. They urged "that, to their knowledge, very considerable sums of money had been paid by stationers and printers to many authors for

¹ 16 Car. I., c. 10.

² Maughan, p. 13.

the copies of such useful books as had been imprinted. In regard whereof we conceive it to be both just and necessary that they should enjoy a property for the sole imprinting of their copies." This, they said, was the only means of recompensing scholars and preventing "vicious impressions, to the great discouragement of learned men and extreme danger of all kinds of good learning."¹ In 1643 the two Houses published an Ordinance² for suppressing "the great abuses and disorders in printing" which recites (*inter alia*) that divers persons "(contrary to former orders and the constant custom used among the Stationers' Company) had taken liberty to print, vend, and publish the most profitable vendible copies of books belonging to the Company and other Stationers," and provides that all books should be entered in the Register Book of the Company of Stationers "according to ancient custom," and that no one should print or import printed any book so entered "for any particular member thereof without the license and consent of the owner thereof," on pain of forfeiture to the owner or owners of the copies of the said books and such further punishment as shall be thought fit.

The Ordinance also forbade the printing of books without a licence before publication, and in 1644 Milton published his famous plea in favour of unlicensed printing, mentioning as one of the glosses used to colour the Ordinance "the just retaining of each man his several copy: which God forbid should be gainsaid."

Another Ordinance follows in 1647, without any mention of the rights of the owner³; and another in 1649, for putting down false and scandalous pamphlets and regulating printing, contains the following enactment:—"That no person shall print or reprint any book entered in the Register

¹ Lowndes, p. 16; Maugham, p. 14. ² Scobell, Acts and Ordinances, p. 44.

³ *Ibid.*, p. 134.

Book of the Stationers' Company *without the consent of the owner thereof, or stitch or bind or put to sale any book upon pain of forfeiture of the same and 6s. 8d. for each book.*"¹

Licensing Act, 1662.

The fall of the Commonwealth in 1660 was almost immediately followed by the Licensing Act in 1662,² which was continued from time to time with one interval of six years³ down to 1694. The primary object of the Act is to give the Government complete control over the press, though there is a distinct recognition of "copy."

Section 8 forbids the printing of any book without a licence and without previous entry of the books in the Register of the Stationers' Company; and forbids the Universities to meddle either with books of Common Law or matters of State and Government, "*nor any book the right of printing whereof doth solely and properly belong to any particular person or persons, without his or their consent.*"

Section 6 forbids the printing or importing of any book which any person by force or virtue of any entry duly made in the Register Book has the right, privilege, authority, or allowance solely to print, "*without the consent of the owner or owners of such book or books, copy or copies,*" on pain of forfeiture of the books and a fine, half to go to the King and half to the *owner*. Section 7 provides that the mark of the person who has the privilege, authority, or allowance to print is not to be put on books without his consent, and the licenser is to return copies to the printer *or owner*.⁴ By Section 17 three copies of each work are to be reserved, one for the King's library and one for each of the Universities of Oxford and Cambridge.

¹ Scobell, p. 89, at p. 92; renewed in 1652, but with the omission (*inter alia*) of the "owner's clause."

² 13 and 14 Car. II., c. 33.

³ 1679-1685.

⁴ Clearly implying that the owner need not be the printer, and therefore not necessarily a member of the Company.

According to Willes, J., the various provisions of this Act effectually prevented piracies without actions at law or bills in equity. Hence there is no clear case where the courts restrained the actual piracy of a book at the suit of the author or his assigns.

Decisions of the Courts.

Cases, however, came before the Courts with regard to books where the ownership was disputed. In the first case dealing with copyright heard in the ordinary courts¹ Atkins claimed the sole right of reprinting Roll's Abridgment under a grant from the King, and sought an injunction against the Stationers' Company for printing it. The Chancellor granted an injunction, and this was upheld by the House of Lords. The plaintiff rested his case on the following grounds:—(1) That the King had a general prerogative over the art of printing, as it had been brought into England at his expense by Corsellis to Oxford in 1468,² and (2) That the King had a prerogative copyright in all law books. In *Roper v. Streater*³ the point was considered in the King's Bench. Roper sued Streater for printing the third part of the reports of Crook, J., which his executors had sold to Roper; Streater pleaded the King's grant; Roper demurred and the demurrer was allowed in the King's Bench, but, on appeal, the House of Lords overruled the demurrer, upon the opinion that the "copy" belonged to the King. In the case of *Stationers' Company v. Parker*⁴ it was said *arguendo* that the Licensing Act (then expired) did not give a right but only an action of debt. And in the case of *Company of Stationers v. Seymour*,⁵ where the plaintiffs claimed the sole right of

¹ *Atkins v. Stationers' Company*; 18 Car. II., [1666] Carter, p. 89; 4 Burr 2316.

² According to Lord Mansfield this argument was completely rejected, 4 Burr, at p. 2401.

³ [1670] *Skinner*, p. 234, 4 Burr 2316.

⁴ (*Pasche*, 1 Jac. II.). *Skinner* 233, at p. 234.

⁵ *Trinity*, 29 Car. II (C. B.) 1 Mod. 256.

printing almanacks by patent from the King, their counsel, Serjeant Pemberton, admitted a doubt how far a grant from the King would “stand good against them that claim a property in the copy paramount to the King’s grant,” but he rested his claim on the ground that the almanack had no certain author and therefore the property was in the King. The Court assented to this argument and further stated—“These additions of prognostications and other things that are common in almanacks do not alter the case; *no more than if a man should claim a property in another man’s copy, by reason of some inconsiderable additions of his own.*”

Ponder v. Bradyl.

During the temporary lapsing of the Licensing Act an action on the case was brought for printing “The Pilgrim’s Progress”¹ “*of which the plaintiff was and is the true proprietor; whereby he has lost the profit and benefit of his copy.*” But there is no trace of this action being proceeded with.

Bye-Law of the Stationers’ Company.

In 1681 the Stationers’ Company, for the purpose of checking abuses which became very frequent among the members after the expiration of the Licensing Act in 1679 passed the following bye-law:—

“And whereas several members of this Company have great part of their estates *in copies*; and by ancient usage of this Company, when any book or copy is duly entered in the Register Book of this Company to any member or members of this Company, such person to whom such entry is made is and always hath been reputed and taken to be *proprietor of such book or copy and ought to have the sole printing thereof*; which privilege or interest is now of late often violated and abused.—it is therefore ordained that,

¹ Ponder v. Bradyl, [1680] Lilly’s Entries 67; 4 Burr 2317.

where any entry is or shall be duly made of any member of this Company, if any member of this Company shall then after without the licence or consent of such member for whom such entry is duly made print or import any such copy or book; or shall sell, bind, stitch, or expose the same for sale, then such member so offending shall forfeit tweldepence for every such copy or book.”¹

Expiration of the Licensing Act.

The Licensing Act was revived by the 1 Jac. II. c. 33, and continued from time to time until the 25th April, 1694, when it finally expired. In spite of the protection which it gave to the owners of “copies” duly entered in the Register Book of the Stationers’ Company, the way in which the Act worked left the authors at the mercy of the Company.

In a protest signed by eleven Lords against the Bill continuing the Act in 1692 we find the following reasons:—“Because it subjects all learning and true information to the arbitrary will and pleasure of a mercenary and perhaps ignorant licenser, *destroys the property of authors in their copies*; and sets up many monopolies.”² And from “Reasons humbly offered to be considered before the Act for printing be renewed,” it appears that the Company often asked large sums for making an entry, and at other times refused or neglected to enter books, or made false entries. The petitioners say—“The property of English authors hath been always *owned as sacred* among the traders and generally forborne hitherto to be invaded; but if any should invade such properties, *there is remedy by laws already made*, and no other were ever thought needful till 1662”; and in another petition “As for securing property, *it’s secured by law already* as our own experience may show.”³ And on

¹ Found by the jury in *Millar v. Taylor*, 4 Burr 2307 (slightly condensed).

² Lowndes, pp. 24-5.

³ *Ibid.*, p. 30.

the last attempt to revive the Act in 1694 at the conference between the Lords and Commons the Commons submitted the following reason, amongst others, against its renewal:—
 “The Company are empowered to hinder the printing of all innocent and useful books; and have an opportunity to enter a title to themselves and their friends, for *what belongs to and is the labour and right of others*.¹

This period is marked by repeated and unequivocal acknowledgments of the existence of copyright in books, both on the part of the general public, and also on the part of the Legislature. No Statute calls any such right into existence, therefore it could only have existed at the Common Law. There is no actual decision in its favour in the courts, but that appears to be only because no one challenges it. In *Seymour's Case* in particular the existence of “copy” is assumed on both sides; the only question is whether the King possesses it or not.

Period IV.—From the Expiration of the Licensing Act in 1694 to the Passing of the Statute of Anne.

During this period copyright rests wholly on the Common Law.

Applications for Legislation to Protect Copyright.

In 1694 the Stationers' Company passed another by-law,² practically the same as the one quoted above; but, this not having the desired effect, repeated petitions were presented to Parliament for more effective securing of the “copy.” There is no hint given of any doubt as to the existence of copyright at Common Law, but it is stated that present remedies are ineffective. As is stated in one petition, “The liberty now set on foot of breaking through this ancient and reasonable usage is no way to be effectually

¹ Lowndes, p. 27.

² Found by the jury in *Millar v. Taylor*, 4 Burr 2308.

restrained but by an Act of Parliament. For by Common Law, a bookseller can recover no more costs than he can prove damage; but it is impossible for him to prove the tenth, nay, perhaps the hundredth part of the damage he suffers, because a thousand counterfeit copies may be dispersed into as many different hands all over the Kingdom, and he is not able to prove the sale of ten. Besides, the defendant is always a pauper; and so the plaintiff must lose his costs of suit. No man of substance had been known to offend in this particular, nor will any ever appear in it. Therefore, the only remedy by the Common Law is to confine a beggar to the rules of the King's Bench or Fleet; and there he will continue the evil practice with impunity. We therefore pray that confiscation of counterfeit copies be one of the penalties to be inflicted on offenders." They also stated that large sums had been paid to authors for copies, amounting to at least £50,000, and that the copies had been made the subject of family settlements.¹

Statute of Anne.

In consequence of these applications for protection Parliament passed an Act² in 1709 entitled "An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies during the times therein mentioned,"³ and generally referred to as the "Statute of Anne." The most important provisions are as follows:—

"Whereas printers, booksellers, and other persons have of late frequently *taken the liberty* of printing, reprinting, and publishing books and other writings without the consent of the *authors or proprietors* of such books and writings to their very great detriment

¹ Lowndes 28-31.

² 8 Anne c. 19.

³ According to Willes, J., the Bill went into Committee as a Bill "to secure the undoubted property of copies for ever" (4 Burr 2333).

and too often to the ruin of them and their families. For preventing therefore such *practices* for the future and for the encouragement of learned men to compose and write useful books " be it enacted.

Section 1, "From and after the 10th April, 1710, the author of any book already printed, or the bookseller, printer, or other person who hath purchased the copy shall have the sole right and liberty of printing such book for the term of twenty-one years from the 10th April, 1710, *and no longer*;¹ and the author of any not yet printed and published shall have the sole liberty of printing and reprinting the same for the term of fourteen years from the first publishing the same *and no longer.*"¹ A penalty of a penny per sheet is imposed on infringers, and the books are to be delivered up to the proprietors of the "copy" for destruction.

Section 2 requires entry of the title to the "copy" in the Register Book of the Stationers' Company before publication; otherwise neither penalties nor forfeiture will be incurred. Section 3 imposes a penalty on the clerk of the Stationers' Company refusing to make the entry. Section 4 provides for the fixing of the prices. Section 5 requires the delivery of nine copies of each book for the use of specified libraries. Section 7 excepts books in Greek, Latin, or any foreign language from the operation of the Act.

Section 9: "Provided that nothing in this Act contained shall extend, or to prejudice, or confirm any right that the said Universities or any person have or claim to have, to the printing or reprinting any book or copy."

Section 10 limits the time within which actions may be brought for offences against the Act to three months.

¹ These words were relied on in *Donaldson v. Becket* as destroying the Common Law right, but this interpretation is quite inconsistent with Section 9.

Section 11: "Provided always, that after the expiration of the said term of fourteen years, the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years."

The unfortunate and ambiguous wording of this Act raised another question: viz.—Whether, assuming the existence of copyright at Common Law, such right was not impliedly abolished by the Statute of Anne. Section 1 rather favours this view; but Section 9 expressly preserves all existing rights.

Period V.—From the Passing of the Statute of Anne to the Decision in *Donaldson v. Becket* in 1774.

Right to Restrain Publication.

Down to 1735 no question as to the continued existence of copyright at Common Law came before the Courts. But another point was raised for the first time in the early part of the eighteenth century: viz.—As to the Common Law right of the author *before publication*.¹ The question was first raised in *Webb v. Rose*² where the clerk of Mr. Webb the conveyancer was restrained by Sir Joseph Jekyll from printing his master's drafts. The same relief was granted by Lord Hardwick in *Pope v. Curl*,³ though there the Court proceeded merely on the Statute of Anne, but in *Duke of Queensberry v. Shebbeare*⁴ the injunction was grounded on its proper basis—the Common Law right before publication. After that case it has scarcely been questioned.

¹ Hereafter referred to as "the right to restrain publication," See pp. 35-43, *infra*.

² [1732] 4 Burr 2330.

³ [1741] 2 Atk. 341.

⁴ [1758] 2 Eden 329.

Injunctions granted in Chancery.

In 1735 the question as to the existence of copyright at Common Law came before the Court of Chancery for the first time in the case of *Eyre v. Walker*¹ where Sir Joseph Jekyll granted an injunction to restrain the printing of *The Whole Duty of Man*, the first assignment of which had been made in December, 1657. In *Motte v. Faulkner*² an injunction was granted to restrain the printing of Pope and Swift's "Miscellanies," some of which had been published in 1701, 1702 and 1708, and in *Walthoe v. Walker*³ to restrain the printing of Nelson's "Festivals and Fasts," although it was first printed in the lifetime of the author, who died in 1714. In the case of *Tonson v. Walker otherwise Stanton*,⁴ Lord Hardwicke granted an injunction to restrain the printing of "Paradise Lost", the plaintiffs claiming under an assignment of the copy in 1667. And in the case of *Tonson v. Walker and Marchant*,⁵ where the defendant had advertised a publication of Milton's "Paradise Lost," with his life by Fenton and notes by former authors, compiled by Dr. Newton, although Lord Hardwicke in his judgment guarded himself from being thought to determine the general question, he granted an injunction "in the disjunctive" restraining the defendants from printing "Paradise Lost," or the life of John Milton, or the notes compiled by Dr. Newton.

The injunctions in all these cases were acquiesced in. The decisions were, of course, not binding on the Common Law courts, but they were entitled to "great attention and respect."⁶

Millar v. Taylor.

Apart from the abortive case of *Tonson v. Collins*⁷ where judgment was refused on the ground that the proceedings

¹ 4 Burr 2325.² [1735] 4 Burr 2326.³ [1736] 4 Burr 2325.⁴ [1739] 4 Burr 2325.⁵ [1752] 4 Burr 2325; 3 Swanst 681.⁶ Per Yates, J., in *Millar v. Taylor*, 4 Burr, at p. 2377.⁷ 4 Burr 2327.

were collusive, the question came before the Common Law Courts for the first time in the famous case of *Millar v. Taylor*.¹ The facts of the case were as follows:—James Thomson wrote and published his poem, “The Seasons,” between the years 1727 and 1729. In 1729 he sold the copyright to Andrew Millar, the plaintiff. In 1763 Robert Taylor printed and exposed for sale copies of “The Seasons,” and Millar brought an action of trespass on the case against Taylor for infringement of his copyright.

The question was argued with extraordinary ability, and practically all the arguments available on both sides of the question are summed up in the various judgments delivered. Willes, J., pronounced in favour of the Common Law right—mainly on the ground of general usage, and its accordance with principles of “general fitness, justice, morality, and convenience which, when applied to a new subject, make Common Law without a precedent.”² His judgment contains a most valuable historical survey of the whole question.³ Aston, J., concurred, mainly on abstract principles, and Lord Mansfield delivered a short but very effective opinion on the same side. On the other hand, Yates, J., pronounced decisively against the Common Law right, on the grounds that there was no such right at Common Law, and, if there was, it was taken away by the Statute of Anne. The arguments on which he chiefly relied were—(1) That no such property was consonant with Common Law principles, as it was (a) neither a property in goods, nor a debt, nor a contract, which were the only species of property known to the Common Law; (b) but it was a property in *ideas* which were incapable either of identification or of exclusive appropriation; (c) that it was a *monopoly*—in ultimate analysis the “right of bringing an action against those that print the

¹ [1769] 4 Burr 2303.

² 4 Burr, at p. 2312.

³ It was said by Lord Abinger in the case of *Chappell v. Purday* that this judgment was the work of Lord Mansfield himself.

author's work without his consent"—and, therefore, was certainly not assignable at Common Law, although it might be created and made so by Statute; (2) That it could not have been from time immemorial as printing was only introduced in the reign of Edward IV.; (3) That the usages of the Stationers' Company and of authors and printers could not alter the Common Law; and (4) That in any case the express gift of "fourteen years from publication *and no longer*" by the Statute of Anne took away all right beyond the statutory term. He, however, admitted the existence of the Common Law right before publication, and also the King's right in prerogative copies, and thereby exposed nearly all his arguments on the Common Law to the charge "that they proved too much." Practically every one applies with equal force to the right before publication. And too much stress is laid on the necessity for immemorial custom, and too little on the flexibility of the Common Law when confronted by new questions. The value of general usage as a source of Common Law, when applied to a new subject, is absolutely denied, contrary to the latest pronouncements on the subject. The construction to be put on the decrees of the Star Chamber is very doubtful, unless contemporary expressions of belief in "copy" are taken into account: but, in the light of these expressions it is quite clear that protection was given, and hence they form valuable authority in favour of the right. It is now universally admitted that the Star Chamber was a perfectly legitimate Court,¹ and the Common Law with respect to misdemeanours is mainly founded on its precedents.

Donaldson v. Becket.

In 1774 the question came before the House of Lords in the famous case of *Donaldson v. Becket*² on appeal from

¹ Holdsworth's *History of English Law*, vol. i., pp. 279-282 (pp. 290-1 especially).

² 4 Burr 2409; 2 Bro. P. C. 129; 17 Cobbett Parl. History 954.

the Court of Chancery. The judges were directed to attend and deliver their opinions severally on the following questions put to them by the House:—

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

Ten judges were of opinion that the author had this right, but two of them thought that he could only bring an action if the manuscript had been obtained by fraud or violence. One denied the right altogether. The numbers on this point may be taken as either ten to one or eight to three in favour of the right before publication, whichever the reader pleases.

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

Seven judges answered in favour of the Common Law right, four (including the three against protection for the right before publication) against it.¹

3. If such action would have lain at Common Law, is it taken away by the Statute of Anne? And is an author by the said Statute precluded from every remedy, except on the foundation of the said Statute, and on the terms and conditions prescribed thereby?

Five of the judges thought that the Common Law right was unaffected by the Statute. Six (including the four against Common Law copyright) thought the right had been taken away.

¹ Drone and Scrutton gave the numbers as eight to three; but I am unable to discover any authority for this.

It was well known that Lord Mansfield adhered to his former opinion, and therefore was in favour of the author on all three points, but, it being unusual for a peer to support his own judgment in the House, he took no part in the proceedings.

Upon these answers Lord Camden moved to reverse the decree, and enter judgment in favour of the appellant. He first considered the arguments founded on "patents, privileges, Star Chamber decrees, and the bye-laws of the Stationers' Company," and dismissed them as "the effects of the grossest tyranny and usurpation." He stated that prior to the Revolution the whole of the press was subject to the arbitrary prerogative of the King; and cited the Statute of Anne itself as a strong proof that at the time when it was passed there was no idea of a Common Law claim. He defined the claim as a claim to property in ideas, and poured scorn on the suggestion that there could be such a property (an argument which, if it proved anything, proved that Parliament had been trying to create an impossible species of property). He refused to admit that "private justice, moral fitness, and public convenience" could create new law. He denied that the claim had any foundation in sound policy or good sense. "Why did we enter into society at all, but to enlighten one another's mind and improve our faculties for the common welfare of the species? Knowledge has no value or use for the solitary owner; to be enjoyed it must be communicated—Glory is the reward of science, and those who desire it scorn all meaner views. It was not for gain that Bacon, Newton, Milton, and Locke instructed the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of letterpress. When the bookseller offered Milton five pounds for his 'Paradise Lost,' he did not reject it and commit his poem to the flames, nor did he accept the miserable

pittance as the reward of his labour; he knew that the real price of his work was immortality and that posterity would pay it." Lord Chancellor Apsley seconded the motion, and in spite of the opposition of Lord Lyttleton the decree was reversed by a majority of twenty-two to eleven.

It will be noted that the arguments of Lord Camden are directed against the existence of the right at Common Law, not against its continuance after the Statute of Anne. He doubtless found that the former topic lent itself best to rhetoric.

Thus the long controversy ended in a denial of the author's rights, against, it is fairly safe to say, the weight of judicial opinion and against an overwhelming weight of argument, the force of which would be felt far more to-day than it was then. As Lord Mansfield said in *Millar v. Taylor*,¹ practically all the positive arguments against the right "*proved too much*"; the negative largely depend upon views about the nature of the Common Law and as to the legality of the Star Chamber which have been abandoned.

Apart, however, from the strict question of law, it is by no means unlikely that the decision in *Donaldson v. Becket* was for the true interest of authors themselves in the long run. Whatever may be said about the right of property residing in the "order of words" and not in the ideas, it is certain that the mere right of protection against the reproduction of that order of words is not sufficient for the author, and it is equally certain that any wider protection handicaps other literary labourers, besides being difficult to support on Common Law grounds. The remedy for these difficulties is in wide and adequate protection of the author during a fairly long but terminable period. This will not be given where there is perpetual

¹ 4 Burr, at p. 2399.

copyright, for the Courts, knowing that whatever restraint they lay on the use of the author's book by others will never be removed by time, instinctively lean against imposing permanent fetters on the progress of human knowledge. In *Dodsley v. Kinnersley*¹ an abridgment formed by "leaving out all the moral reflections" was held a legitimate and meritorious work. In *Weatherby v. International Horse Exchange*² the mere taking of information collected by another author in one work and using it in a work which could not compete with it was held unlawful. The former decision could never have been given under a system of limited copyright, the latter never under a system of perpetual copyright.

Beckford v. Hood.

The Common Law right was again under consideration in the cases of *Beckford v. Hood*³ and *Jefferys v. Boosey*.⁴ In *Beckford v. Hood*³ the question was whether registration was necessary to bring an action for damages; and it was held that it was not. Grose, J., suggested that the true interpretation of *Donaldson v. Becket* was not that the Common Law right was destroyed, but that it was limited to the periods prescribed by the Statute.

Jefferys v. Boosey.

In *Jefferys v. Boosey*⁴ the question turned mainly on matters of international copyright; but the question of copyright at Common Law was raised, and several of the judges in their opinions refer to the point. Erle and Coleridge, JJ., strongly supported the right, the former's opinion being one of the strongest ever pronounced in its favour. One of his points that "the claim is not to ideas,

¹ [1761] Ambler 403. At that time copyright was believed to be perpetual. The attitude of the Courts adopted during this period, persisted, of course, down to a much later period.

² [1910] 2 Ch. 297.

³ [1799] 7 T. R. 620.

⁴ [1854] 4 H. L. C. 815.

but to the order of words, and that this order has a marked identity and a permanent endurance,"¹ completely disposes of many arguments on which Yates, J. and Lord Camden lay the greatest stress. On the other hand, Parke, B., Pollock, C. B., and Jervis, C. J., all denied the existence of copyright apart from Statute, mainly on the ground of monopoly, and on the analogy of patents. In this they were supported by the three Law Lords, who pronounced judgment. Lord Cranworth gave it as his opinion that copyright after publication, "if not the creature, as I believe it to be, of our Statute Law, is now entirely regulated by it."² Lord Brougham went into the question at some length, and expressed himself as strongly against it,³ while Lord St. Leonards "had arrived long since at the conclusion that no Common Law right exists after publication."⁴

Drama.

Apart from literary works the question of copyright at Common Law has only been considered in the cases of *Morris v. Kelly*⁵ and *Murray v. Elliston*.⁶ In the first case Lord Eldon restrained the unauthorised representation of a play which appears to have been performed in public. In the second, it was held by the Court of King's Bench that representation of an abridged version of "Marino Faliero" did not infringe the copyright. It is, however, almost impossible to extract a rule of law from either decision, as the facts given are scanty.

Period VI.—From the Decision in Donaldson v. Becket to The Copyright Act, 1911.

During this period statutory copyright alone exists, and is gradually extended both in the length of the term of copyright and in the measure of protection given to the author.

¹ 4 H. L. C., at p. 869.

³ *Ibid.*, at pp. 961-9.

⁵ [1820] 1 Jac. & W. 491.

² *Ibid.*, at p. 954.

⁴ *Ibid.*, at p. 977.

⁶ [1822] 5 B. and Ald. 657; see *infra*, pp. 130-1.

Effect of Donaldson v. Becket.

The decision in *Donaldson v. Becket* caused great dismay among the booksellers, and they immediately petitioned Parliament for redress. A Committee was appointed to enquire into the matter. The chief witness examined was William Johnston, a retired bookseller, who stated that the universal opinion in the trade, down to the last decision, had been that there was perpetual copyright at Common Law, and that the universal practice was to assign this right on any transfer of copyright. The effect of the late decision had been to reduce greatly the value of copyrights. The author unquestionably got more for twenty-eight years than fourteen. The trade did not rely on an action at Common Law, but a Bill in equity. The penalties under the Statute were not worth contending for. It was also stated that nearly £50,000 had been laid out in the purchase of copyrights at public auctions since 1755.¹ On the report of this Committee a Bill was brought in the House of Commons "for relief of booksellers and others by vesting the copies of printed books in the purchasers of such copies from authors or their assigns, for a time therein to be limited." It was strongly supported by Edmund Burke and Wedderburn, and opposed by Thurlow and Charles Fox, and counsel were heard both for and against it. The Bill passed the Commons,² but it was thrown out in the Lords (in the absence of Lord Mansfield) on the motion of Lord Denbigh supported by the Lord Chancellor (Apsley) and Lord Camden.³

University Copyright.

The Universities were successful in obtaining an Act vesting in them perpetual copyright in all books bequeathed or otherwise given to them so long as the Universities themselves printed the books.⁴

¹ 17 Cobbett 1077-1088.² *Ibid.* 1088-1110.³ *Ibid.* 1400-2.⁴ 15 Geo. III. c. 53.

Copyright Act, 1814.

In 1814¹ the term of copyright was extended from fourteen years, with a reversionary term of fourteen years to the author if living at the expiration of the first fourteen years, to a term of twenty-eight years, or the life of the author, whichever should be the longer.

Copyright Act, 1842.

It was found, however, that even this extended term did not provide adequate remuneration for works of enduring value and popularity, and in the fourth decade of the nineteenth century the sympathy of the public was greatly excited by the misfortunes of authors of the first rank, including some whose works had only won their way into popular favour just before the copyright expired. After a struggle of several years in which Serjeant Talfourd took the leading part on behalf of the authors, an Act² giving a further measure of protection to authors was passed in 1842. The chief alterations in literary copyright made by the Act were :—

1. The term of copyright in books was extended to forty-two years from publication, or the life of the author and seven years, whichever should be the longer period.³

2. Registration was made a necessary preliminary to legal proceedings to protect copyright, but not to the attachment of the right itself.⁴

3. Copyright in a book unpublished at the death of its author is traced from the proprietor of the manuscript from which publication is first made.⁵

¹ 54 Geo. III. c. 156.

² 5 & 6 Vict. c. 45; commonly known as "Talfourd's" Act. The history of the struggle is very well given in Drone on Copyright, at pp. 74-82, and in Scrutton on Copyright, at pp. 42-46, and I do not propose to repeat it.

³ s. 3.

⁴ s. 24.

⁵ s. 3; *Macmillan v. Dent*, [1907] 1 Ch. 107.

4. Provision is made against the suppression of any published book after the death of its author.¹

This Act governed literary copyright down to the coming into force of The Copyright Act, 1911.

Other Subjects of Copyright.

The history of copyright, apart from that of literary copyright, presents few features of interest. On the eve of The Copyright Act, 1911, the various branches of copyright works were regulated as follows:—

Lectures delivered in public were protected by an Act of 1835.² Drama was provided for by an Act of 1833,³ commonly known as “Bulwer Lytton’s” Act. In music the right of multiplying copies of a musical piece has always been protected under the various Literary Copyright Acts, but the performing right was only created by The Copyright Act, 1842. Since then, music has also been dealt with in Acts of 1882, 1888, 1902, and 1906.⁴ The last two Acts first introduced the principle of summary remedies against pirates, which have now been extended to all forms of copyright by The Copyright Act, 1911. Engravings and prints were provided for by Acts of 1735, 1767, 1777, and 1836⁵; sculpture by an Act of 1814⁶; and paintings, drawings, and photographs by The Fine Arts Copyright Act, 1862.⁷ Under the last Act copyright attaches on creation, not publication; and this principle has been extended by The Copyright Act, 1911, to all artistic works other than engravings.

¹ s. 4.

² 5 and 6 Will. IV. c. 65.

³ 3 Will. IV. c. 15, and also by The Copyright Act, 1842.

⁴ 45 & 46 Vict. c. 40; 51 & 52 Vict. c. 17; 2 Edw. VII. c. 15; 6 Edw. VII. c. 36.

⁵ 8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57; 6 & 7 Will. IV. c. 59; see also 15 & 16 Vict. c. 12, s. 14.

⁶ 51 Geo. III. c. 56.

⁷ 25 & 26 Vict. c. 68.

Royal Commission of 1876.

In 1876, a Royal Commission sat to consider the Law of Copyright and its practical working. A great quantity of valuable evidence was taken, and the Committee reported in 1878, advising many changes in the law. These recommendations, however, were never carried out.

Owing to the continual progress of International copyright—a subject which is treated of later¹—it was found desirable to fix some common period for the duration of copyright, and this was fixed by the Berlin Convention of 1908 at the life of the author and fifty years from his death.² In consequence of this Convention legislation became necessary, and the opportunity was taken to consolidate and amend the law.

The Copyright Act, 1911.

The Law of Copyright now rests on The Copyright Act, 1911,³ and no rights (other than contractual) of the nature of copyright can exist in any work except under that Act.⁴ The chief changes introduced by the Act are as follows:—

1. The unification of the Law of Copyright, *e.g.*, the law of Artistic copyright is made exactly the same as that of Literary copyright as far as the subject-matter allows. This is unquestionably a great improvement in the law.

2. The consolidation of the various rights bearing the name of copyright into one; thus the post-publication right and the Common Law right to prevent publication are both united into one and called "copyright."⁵

¹ See pp. 200-213, *infra*.

² *i & 2 Geo. V. c. 46.*

⁵ s. 1 (2).

² Article 7.

⁴ s. 31.

3. The abolition of the rule in *Macmillan v. Dent*.¹
(Unquestionably good.)²

4. The conditions for acquiring copyright to be: (a) in the case of a work of which no copies have been issued to the public, that the author should be a British subject or resident within the British Dominions to which the Act extends; (b) in the case of a work of which copies have been issued, first issue of those copies in the British Dominions.³

This is a very unfortunate provision. In the first place it is quite possible that under it a work may fall into the public domain and then become the subject of copyright. Secondly, it leaves many things, *e.g.*, private letters, entirely without protection from the Law of Copyright unless the author is a British subject or resident here. Fortunately International copyright and the contractual right of secrecy will preserve us from the consequences in most cases; it is none the less a blunder.⁴

5. The extension of the term of copyright to the life of the author and fifty years.⁵

6. The introduction of the royalty system twenty-five years after the death of the author.⁵

7. The abolition of registration as a preliminary to protection or litigation.

8. The extension of all civil remedies to the period before publication.⁶

¹ [1907] 1 Ch. 107.

² s. 5.

³ s. 1 (1).

⁴ Probably the following represents the ideal; complete protection to unpublished works in any case; for published works, first publication within the area of protection where the value lies in the rapid multiplication of copies, creation within the area where the value lies in the original work.

⁵ s. 3.

⁶ s.s. 6-10.

9. The protection of the innocent infringer against all penalties except an injunction.¹

10. The extension of summary remedies to all cases.²

11. The extension of protection to architecture³ and mechanical records &c.⁴

12. Various extensions of the owner's rights; in particular, protection against mechanical reproductions.⁵

13. The restriction of the author's right of transfer over the last twenty-five years of the term to transfer by bequest.⁶

14. Protection to extend throughout the British Dominions other than self-governing Dominions; self-governing Dominions to be treated as foreign countries unless they themselves desire to be brought within the Act.⁷

¹ s. 8.

² s.s. 11-13, but there are exceptions.

³ s. 1.

⁴ s. 19.

⁵ s. 1 (2).

⁶ s. 5.

⁷ s.s. 25-27.

GENERAL PART.

CHAPTER II.

THE COPYRIGHT ACT, 1911.

IN this Chapter it is proposed to consider the system set up by The Copyright Act, 1911, which came into force on the 1st July, 1912. Certain parts of the law as it stood on the eve of the Act rested mainly on judicial decisions, and these are only affected to a small extent. Again, these parts of the law vary to a considerable extent with the subject-matter of protection, *e.g.* the principles of infringement require different treatment in the cases of Literary and Artistic Copyright. They are therefore dealt with separately. The main body of the law set up by the Act of 1911, resting wholly on Statute, and now the same for all branches of Copyright Law, is considered in this Chapter.

Nomenclature.

There are three¹ different rights which have at various times been denoted by or included in the word "copyright": *viz.*—

(1) The Common Law right to restrain publication. This rested wholly on the Common Law, and has been said to be an incident of property, not a branch of the Law of Copyright at all. It belonged to all species of copyright property indiscriminately, was perpetual until publication, and was destroyed by publication. So far as it is not included in the right next considered it has been abolished.² It must be

¹ Assuming that the first and second are not identical.

² 1 & 2 Geo. V. c. 46, s. 31.

carefully distinguished from (a) "Common Law copyright"¹ which refers to post-publication copyright at Common Law before the Statute of Anne, (b) contractual rights arising out of the repose of confidence by one man in another preventing the latter from publishing the former's work.

(2) The inchoate right to publish and so acquire post-publication copyright. If this right carries with it (as it is submitted that it does) the right to restrain anyone else from publishing,² it includes the Common Law right to restrain publication.

The present writer respectfully submits that these two rights are really the same right looked at from two different aspects; they are merely the right to preserve the fruit until it is plucked, and the right to pluck it when desired. But, as Buckley, L. J., in *Macmillan v. Dent*,³ clearly contemplates their separation, they are here set out separately.

¹ This phrase is occasionally applied to the right to restrain publication, but its more usual and more accurate meaning is copyright at Common Law, apart from the Statute of Anne.

² *I.e.*, as a general rule. The whole difficulty arises under the rule in *Macmillan v. Dent*, [1907] 1 Ch. 107. Where the right to acquire copyright is traced from the author, both the right to publish and the right to restrain publication are united in the same person, and it is unnecessary to distinguish between them. But under Section 3 of The Copyright Act, 1842, the right to acquire statutory copyright in a work unpublished at the death of its author is conferred on the owner of the manuscript. According to Buckley, L. J., however, the personal representatives of the author retain the right to restrain publication. Consequently, until the owner publishes, his property would be at the mercy of anyone who can get a copy and chooses to pirate it, unless he possesses the right to protect his property before publication; more especially, if unlawful publication is not such publication as will divest the Common Law right. Such a lack of protection is contrary to elementary principles. Hence the owner of the inchoate right must be able to protect his property before publication.

There may, however, be several manuscripts in different hands. Each owner possesses a right to acquire copyright, and the first who publishes rightfully acquires copyright. In this case none of the owners have a right to insist that another shall not publish. The true view, it is submitted, is that the owner of the manuscript possesses the Common Law right to restrain publication, and that the representatives of the author have merely a contractual right to restrain the publication of the author's sentiments against his wishes. See pp. 38-9, *infra*.

³ [1907] 1 Ch., at p. 129.

(3) The right of multiplying copies after publication
This is copyright in its strictest sense, and, according to the modern theory, is purely the creature of Statute.

The term "copyright" is usually reserved for the last of these rights, and it appears to have this meaning in all the earlier Statutes dealing with the subject. But in the Act of 1911 all three rights are included in the term.¹

In the present work "copyright" is used as the equivalent of "statutory copyright." Prior to The Copyright Act, 1911, it will therefore include only post-publication copyright. Under the present law it includes all three rights, and also "playright" or the right of public performance.

In all Statutes, cases, and treatises prior to The Copyright Act, 1911. "publication" is used with the natural meaning of "making a work public to the world at large by any method by which the work can be made public." It may be defined as "any act which, if done by the author, would destroy the control of the multiplication of copies of his work given him by the Common Law." In The Copyright Act, 1911, it is defined as "the issue of copies to the public,"² and it is to bear that meaning throughout the Act. It has been found, however, impossible to explain the law as it stood before the Act, if the word is used with this restrictive meaning in the present work. It is, therefore, used with the wider meaning throughout this work, except in extracts from The Copyright Act, 1911; and in dealing with publication by issue of copies the phrase "publication by issue of copies" is always used. In describing the law as it stands now, the word is as far as possible avoided. After the commencement

¹ S. 1 (2).

² S. 1 (3). Similarly in the Berlin Convention.

of the Act, publication by issue of copies is the only form of publication which affects the copyright, except in the case of posthumous works.

“Qualifications for copyright” is used to denote the intrinsic qualities which a book or other work must possess to be capable of copyright, *e.g.*, innocency, originality.

“Conditions for acquiring copyright” is used to denote the circumstances unconnected with the intrinsic qualities of the work which are necessary for the author to acquire copyright, *e.g.*, British nationality of the author, first publication within the United Kingdom.

Copyright as Defined by The Copyright Act, 1911.

Copyright is defined by The Copyright Act, 1911, as “the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever; to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public: if the work is unpublished, to publish the work or any substantial part thereof, and shall include, &c.”¹

Common Law right to restrain Publication.

Copyright, therefore, as defined by the Act, includes, besides the statutory right of multiplying copies or repeating performances of a work already published, a corresponding right over unpublished works. This right almost exactly corresponds to the old Common Law right of restraining publication of an unpublished work. So far as literary, dramatic, and musical works are concerned, it is submitted that the right remains exactly the same. In the case of artistic works it has never been decided whether the right included the right to prevent the

¹ s. 1 (2).

exhibition of an artistic work.¹ Whether this was the case at Common Law or not, it is probably not the case now; and any attempt to prevent the exhibition of an artistic work must be based on the contractual right of secrecy.² So far as decided cases go, it is impossible to distinguish in essence between this Common Law right and statutory copyright. It was not infringed by the sale of the manuscript by a person other than the possessor of the Common Law right,³ nor by the owner of the manuscript making any use he pleased of the contents except publishing them or extracts from them, or paraphrases of them.⁴ In the American case of *Kiernan v. Manhattan Quotation Co.*⁵ it was held that the exhibition of copies to the public did not constitute a publication sufficient to divest the Common Law right. The alterations made in the Common Law right by The Copyright Act, 1911, are as follows—

(1) Under the old law the right attached to any work capable of copyright, whether the author was a British subject or resident or not. Under the present law certain conditions of allegiance or residence must be fulfilled.

(2) At Common Law the right of restraining publication was perpetual until waived. Under The Copyright Act, 1911, in the case of artistic works other than engravings it expires fifty years after the death of the author.

¹ *Prince Albert v. Strange*, [1849] 1 MacN. & G. 25, which is the nearest case, turns on the contractual right of secrecy. In any case the copies exhibited were wrongfully made, and the Court was entitled to order their destruction. *Turner v. Robinson*, [1800] 10 Ir. Ch. Rep. 121, 510, actually decided that exhibition to all the public who chose to come at picture galleries where there was such a rule forbidding copying, did not constitute publication.

² See pp. 44-6, *infra*.

³ *Macmillan v. Dent*, [1907] 1 Ch. 107.

⁴ *Phillip v. Pennell*, [1807] 2 Ch. 577; *cf. Duke of Queensberry v. Shelbourn*, [1758] 2 Eden 329; *Labouchere v. Hess*, [1897] 77 L. T. 550.

⁵ [1876] 60 How Pr. N. Y. 194.

(3) Under the old law, in all probability, certain acts would have infringed the Common Law right before publication which would not have infringed the copyright after publication.¹ In the Act of 1911, generally speaking, no distinction is drawn between the right before and the right after publication. Any "fair dealing" with a work for the purpose of private study, research, criticism, review, or newspaper summary is allowed.² But it seems very unlikely that it would be considered "fair dealing" with an unpublished work to review or criticise it or to give a newspaper summary of it. If it is not, then the distinction between the right before publication and the right after publication still survives, and the right before publication is practically identical with the old Common Law right to restrain publication. In any case it is necessary to deal with the right as the existence of copyright in an existing work may depend on the question whether it has been published or not.

The right is essentially a right of property, not of privacy. It is doubtful whether the Common Law knows of a right of privacy,³ although a right of property may be of use to protect privacy and little else. Thus, I may prevent strangers from intruding into my house or garden, but I can do so, not because their conduct is an intrusion on my privacy, but because it is a trespass done to my property. By publication the author secured to himself the statutory post-publication copyright and its fruits; and at Common Law the right to restrain publication was nothing but the right of the author to preserve such fruits until the time arrived when he desired to pluck

¹ Cf. *Prince Albert v. Strange*, [1849] 2 De G. & S., at p. 693.

² 1 & 2 Geo. V. c. 46, s. 2 (1).

³ *Chandler v. Thompson*, [1811] 3 Camp. 80; *Roberson v. The Rochester Folding Box Co.*, [1902] 171 N.Y. 538 (Am.).

them.¹ In cases where the work is of such a character that no copyright can exist in it, *e.g.*, of an immoral, seditious, or libellous nature, no right to restrain publication exists. Thus in *Southey v. Sherwood*,² where the defendants had published "Wat Tyler," a juvenile work of Southey, which he had left with the publishers for twenty-three years and had completely forgotten, and Southey sought an injunction expressly for the sole purpose of suppressing the work, Lord Eldon refused an injunction. Fully acknowledging the evil effects which might follow, he stated that his jurisdiction to restrain publication arose solely from the right of property in the author, and that there could be no right of property in a seditious work. So, also, his reasonings in *Gee v. Pritchard*³ all proceeded on the ground of the right being a right of property. It is not distinguishable from other forms of personal property, and at Common Law was descendible and bequeathable like other personalty.⁴ On the other hand, there are dicta in an American case that not even a man's creditors can seize his manuscript for publication against his will.⁵ According to the reasoning in *Macmillan v. Dent*,⁶ The Copyright Act, 1842, has severed this right after the author's death, from the right to acquire the statutory copyright by publication, the latter depending on the possession of a manuscript. The actual decision in that case is only that the owner of a manuscript, obtained

¹ But see *Macmillan v. Dent*, [1907] 1 Ch., at p. 129 (per Buckley, L. J.). The opinion expressed in the text does not necessarily imply the existence of copyright at Common Law. In any case the author was entitled to the first distribution of books to the public; *cf.* *Wheaton v. Peters*, [1834] 8 Peters 591 (Am.).

² [1817] 2 Mer. 435. The dicta at p. 434 are inconsistent with the reasoning on which the actual decision is based. I can find no word to suggest that the right was lost by waiver.

³ [1818] 2 Sw. 402.

⁴ *Palmer v. De Witt*, [1872] 47 N. Y. 532 (Am.).

⁵ *Bartlett v. Crittenden*, [1819] 5 McLean 32. If this dictum is correct the right to restrain publication must be a right of privacy as well as a right of property, though it has always been treated as a right of property and nothing else. But the dictum is unsupported and seems contrary to principle.

⁶ [1907] 1 Ch. 107.

under an implied contract never to publish, may acquire the copyright in it by publishing it, if his publication is acquiesced in; and it was impossible to decide otherwise in the face of Section 3. But it does not decide that the right to restrain publication does not belong to the person owning the manuscript, and therefore enabled to acquire copyright, instead of to the person who cannot. Now, however, The Copyright Act, 1911, has re-united it to the post-publication copyright, and included it in the general term "copyright," and protects it with the statutory penalties for infringement of copyright.

Nearly all the cases turn on the question whether there has been publication sufficient to divest the Common Law right. Publication to a limited class or under special conditions will not divest the right. Thus the delivery of lectures to a limited audience under an implied contract that they are not to publish their notes, does not constitute publication,¹ though the lecturer may be under a duty to deliver them. The presumption in the case of a lecture delivered to a limited audience is that the auditors are entitled to take the fullest notes for their own personal benefit, but not to publish such notes. So, also, the hanging of a picture at a public gallery or exhibition where copying is not permitted, does not constitute publication.² Nor is the right lost by publication to a limited number under pledge of secrecy,³ nor by distributing copies among friends,⁴ nor by private circulation,⁵ nor by sale of the manuscript.⁶ The presumption in the case of a gift of a manuscript is

¹ *Abernethy v. Hutchinson*, [1825] 3 L.J. (O.S.) Ch. 209; *Nicols v. Pitman*, [1854] 20 Ch. D. 374; *Caird v. Sime*, [1887] 12 App. Cas. 326.

² *Turner v. Robinson*, [1859] 10 Ir. Ch. 121, 510.

³ *Exchange Telegraph Co., Limited v. Gregory & Co.*, [1896] 1 Q. B. 147; *Exchange Telegraph Co., Limited v. Central News, Limited*, [1897] 2 Ch. 48 (perhaps it would be safer to put these cases on the footing of implied confidence); *Kenrick v. Danube Collieries*, [1891] 39 W. R. 473 (case of 100 copies of an Engineer's report distributed to a Syndicate).

⁴ *Prince Albert v. Strange*, [1849] 1 MacN. & G. 25.

⁵ Per Lord Brougham in *Jeffreys v. Boosey*, [1854] 4 H. L. C., at p. 962.

⁶ *White v. Geroch*, [1819] 2 B. & Ald. 290; cf. *Turner v. Robinson*.

that the receiver may make every use of it he pleases (including destruction) except multiplying copies of it,¹ and his assignee in bankruptcy is under the same disability.² Guilty knowledge is not necessary to make the infringer liable.³

In *Macklin v. Richardson*,⁴ the author of a play allowed it to be acted on the stage, but only occasionally and by his special permission, and the defendants were restrained from publishing the play in their magazine. But this decision appears to turn, not on the question as to what constitutes publication of a play, but on the peculiar rule of English Law, that literary copyright and dramatic copyright or playwright are of such different natures that a work published for the purposes of public representation may be unpublished for the purpose of multiplication of copies and *vice versa*.⁵ This rule of law has now lost all its importance under the Act of 1911,⁶ except as regards existing works.

The case of private letters is particularly instructive. In the case of a private letter, the property in the ink and paper passes to the receiver, but the property in the order of the words used remains in the writer, and he is entitled to restrain the receiver from publishing the contents, or extracts, or paraphrases from them.⁷ At first, in the case of *Pope v. Curl*,⁸ the letter was treated as published, and the restraint was grounded on the Statute of Anne; but in later cases it has been based on the non-destruction

¹ *Duke of Queensberry v. Shebbeare*, [1758] 2 Eden. 694; per Lord Mansfield in *Millar v. Taylor*, [1769] 4 Burr., at p. 2309.

² *Mayall v. Higby* [1862] 1 H. & C. 148.

³ *Mansell v. Valley Printing Co.*, [1908] 2 Ch. 441.

⁴ [1770] Ambler 694.

⁵ Cf. also *Coleman v. Wathen*, [1793] 5 T. R. 245, where it was held that representation of a play on the stage did not constitute an infringement of the literary copyright.

⁶ Cf. s. 17, where in the case of a posthumous dramatic work copyright endures until performance in public or "publication" (*i.e.*, issue of copies to the public), whichever first may happen, and for a period of fifty years afterwards.

⁷ *Philip v. Pennell*, [1907] 2 Ch. 577.

⁸ [1741] 2 Atk. 341.

of the Common Law right by a confidential communication.¹ There are repeated dicta² that the receiver has a right to publish the letters if his object is not profit but the vindication of his own character, and if the letters will effectually vindicate him from attacks made by the writer; but the extent of this supposed right is doubtful. Letters must be produced "for the purposes of public justice, publicly administered according to the established institutions of the country."³ But the only other case in which the receiver has been allowed to publish letters is *Perceval v. Phipps*,⁴ before Sir Thomas Plumer; and Lord Eldon suggested in *Gee v. Pritchard*,⁵ that this decision might be explained on the following grounds:—(1) The author had implicitly authorised publication; (2) Her conduct had been such as to deprive her of any right to the assistance of the Court of Chancery. Again the decision in *Perceval v. Phipps*,⁴ is based partly on the ground that the rule does not apply where the receiver's object is not profit, and partly on the ground that there is no literary property in familiar letters; two propositions both overruled in *Gee v. Pritchard*.⁶ It seems doubtful how far *Perceval v. Phipps*⁴ can be relied on. Even in vindication of his character, the receiver cannot publish letters to disprove something which he has admitted in Court to be true.⁷ It appears that the justification alleged to be contained in the letters must actually exist,⁸ and

¹ *Thompson v. Stanhope*, [1774] *Ambler* 737; *Earl of Granard v. Dunkin*, [1809] 1 *Ball & B.* 207.

² Per Lord Eldon in *Gee v. Pritchard*, [1818] 2 *Sw.*, at p. 427; Bacon V. C. in *Lytton v. Devey*, [1884] 54 *L. J. Ch.* 203; see also *Woolsey v. Judd*, [1855] 4 *Duer N. Y.* 379 (Am).

³ Per Lord Eldon in *Gee v. Pritchard*, [1818] 2 *Sw.*, at p. 427; *Hopkinson v. Lord Burghley*, [1867] *L. R.* 2 *Ch.* 447; cf. also *Taylor v. Sheppard*, [1835] 1 *Y. & C. Ex.* 280.

⁴ [1813] 2 *V. & B.* 19.

⁵ [1818] 2 *Sw.* 402, 415, 427.

⁶ See also *Woolsey v. Judd*.

⁷ *Palin v. Gathercole*, [1844] 1 *Coll.* 565.

⁸ *Lytton v. Devey*.

the Court will look at the letters if necessary.¹ The receiver is not allowed to publish the letters for the purpose of attacking the writer's character, even in retaliation for an attack by him.² No person who has wrongful possession of the letters may publish them in any case.³ But a solicitor (or probably any agent), who writes a letter clearly intended to be taken as written on behalf of someone else, cannot restrain publication as against his principal, even although he swears that it was not written in his capacity as agent.⁴ The receiver of the letter has the property in the ink and paper, and may maintain detinue or trover for it, even against the writer,⁵ and may destroy it, and may also, in the absence of special circumstances, inform his friends of its contents, and make any use of it he pleases, except publication.⁶ It has been suggested in an American case that the Government has a right to publish, or to restrain publication of, official letters addressed to it, or to any of its departments.⁷

The right attaches as soon as the work is in any form capable of being pirated; thus, in the case of a lecture, putting the lecture into writing is not necessary. In *Caird v. Sime*,⁸ where it appears that the lectures were never reduced to writing, the Lords rested their decision wholly on the ground of property.

Under The Copyright Act, 1911, the right only attaches where the author is a British subject, or resident within the parts of the British Dominions to which the Act

¹ *Gee v. Pritchard*.

² *Labouchere v. Hess*, [1897] 77 L. T. 559.

³ *Woolsey v. Judd*.

⁴ *Howard v. Gunn*, [1863] 32 Beav. 462.

⁵ *Oliver v. Oliver*, [1861] 11 C. B. N. S. 139. The damages for conversion are not limited to the value of the paper; *Thurston v. Charles*, [1905] 21 Times L. R. 659.

⁶ *Philip v. Pennell*, [1907] 2 Ch. 577; *Labouchere v. Hess*; *Gee v. Pritchard*; but see *Palin v. Gathercole* (as to shewing letters).

⁷ *Folsom v. Marsh*, [1841] 2 Story 100 (Am.); *cf.* right of Government to prevent evidence being given as to affairs of State; *Stephen's Digest of Evidence*, Art. 112.

⁸ [1887] 12 App. Cas. 326, Lord Halsbury at pp. 337-9; Lord Watson at 343-4. For absence of manuscript, see p. 335.

extends.¹ Anyone else must rely on International Copyright or on the contractual right of secrecy.² The contractual right is wider than the Common Law right, but it is doubtful whether it can be enforced against a purchaser for value without notice.

The right is lost by—

(1) Publication. The publication must be to the world at large and not to a limited class selected by the author.³ Thus in the case of books private circulation, in the case of lectures delivery to a selected audience, will not divest the Common Law right. But if anyone who chooses can purchase the books or can attend the lecture otherwise than on conditions imposed by the author, then the Common Law right is divested.⁴ But the publication must, of course, be with the consent or acquiescence of the owner of the copyright.⁵

(2) Waiver.⁶

(3) Expiration of the statutory term of copyright in certain cases.⁷ At Common Law the right, unless lost by publication or waiver, was perpetual; and it still continues to be so in the case of a literary, dramatic, or musical work, or engraving not in any way made public. But in all other cases the statutory period of life and fifty years begins to run, not from publication, but from the creation of the work; and on the expiration of that period the Common Law right lapses as well as the rights which have always depended on Statute.⁸

¹ 1 & 2 Geo. V. c. 46, s. 1 (1); pp. 50-2, *infra*.

² See pp. 44-6, *infra*.

³ *Blank v. Footman*, [1888] 39 Ch. D. 678; *McFarlane v. Hulton*, [1899] 1 Ch. 889

⁴ See pp. 39-40, *supra*.

⁵ This is expressly provided by s. 35 (2).

⁶ *Scrutton on Copyright*, p. 65; *Macmillan v. Dent*, [1907] 1 Ch. 107.

⁷ s. 17. Photographs are excluded from the class of work in which this right is perpetual, although surely no works have a stronger claim to be in it. The customer is, however, protected by the implied contract of secrecy.

⁸ s. 31.

Rights arising out of the Repose of Confidence.

The right which has just been dealt with must be carefully distinguished from any contractual rights to prevent publication which the author or his assignee may possess. The former is a right of property resting primarily on the Common Law and available against the world, and is now governed by The Copyright Act, 1911; the contractual rights arise out of the repose of confidence by one party in another, are only available against certain persons, and are entirely unaffected by the Copyright Act. Since the Act their importance has greatly increased, as they are available in cases where there is no copyright; and as, under the Act, a work may fall into the public domain on creation, and then become capable of copyright on publication, the only protection of the author before publication may be his contractual rights.¹

Apart from an express contract of secrecy, where the circumstances are such that the Court will imply such a contract it will enforce secrecy. Thus where a person is employed by another to discharge duties which necessitate the entrusting to him of secrets or information which it is not reasonable to suppose that the employer intended him to publish to the world, he will be restrained from disclosing those secrets or information, although the employer might have no claim to be protected against the world.² This right arises out of an implied contract of secrecy and is enforced at law by an action for damages, in equity by an injunction³; and it extends to works which may be the

¹ s. 1 (1). In all probability the present system of International copyright will prevent nearly all practical inconveniences, but it is an unfortunate piece of legislation.

² *Morison v. Moat*, [1851] 9 Ha. 241; *Tipping v. Clark*, [1843] 2 Ha. 383, at p. 393; *Yovatt v. Winyard*, [1820] 1 J. & W. 394 (where information was obtained by a breach of trust); *James v. James*, [1872] L. R. 13 Eq. 421.

³ *Tipping v. Clark*, 2 Ha., at p. 393; per *Jessel, M. R.*, in *Reuter's Telegram Co. v. Byron*, [1874] 43 L. J. Ch. 661; per *Kekewich, J.*, in *Merryweather v. Moore*, [1892] 2 Ch., at pp. 522-3; per *Bowen, L. J.*, in *Lamb v. Evans*, [1893] 1 Ch., at p. 229.

subject of copyright. Thus a photographer will not be allowed to sell or exhibit copies of a photograph of a customer, although the negative remains the property of the photographer,¹ unless the circumstances are such as to rebut this presumption.² So also a clerk who has left his employers will not be allowed to publish information compiled or to make use of materials collected while in their service³: for instance, canvassers who have been employed by the proprietor of one trade directory will not be permitted to use the material so obtained for the purposes of another.⁴ Again, a workman employed to make copies for the author cannot make and retain copies for his own use.⁵ The actors of a play not yet produced are under an obligation not to divulge its contents.⁶ This confidential obligation survives,⁷ although the employer has repudiated the contract of service, and so has deprived himself of any right to enforce any of its stipulations.⁸ The leading case on the subject is *Prince Albert v. Strange*.⁹ In that case Queen Victoria and Prince Albert, who were in the habit of making etchings for their own amusement, entrusted certain of the plates to a workman for the purpose of printing off impressions; and he, in violation of the trust reposed in him, took impressions for himself which got into the hands of Strange. Strange made a collection of them of which he intended to form a public exhibition, and published a catalogue of "The Royal Victoria and Albert Gallery of

¹ *Pollard v. Photographic Co.*, [1888] 40 Ch. D. 345.

² *Ellis v. Horace Marshall & Son*, [1895] 64 L. J. Q. B. 757. Here the learned judge found that the copyright belonged to the photographer; see p. 180, *infra*.

³ *Merryweather v. Moore*, [1892] 2 Ch. 518; *Louis v. Smellie*, [1895] 11 Times L. R. 515; *Robb v. Green*, [1895] 2 Q. B. 315; *Tipping v. Clarke*.

⁴ *Lamb v. Evans*, [1893] 1 Ch. 218, doubting the reasoning in *Reuter's Telegram Co. v. Byron*, [1874] 43 L. J. Ch. 661.

⁵ *Tuck v. Priestler*, [1887] 19 Q. B. D. 629; *Prince Albert v. Strange*, [1849] 2 D. G. & S. 652, 1 MacN. & G. 25; *Murray v. Heath*, [1831] 1 B. & Ad., at p. 804.

⁶ *Gilbert v. Star Newspaper Co.* [1894] 11 Times L. R. 4.

⁷ *Measures Bros., Limited v. Measures*, [1910] 1 Ch. 336, affirmed as to another point [1910] 2 Ch. 248.

⁸ *General Billposting Co. v. Atkinson*, [1909] A. C. 118.

⁹ [1849] 2 D. G. & S. 652; 1 MacN. & G. 25

Etchings.” The Queen and Prince Albert had given certain copies to their friends, but had no intention of publication. Strange was restrained from publishing or in any way parting with the copies, and was ordered to deliver up all copies, and to destroy or deliver up all copies of the catalogue, both on the ground of the Common Law right and also on the ground that his action involved a gross breach of confidence to which he was privy.

It is difficult to say whether many decisions come under this head or under the preceding. As a general rule, under the old law anyone unlawfully publishing a work against the will of its author both infringed the right to restrain publication and committed a breach of trust as well. Consequently, it is difficult to ascertain the exact extent of each right apart from the other. But it appears that, while the right arising out of the repose of confidence is broader than the Common Law right of property, being indeed limited only by the agreement of secrecy which will be implied under the circumstances, and by the power of the Court to enforce that agreement, and probably extends to cases where all copyright is lost, it cannot be enforced against purchasers for value without notice.¹ It does not seem to be in any way affected by The Copyright Act, 1911. Except in the case of a purchaser for value without notice, it is probable that the Courts will under all circumstances imply a contract sufficiently wide to prevent all acts which would have been breaches of the Common Law right before The Copyright Act, 1911, although the author may possess no Imperial copyright in his work, where the work has not been published in any manner.

¹ Per Turner, V. C., in *Morison v. Moat*, [1951] 9 Ha., at p. 263; cf. *Philip v. Pennell*, [1907] 2 Ch. 577.

Right of Public Performance.

In addition to the Common Law right to restrain publication, "Copyright" as defined by The Copyright Act, 1911, also includes the right of performing a drama or musical work (sometimes referred to as "playright"), and also the exclusive right to deliver the work in public, if a lecture, a right which probably did not exist before the Act of 1911 in the case of a published work.¹

Works Protected by The Copyright Act, 1911.

The Act applies to "literary, dramatic, musical, and artistic" works,² and "artistic work" is defined to include works of painting, drawing, sculpture, and artistic craftsmanship, and architectural works of art and engravings and photographs.³ But the Act does not apply to designs capable of being registered under The Patents and Designs Act, 1907,⁴ except designs which are not used or intended to be used as models or patterns to be multiplied by an industrial process.⁵ General rules under the Act of 1907 may be made to determine when a design is so used.⁶

Authorship.

There is no definition of the "author" of a work in the Act, and certain parts of the Act, *e.g.*, the provisions as to duration of copyright and ownership in the case of photographs and mechanical instruments, seem to have been drawn to avoid the necessity of deciding the authorship in difficult cases. For the purpose of deciding the question of authorship we are, therefore, thrown back on decisions under the old law. There is little authority on the point, but the general result seems to be that the author is the last mind or master-mind concerned with the creation of the work. In the case of photographs, it was eventually held that the author was the person who superintended

¹ s. 1 (2).

² s. 1 (1).

³ s. 35 (1).

⁴ 7 Edw. VII c. 29.

⁵ 1 & 2 Geo. V. c. 46, s. 22 (1); see pp. 104-5, *infra*.

⁶ s. 22 (2).

and directed the taking of the photographs.¹ "In my opinion 'author' involves originating, making, producing, as the inventive or master-mind the thing which is to be protected."² In most cases there will be no difficulty. The main difficulty will be in the case of composite works planned by one person as a whole and written by others. Under the Statute of Anne, the projector might be regarded as the author of the composite work as a whole.³ Under The Copyright Act, 1842, the Court of Appeal was fully prepared to hold in *Lamb v. Evans*,⁴ that there were two separate copyrights in a sheet of advertisements, one that of each advertiser in his separate advertisement, the other that of the proprietor of the sheet in the mass as arranged. The copyright of the proprietor could only be obtained by his own authorship. It is submitted that these cases are still good law. On general principles it would seem that the proprietor of a newspaper or other composite work should have the right of restraining other persons from copying his work as a whole, although he might not have copyright in any single article. But this right implies a copyright in the work as a whole, and this copyright must be founded on authorship. In such cases it is not an infringement of copyright in the work as a whole to copy a single article.⁵

The Act clearly contemplates that the author of a work may be a person under a contract of service⁶; *i.e.*, "a person subject to the command of his master as to the manner in which he shall do his work."⁷ It does not follow, however, that the actual mechanical execution

¹ *Melville v. Mirror of Life Co.*, [1895] 2 Ch. 531; *cf.* *Nottage v. Jackson*, [1883] 11 Q. B. D. 627; *Wooderson v. Tuck*, [1887] 4 Times L. R. 57.

² Per Cotton, L. J., in *Nottage v. Jackson*, [1883] 11 Q. B. D., at p. 635.

³ *Barfield v. Nicholson*, [1824] 2 L. J. O. S., at p. 102. *Cf.* under the Act of 1842, *Hatton v. Kean*, [1859] 7 C. B. N. S. 269; *Wallerstein v. Herbert*, [1867] 16 L. T. 453.

⁴ [1893] 1 Ch. 218.

⁵ *Walter v. Howe*, [1881] 17 Ch. D. 708.

⁶ 1 & 2 Geo. V. c. 46 s. 5 (1).

⁷ Per Bramwell, L. J., in *Yewens v. Noakes*, [1880] 6 Q. B. D., at p. 532.

always constitutes authorship. If the workman simply follows the directions of his master without any exercise of his own skill and judgment, he is probably no more the author of the work than a clerk who takes down the words of a book from dictation is the author of the book. On the other hand, the person who merely suggests the idea is not the author of the work.¹

In the case of photographs made after the 30th June, 1912, the first owner of the negative is deemed to be the author²; and in the case of mechanical contrivances, the first owner of the original plate from which such contrivance was directly or indirectly derived, is deemed to be the author.³

Joint Authorship.

A joint work is defined as "a work produced by the collaboration of two or more authors, in which the contribution of one author is not distinct from the contribution of the other author or authors."⁴ "Collaboration" probably implies a joint design.⁵ When a work is created by one man and the second makes alterations in it, the two are not joint authors of the result; if the alterations are insignificant, the first man remains the author; if they are extensive and important, the second man becomes the author of the work in its final shape.⁶

Qualifications for Copyright.

The necessary qualities which a work must possess to be capable of protection under the Law of Copyright are dealt with in the chapters devoted to the different species of copyright works.⁷ They mainly depend on judicial

¹ Kenrick v. Lawrence, [1890] 25 Q. B. D. 99; cf. Nottage v. Jackson, [1883] 11 Q. B. D. 627.

² s. 21.

³ s. 19 (1).

⁴ 1 & 2 Geo. V. c. 46 s. 16 (3).

⁵ This was the case under the old law; Levy v. Rutley, [1871] L. R. 6 C. P. 523

⁶ Cf. Levy v. Rutley; Springfield v. Thame, [1903] 89 L. T. 242.

⁷ See *infra*, pp. 76-87 for literary works; pp. 104, 108, 182, 194, 195 for artistic.

decisions. Two qualifications are necessary for all kinds: (1) originality, *i.e.*, the work must not infringe the copyright in a copyright work nor be a slavish copy of a non-copyright one; (2) innocency, *i.e.*, the work must not display characteristics forbidden or discouraged by law.

Conditions for acquiring Copyright.

Under The Copyright Act, 1911, the conditions of attaining copyright are—(1) In the case of a work copies of which have not been issued to the public creation by a person who at the date of the making of the work was a British subject¹ or resident within the parts of the Empire to which the Act extends, in which case the “date of the making of the work” means the date of its completion. (2) In the case of a work, copies of which have been issued to the public, issue of copies first within such parts.²

In the first case, if the work is one which has taken a considerable period to create, it is sufficient if the author is a British subject or resident within the said parts of the British Dominions during a substantial part of that period.³

Nothing is said as to the meaning of the phrase “considerable period.” A person domiciled in any part of the British Dominions to which the Act extends is considered resident in that part.⁴ In the case of a work of joint authorship it is sufficient if one of the authors fulfils either of these conditions.⁵

In the case of photographs or mechanical contrivances, the first owner of the negative or original plate is deemed to be the author. When the first owner is a body corporate, such body corporate is deemed to be resident within the parts of the British Dominions to which the Act extends if it has established a place of business there.⁶

¹ Who is not resident in the parts of the British Dominions to which the Act does not extend (s. 20 (3)).

² s. 1 (1).

³ s. 35 (4).

⁴ s. 35 (5).

⁵ s. 16 (2).

⁶ s. 19 (1); s. 21.

In the second case simultaneous publication (by issue of copies) within the parts of the British Dominions to which the Act extends and also in some other place, will vest Imperial copyright in the author or his assigns; and the work is deemed to be published simultaneously in the two places, if the interval does not exceed fourteen days.¹ This period of fourteen days may be lengthened by Order in Council. The issue of copies within the British Dominions must be genuinely intended to satisfy the reasonable requirements of the public and not merely colourable.¹ Where it appears that any foreign country does not afford adequate protection to British authors, the Crown may exclude, by Order in Council, the subjects or citizens of such country not resident² in the British Dominions³ from any benefit to be gained by first publication by issue of copies after the date of the Order within the parts of the British Dominions to which the Act extends.⁴ Publication by any method other than by issue of copies will not affect copyright.⁵ Thus a drama may be performed or a lecture delivered abroad, or a picture exhibited, or photographs and engravings of a work of sculpture issued, without affecting its Imperial copyright; but the issue of copies of a book or drama or of an artistic work abroad will destroy the copyright. It appears that the issue of engravings or photographs of any artistic work other than a work of sculpture or architecture is an issue of copies sufficient to affect the copyright.

¹ s. 35 (3).

² Probably at the date of the making of the work. The object of the provision seems to be this. An author can gain copyright in two ways—(1) by being a British subject or resident at the date of making the work; (2) by issue of copies within the British Dominions. The Crown is empowered to exclude the subjects or citizens of a Foreign State from the benefits of the latter method. If this is so, then an author already possessing copyright at creation cannot be excluded from the benefits of publication by issue of copies.

³ Is this limited to the parts to which the Act extends? See note².

⁴ s. 23. It is clear from this provision that the conditions for obtaining copyright are alternative, not cumulative.

⁵ s. 1 (3).

It is therefore clear that a work may fall into the public domain on creation, and afterwards become the subject of copyright. Consequently, the making of copies will be lawful at one time and unlawful afterwards. What will be the position of the manufacturer of copies made before the issue of copies and not sold until afterwards? Can they be lawfully sold? Probably they can, as they are lawfully made.¹ In any case the copier must lose the benefit of any plate exclusively designed for multiplying copies.

Term of Copyright.

The term of copyright in all classes of works (except in the case of photographs, mechanical instruments, and Government publications) is the life of the author and fifty years after his death.² This applies to all works in which copyright subsists at the date of the coming into force of the Act.³ It is, however, subject to the royalty system introduced by the Act, which is allowed twenty-five years after the death of the author, or thirty years after in the case of a work in which copyright exists at the passing of the Act.⁴

Joint Works.

In the case of joint works the term of copyright is the life of the author who dies first and fifty years after his death, or the life of the author who dies last, whichever period shall be the longer.⁵

The royalty system comes into operation twenty-five years after the death of the first author, or after the death of the author who dies last, whichever event shall happen last.⁵

¹ s. 2 (2). See also *Taylor v. Pilkow*, [1899] L. R. 7 Eq. 418.

² s. 3. ³ s. 24 (1).

⁴ s. 3. The date of the passing of the Act was the 16th day of December, 1911. "Copyright" includes the Common Law right. For the details of the royalty system, see pp. 55-7, *infra*.

⁵ s. 16 (1).

Posthumous Works.

In the case of a literary, dramatic, or musical work, or an engraving, which has not been published by issue of copies or publicly performed or delivered at the date of the death of its author, or the last of its authors, and in which copyright subsists at the date in question, and is not determined by first issue of copies abroad, copyright shall subsist in the work until such publication, or public performance, or delivery and fifty years afterwards.¹ The royalty system comes into operation twenty-five years after publication by issue of copies, or performance, or delivery.

Existing Works.

In the case of works in which copyright exists at the commencement of the Act, the term of copyright is extended to that which would have been given by The Copyright Act, 1911, if it had been in force when the work was made, and the work had been entitled to copyright under it.²

This applies to all works, although they may not fulfil the qualifications or the conditions necessary to acquire copyright if they had been made or published after the Act came into force. On a literal construction it would seem that, in the case of an unpublished work, not even first publication by issue of copies abroad after the commencement of the Act, would destroy its copyright; but it is conceived that the Courts would not accept this construction, as contrary to all principles of English Copyright Law.

The extended term becomes the property of the owner of the copyright before the commencement of the Act, or, where the existing copyright has been split up into various interests, the property of the various owners of

¹ s. 17 (1). This seems to be the meaning of the section, which is very badly drafted. The "period" referred to in the section is the period from the coming into operation of the royalty system to the expiration of the copyright.

² 24 (1).

those interests, except where the author himself was the first owner of the copyright.¹ In that case the additional term of copyright reverts to the author.² But any person, to whom he has assigned the right or granted any interest therein for the whole term, has the option of purchasing the right or the grant of a similar interest for the remainder of the term. If he desires to exercise the option he must give written notice to the author,³ not more than one year or less than six months before the date at which the right would have expired; and the notice must be sent by registered post or, if the author cannot be found, advertised in the *London Gazette* and two London newspapers. The amount to be paid is to be fixed by arbitration.³ The owner of the right or interest has also the option to continue to exercise the privileges which he previously enjoyed, subject to the payment of royalties if demanded within three years after the expected termination of the right. The royalties are to be determined by arbitration. Where the work forms part of a collective work of which the assignee or grantee is the "proprietor," no royalties need be paid.⁴ There is no definition of "proprietor" in the Act; it is a term borrowed from the Act of 1842, and means the owner of copyright in the collective work as a whole.

Where anyone has, before the 26th July, 1910, incurred any expenditure or liability in connection with the reproduction or performance of any work, which at the time was lawful or would have been lawful but for the passing of The Copyright Act, 1911, all rights or interests

¹ This appears to be the true meaning of the provision. "Copyright" here includes the inchoate right to acquire copyright by publication as well as statutory copyright. A writes a book and sells it to B, who publishes it; A is the first owner of the copyright for the purposes of this section. C writes a book under such circumstances that the copyright vests *ab initio* in D; it is conceived that D is the first owner. E writes a book and gives F a copy of the manuscript, from which the work is published after E's death; F or other the owner of the manuscript at E's death is the first owner of the copyright.

² Including his personal representatives. ³ s. 21 (1) (a). ⁴ s. 21 (1).

arising under such transaction and still valuable and subsisting shall not be prejudiced, unless the person entitled under the Act to restrain reproduction or performance agrees to pay compensation. This seems to mean that, where any one has incurred any legal liability or expenditure for the purpose of doing something, which under the Act is a breach of copyright, but under the law existing at the time would not have been, he can proceed as he could have done if the Act had not been passed, unless the owner of the copyright is prepared to compensate him.

In the case of a work unpublished at the commencement of the Act, copyright is conferred on the owner of the Common Law right to restrain publication.¹ In the case of a dramatic or musical work where the copyright and playright were in different hands before the Act, the owner of the playright has the performing right, but the owner of the copyright acquires all the other rights included in copyright by the Act.¹ Where either the copyright or playright has expired, the expired right is not revived by the Act.

Photographs, Mechanical Records, and Government Publications.

In the case of photographs the term is fifty years from the making of the original negative,² and in the case of mechanical instruments for the reproduction of sounds fifty years from the making of the original plate.³ The term of fifty years from first publication is given to Government publications.⁴

Royalty System.

After the expiration of twenty-five years from the death of the author of a work which has been published

¹ s. 24 (1). First Schedule.

² s. 21. "Making" clearly means "completion."

³ s. 19 (1).

⁴ s. 18.

by the issue of copies to the public, anyone is at liberty to reproduce the work for sale on the following conditions:—

(1) The prescribed notice in writing must be given to the owner of the copyright;

(2) Royalties must be paid to the owner on all copies sold, calculated at the rate of ten per cent. on the published price.¹

In the case of a work in which copyright exists at the passing of the Act² the period is thirty years after the death of the author.¹

The Board of Trade are empowered to make regulations concerning the notices to be given and the manner of payment of the royalties.¹ In pursuance of these powers the Copyright Royalty System (General) Regulations were issued. The notice must contain:—

- (a) The name and address of the person intending to reproduce the work;
- (b) The name of the work and (if necessary) a sufficient description of it;
- (c) The intended manner of reproduction;
- (d) The price; and
- (e) The earliest date at which a copy will be delivered to a purchaser.³

The notice must be sent not less than one month before any copies are delivered to a purchaser, to the owner or his agent for the receipt of notice, if the name and address within the United Kingdom are known or can be ascertained with reasonable diligence; if not, an advertisement must be put in the *London Gazette* giving particulars (a) and (b), and an address from which a copy of the notice can be obtained.⁴

¹ s. 3. ² 10th December, 1911.

³ Regulation (2). ⁴ *Ibid.* (3).

Unless otherwise agreed, royalties are payable by means of adhesive labels affixed to the copies. The owner of the copyright must intimate by registered letter to the person giving the notice some reasonably convenient place within the United Kingdom from which such labels can be obtained, and must supply them on demand in writing and tender of the price. No copy may be sold without an adhesive label affixed, unless the owner fails to give such intimation after the expiration of fourteen days after the notice or fails to supply such labels within fourteen days after demand duly made. In these cases the royalties are a debt due to the owner from the person reproducing the work.¹

The labels must conform to the regulations.¹

The Act only speaks of copies, but in all probability any work that would otherwise infringe the copyright may be produced under this section, on the principle that the greater includes the lesser.

Extension of Imperial Copyright.

The protection given by The Copyright Act, 1911, extends throughout the British Dominions other than self-governing Dominions.² The self-governing Dominions are the Dominions of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.³ The self-governing Dominions may adopt the Act, if they so desire, or pass copyright laws practically identical with it; and then they will be treated as parts of the British Dominions to which the Act extends.⁴

The Crown is empowered to extend the Act to Cyprus and to any territories under British protection,⁵ and by

¹ Regulation (4).

² s. 25 (1).

³ s. 35 (1).

⁴ s. 25. See pp. 197-9, *infra*.

⁵ s. 24.

an Order in Council¹ of the 24th June, 1912, the Act was extended to Cyprus, and to the following protectorates:—The Bechuanaland Protectorate, East Africa Protectorate, Gambia Protectorate, Gilbert and Ellice Islands Protectorate, Northern Nigeria Protectorate, Northern Territories of the Gold Coast, Nyasaland Protectorate, Northern Rhodesia, Southern Rhodesia, Sierra Leone Protectorate, Somaliland Protectorate, Southern Nigeria Protectorate, Solomon Islands Protectorate, Swaziland, Uganda Protectorate, and Weihaiwei.

Ownership.

First Owner.

Subject to the following exceptions, the first owner of the copyright is the author.² In the case of joint authorship the joint authors are probably owners in common. In the two cases of photographs³ or mechanical instruments for the reproduction of sounds⁴ the first owner of the copyright is the owner of the original negative or plate at the time of its making.

Exceptions.—1. Where the author is in employment under a contract of service or apprenticeship and the work is made in the course of that employment then, subject to any agreement, the employer is the first owner of the copyright.⁵

The test as to whether one person employed to do work for another is a servant, is whether the employer retains the power of controlling the work.⁶ In *Yewens v. Noakes*,⁷ Bramwell, L. J., said: "A servant is a person subject to the command of his master as to the manner in which he shall do his work." These principles were

¹ See p. 274, *infra*; *London Gazette*, 28th June, 1912, p. 4658.

² s. 5 (1).

³ s. 21.

⁴ s. 10 (1).

⁵ s. 5 (1).

⁶ Per Crompton, J., in *Sadler v. Henlock*, [1855] 4 E. & B., at p. 578.

⁷ [1880] 6 Q. B. D., at p. 532.

accepted by the Court of Appeal in *Simmons v. Heath Laundry Company*.¹ "The question to be asked," said Buckley, L. J., "is: was he employed upon the terms that he should within the scope of his employment obey his master's orders, or was he employed to exercise his skill and achieve an indicated result in such manner as, in his judgment, was most likely to ensure success?"² If he is bound to render obedience to his employer, it does not matter that in certain circumstances it is his duty to exercise his own judgment.³

The principle is quite clear and has long been settled; the only difficulty is to apply it to the case of authorship. There is no authority as to what constitutes a contract of service in this case. The present writer submits the following test:—*Where the author is bound to produce a work and is bound to alter the work as his employer pleases without the option of refusing to go on with the work, the author is the servant of the employer.*

Examples.—(i) A agrees to write a book, B agrees to publish it. A writes the book. Unless the book contravenes the conditions of the publishing agreement, B is bound to publish it as A wrote it. A is not B's servant.

(ii) A writes an article and offers it to B, the editor of a Review. B refuses to insert it unless A makes certain alterations in it. A will not get it inserted unless he makes those alterations, but he is not bound to make them. A is not B's servant.

(iii) A is a reporter for a newspaper, of which B is the editor and proprietor. A is bound to furnish reports, he is also bound to follow B's directions as to the length and nature of his reports and to alter them in accordance with B's directions. A is B's servant.

¹ [1910] 1 K. B. 543.

² *Ibid.*, at p. 553.

³ *Walker v. Crystal Palace Football Club*, [1910] 1 K. B. 87.

It should be noted that the servant must actually exercise his own skill or judgment; otherwise (it is submitted) he is not the author.¹ Thus a clerk making a plan under minute directions from his employer is not the author of that plan. He is exactly in the position of a clerk writing a letter from dictation.

Where the work is an article or contribution to a periodical, the author is to be deemed to have reserved a right to restrain the publication of the work otherwise than as part of a periodical, in the absence of agreement to the contrary.² This right is probably a purely contractual right.³

A contract of apprenticeship is a contract where the employer agrees to teach and the employé to serve.⁴ There is no apprenticeship without a contract to teach, express or implied; a contract to give the employé an opportunity of learning is not sufficient.⁵ There is also authority that the teaching must be the primary object of the contract.⁶

2. Where, in the case of an engraving, photograph, or portrait, the plate or other original was ordered and made for valuable consideration in pursuance of that order, then in the absence of agreement the first owner is the person who gave the order.⁷

3. In the case of Government publications, *i.e.*, works prepared or published under the direction or control of His Majesty or any Government department, the copyright belongs to the Crown, in the absence of agreement to the contrary.⁸

¹ See pp. 47-9, *supra*.

² s. 5 (1).

³ *Cf.* *Mayhew v. Maxwell*, [1860] 1 J. & H. 312.

⁴ *St. Pancras v. Clapham*, [1860] 2 E. & E. 742; *Horan v. Hayhoe*, [1904] 1 K. B. 288.

⁵ *R. v. Shinfield*, [1811] 14 East 547.

⁶ *R. v. Burbach*, [1813] 1 M. & S. 370.

⁷ s. 5 (1).

⁸ s. 18.

In the case of joint works not published by issue of copies, only those authors who fulfil the necessary conditions of allegiance or residence are the owners of the legal interest in the copyright.¹ They hold the legal interest as trustees for themselves and the other authors who do not fulfil the necessary conditions.

Transfer.

The owner of the copyright may assign his copyright or any interest therein for any period or over any area, subject to the following exception; but such assignment or licence must be in writing and signed by the grantor or by his duly authorized agent.² But if the first owner of the copyright is the author he cannot assign or grant any interest in the right which shall endure beyond the space of twenty-five years from his death otherwise than by will.² This applies to all assignments after the passing of the Act (16th December, 1911). It does not apply to an assignment of copyright in a collective work or to a licence to publish a work as part of a collective work.²

Copyright is personal property³ and will descend like other personalty to the owner's next-of-kin on intestacy, and will also pass to the owner's trustee in bankruptcy.⁴ The copyright in a work can be assigned as a whole to more than one person as part owners; and they may take either as tenants in common or as joint tenants. But the presumption is that they take as tenants in common.⁵ No part owner can grant a valid licence without the consent of all the other part owners.⁶ In *Jauri v. Renad*⁷

¹ s. 13 (2).

² s. 5 (2).

³ *Latour v. Bland*, [1818] 2 Stark 382.

⁴ *Mawman v. Tegg*, [1820] 2 Russ. 385, p. 392.

⁵ *Jauri v. Renad*, [1802] 3 Ch. 402; but there Kekewich, J., relies on the authority of *Powell v. Head*, [1879] 12 Ch. D. 696. *Powell v. Head* does not decide this point.

⁶ *Powell v. Head*.

⁷ [1802] 3 Ch. 402.

Kekewich, J., allowed three part owners to sue without joining the fourth. Nothing was said on this point by the Court of Appeal.

Licences.

A licence must be in writing and signed by the grantor or by his duly authorized agent.¹ It is not part of the copyright, but merely a permission to do what would otherwise infringe the copyright. It is not presumed to be a sole licence.² A sole licensee cannot sue in his own name³; but it has been suggested that the owner of the copyright must join him as a plaintiff.⁴

Compulsory Licences.

In the case of a literary, dramatic, or musical work which has been published by issue of copies or publicly performed, and of which the owner of the copyright refuses to republish or to allow the republication or performance, the Judicial Committee may, at any time after the death of its author, order the owner of the copyright to grant a licence to republish or perform the work on such terms and subject to such conditions as it may think fit.⁵ It will be noted that nothing is said about inadequacy of supply.

Destruction.

Copyright is lost by—

1. Expiration of the term of protection;
2. First issue of copies outside the parts of the British Dominions to which the Act extends.⁶

Infringement.

Infringement of the copyright in a work is committed by making copies of, or performing or delivering in

¹ s. 5 [2].

² *Warne v. Routledge*, [1874] L. R. 18 Eq. 497.

³ *Neilson v. Horniman*, [1909] 26 Times L. R. 189.

⁴ *Taylor v. Neville*, [1878] 26 W. R. 299; *Tree v. Bowkett*, [1896] 74 L. T. 77; *see quære* whether these cases are not instances of a partial assignment of copy-right. Cf. *Macmillan v. Dent*, [1907] 1 Ch. 107.

⁵ s. 4.

⁶ See s. 1 (1).

public the work in question, or a work derived from it and not recognised by the law as an original and legitimate work, without the consent of the owner.¹ What use of one work in composing or making another will render the latter illegitimate, will be considered later.²

Copyright is also infringed by any person who sells or lets for hire, or by way of trade exposes or offers for sale or hire, or distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright, or by way of trade exhibits in public or imports within the British Dominions to which the Act extends, any work which *to his knowledge* infringes copyright, or would do so if made within the parts of the British Dominions in question.³

It is also infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance of the work in public, unless he was not aware and had no reasonable grounds for suspecting that the performance would be an infringement of copyright.⁴ These acts must all be done within the parts of the British Dominions to which the Act extends to render the infringer liable.⁵

Civil Remedies.

Remedies against the Infringer.

Where copyright is infringed, the owner has all the remedies conferred by law for the protection of a right against any person who infringes it⁶: viz.—

1. Damages. Theoretically the owner of the copyright can recover compensation for all the damage

¹ s. 2 (1).

² See pp. 98-119, *infra* for Literary Copyright; pp. 143-8 for Dramatic; pp. 153-9 for Musical; pp. 171-6 for Engravings; pp. 179-180 for Sculpture; pp. 187-191 for Paintings &c.; p. 195 for Architecture.

³ s. 2 (2). ⁴ s. 2 (3). See pp. 144-6, *infra*.

⁵ *Saccharin Corporation v. Rietmayer*, [1900] 2 Ch. 659; *Badische Anilin und Soda Fabrik v. Hickson*, [1906] A. C. 419.

⁶ s. 6.

caused to him by the infringement, *i.e.*, by the diminution of his profits, and for any injury done to the reputation of the work. But it appears that the diminution in the sales of the original work is *prima facie* measured by the number of infringing copies sold, not by any actual fall in the sales. In *Pike v. Nicholas*,¹ James, V. C., directed that the infringer should account for each infringing copy as if it had been a copy of the original work, and should pay to the owner the amount of profit which he would have received from the sale of the same number of copies of the original work. In that case there was no question of any injury to the reputation of the original work. It is submitted that compensation may be recovered for any such injury.²

2. An account of profits made by the infringer.³

3. An injunction or interdict.⁴ This may be granted although only one copy has been wrongfully dealt with.⁵

4. Destruction of all copies made in violation of the owner's rights. This is given by the Common Law,⁶ but it is practically superseded by the right given by the Act for the delivery up of infringing copies.

Only an injunction or interdict can be obtained if the defendant alleges and proves that at the date of the infringement he was not aware, and had no reasonable ground for suspecting that copyright existed in the work.⁷

This only applies where the infringer is not aware of the existence of copyright in the original work. It

¹ [1880] L. R. 5 Ch., 251.

² *Gaimart v. Bull*, [1863] 14 C. B. N. S. 306; *Dicks v. Brooks*, [1880] 15 Ch. D. 22.

³ *Baily v. Taylor*, [1829] 1 R. & M. 73.

⁴ *Cooper v. Whittingham*, [1880] 15 Ch. 501.

⁵ *Butterworth v. Kelly*, [1886] 4 Times L. R. 430.

⁶ *Prince Albert v. Strange*, [1849] 2 D. G. & S. 652; *Hole v. Bradbury*, [1879] 12 Ch. D. 886.

⁷ *s. 8.*

is no defence that he was not aware that he was committing a breach of copyright; *e.g.*, in the case of a printer who is printing an infringing copy.¹ It is doubtful whether it is a defence that the infringer was not aware of the existence of the work whose copyright he is infringing, *e.g.*, where he is writing a novel founded on a drama, with the permission of the author of the drama, and is not aware that the drama is founded on an earlier copyright novel. It would seem that the infringer must be taken to know of the existence of the work whose copyright he is infringing, and then the question arises whether he had reasonable grounds of suspicion.

The provision only affects remedies, not rights; hence, where the innocent infringer is protected under this section, the infringing work is still illegal and can possess no copyright of its own; and it will be a breach of copyright to sell or distribute the copies after the maker has learnt of the infringement.

In the case of architecture, where the infringing building has been commenced, the owner cannot obtain an injunction restraining its completion or ordering its demolition²; and no order for forfeiture can be obtained.³

In any action for infringement of copyright in any work, the work is deemed to be a work in which copyright subsists, and the plaintiff is presumed to be the owner, unless the defendant puts these questions in issue.⁴ If he puts in issue the plaintiff's title, then, if a name purporting to be that of the author is indicated in the usual manner, the owner of that name is presumed to be the author of the work. If there is no such name, or if the name so indicated is not the author's true name, or

¹ *Baschet v. London Illustrated Standard Co.*, [1900] 1 Ch. 73.

² s. 9 (1).

³ s. 9 (2).

⁴ s. 6 (3).

the name by which he is commonly known, and a name purporting to be that of the publisher is indicated in the usual manner, the owner of that name is presumed to be the owner of the copyright.

The costs are in the absolute discretion of the Court.¹

No action is to be commenced three years after the infringement.²

Forfeiture of Infringing Copies.

All infringing copies and all plates used or intended to be used for the production of such copies, are deemed to be the property of the owner of the copyright, who may take proceedings for the recovery of such copies or plates, or for damages for their conversion.³

An infringing copy is defined to be "any copy, including any colourable imitation, made or imported in contravention of the provisions of the Act."⁴ It is submitted that this definition includes all works made or imported in violation of the rights of the owner of the copyright. There is no reason for convenience for putting a narrower interpretation on it, as the remedies given by the Common Law include the right to the delivery up for destruction of all copies made in contravention of the owner's rights. Where part of the infringing work is innocent the whole must be delivered up, unless the innocent part can be severed from the infringing part.⁵

This provision does not apply to the case of architecture.

"Plate" includes "any stereotype or other plate, stone, block, mould, matrix, transfer, or negative used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which records,

¹ s. 6 (2).

² s. 10.

³ s. 7.

⁴ s. 35 (1).

⁵ *Warne v. Seebohm*, [1888] 39 Ch. D. 73; *Boosey v. Whight* (No. 2), [1890] 81 L. T. 265.

perforated rolls, or other contrivances for the acoustic representation of the work, are, or are intended to be made."¹ It is submitted that the essential distinction between plate which is to be forfeited under this provision, and plate which is not, is that the former can only be used for the production of infringing copies.

It is submitted that an action for the delivery up of infringing copies is not "an action for infringement of copyright"; it is an action for the recovery of property² and can be brought against innocent parties. If this is so, none of the provisions dealing with proof of the ownership of the copyright, or protecting the innocent infringer, or limiting the time for bringing actions, will apply.

Summary Remedies.

If a person knowingly—

- (1) Makes for sale or hire, or
- (2) Sells or lets on hire or by way of trade exposes or offers for sale or hire, or
- (3) Distributes for the purposes of trade or to such an extent as to affect prejudicially the owner, or
- (4) By way of trade exhibits in public, or
- (5) Imports for sale or hire into the United Kingdom any infringing copy or copies of any work in which copyright exists;

he commits an offence under the Act punishable on summary conviction by a fine not exceeding forty shillings per copy and fifty pounds in respect of a single transaction: or, in the case of a second or subsequent offence, by imprisonment with or without hard labour for a term not exceeding two months.³

¹ s. 35 (1).

² Cf. *Muddock v. Blackwood*, [1898] 1 Ch. 58.

³ s. 11 (1).

If a person makes or has in his possession any plate for the purpose of making infringing copies, or knowingly and for his private profit causes any copyright work to be performed in public without the consent of the owner, he is liable on summary conviction to a fine not exceeding fifty pounds, or on a second or subsequent offence to imprisonment, with or without hard labour, for a term not exceeding two months.¹ The Court may order all infringing copies or all plates for making them in the possession of the alleged offender to be destroyed, or delivered up to the owner of the copyright, whether the alleged offender is convicted or not.²

An appeal from a summary conviction lies to Quarter Sessions.³

These provisions only extend to the United Kingdom,⁴ and are not applicable to infringing copies of architectural work.⁵

Importation of Copies.

The owner of the copyright in any work may give notice in writing to the Commissioners of Customs and Excise that he desires that copies of the work made without his consent shall not be imported into the United Kingdom, and in that case the importation of such copies is forbidden.⁶ The Commissioners are empowered to make regulations concerning the information to be given and other conditions to be complied with before ordering the detention of the imported copies;⁷ and such conditions may include the indemnification of the Commissioners against all expenses and damages incurred

¹ s. 11 (2).

² s. 11 (3).

³ s. 12.

⁴ s. 13.

⁵ s. 9 (2). As to summary remedies in the case of musical works see pp. 160-2, *infra*.

⁶ s. 14 (1).

⁷ s. 14 (2), (3).

through such detention.¹ The regulations may also deal with the security to be given and the evidence necessary,¹ and may vary with the different classes of work.² The copies may be destroyed or otherwise dealt with as the Commissioners direct.³ For the purposes of this section the United Kingdom does not include the Isle of Man.⁴ These provisions apply with the necessary modifications to importation into a British Possession to which the Act extends.⁵

By the Regulations⁶ of the 19th June, 1912, the Commissioners provide forms of notice to be given by the owner of the copyright, and a statutory declaration to be made by him. He must also, before any article is detained, give such further information and evidence, if the Commissioners so desire, as may satisfy them that the article is liable to detention or forfeiture, and must also deposit a sum of money sufficient to cover the expenses of the examination of the goods. If so required, he must give an undertaking to indemnify the Commissioners against all expenses and damages, and must also enter into a bond with two sureties within four days after the detention. Apparently only copies of the original work are excluded by the provision, not colourable imitations.

Right to Restrain "Passing Off."

The preceding pages describe the system set up by The Copyright Act, 1911. Roughly speaking, all rights in the nature of copyright depend solely on that Act. But the owner of copyright possesses another right in his work given him solely by the Common Law, the right to restrain "passing off."⁷ At one time the right

¹ s. 14 (5).

² s. 14 (4).

³ 39 & 40 Vict. c. 36, s. 42.

⁴ s. 14 (6).

⁵ 1 & 2 Geo. V. c. 46, s. 14 (7).

⁶ See pp. 267-271 *infra*.

⁷ Cf. *Reddaway v. Banham*, [1896] A. C. 109.

was grounded on a supposed copyright in the title of the work; but since *Dicks v. Yates*¹ it is clear that the right rests on the Common Law and not on the Law of Copyright. There cannot, as a general rule, be copyright in a title²; there may possibly be such in a page of title.³

Two conditions are necessary to give a right of action, viz.—(1) The original work must have acquired a reputation in the market, (2) the second work must be likely to deceive persons of ordinary intelligence into buying it instead of the original. (1) If the work has acquired no reputation in the market, no one will be deceived into buying the second in mistake for it; thus in *Maxwell v. Hogg*⁴ two rival publishers projected magazines with identical titles: viz.—“Belgravia,” which in the case of one publisher had been extensively advertised for two months, and in the case of the other the title had been entered at Stationer’s Hall three years previously. but, as no reputation had been acquired by publication, neither publisher was allowed to restrain the other from using the name “Belgravia.” Again, in *Licensed Victuallers’ Newspaper Co. v. Bingham*,⁵ the owners of the first newspaper failed to restrain the publication of the second, on the ground that no reputation could be acquired by publication for three days with a very small sale (80 copies). And in *Franke v. Chappell*⁶ an injunction to restrain the defendants from describing their concerts as “Richter Concerts” was refused, as the plaintiff failed to shew that the term “Richter Concerts” meant the plaintiff’s concerts (previously, but no longer, conducted by Dr. Richter).

¹ [1881] 18 Ch. D. 76; *Hogg v. Kirby*, [1803] 8 Ves 215, per Lord Eldon, p. 223.

² *Schove v. Schmincké*, [1886] 33 Ch. D. 546; *Crotch v. Arnold*, [1900] 54 S. J. 49. *Weldon v. Dicks*, [1878] 10 Ch. D. 347, must be treated as bad law; *Dicks v. Yates*; *Licensed Victuallers’ Newspaper v. Bingham*, [1888] 38 Ch. D. 139 (per Lindley, L. J., at p. 142).

³ Per Jessel, M. R., *Dicks v. Yates*, 16 Ch. D., at p. 89.

⁴ [1867] L. R. 2 Ch. 307, judgment of Cairns, L. J.

⁵ [1888] 38 Ch. D. 139.

⁶ [1887] 57 L. T. 141; *Schove v. Schmincké*, [1886] 33 Ch. D. 546.

(2) The second publication must also be calculated to deceive sensible people into buying it in mistake for the original, and all circumstances, the size, shape, and appearance of the works, and, if they are newspapers, the times of publication, will be taken into account. Thus in *Bradbury v. Beeton*,¹ an application by the proprietors of *Punch* to restrain the publication of a comic journal, which differed in appearance from the threepenny *Punch* and was actually published on a different day of the week (though nominally on the same day), under the title of "*Punch & Judy*," was dismissed, although Malins, V.C., thought that the title had been chosen on account of the plaintiff's reputation. In *Cowen v. Hulton*,² the proprietor of the *Newcastle Chronicle* failed to restrain the publication in the same town, Newcastle, of another paper under the title of *The Sporting Chronicle & Prophetic Bell*, with different appearance and contents; and in *Walter v. Emmott*,³ the proprietor of a twopenny paper published three times a week at 11 a.m., called the *Mail*, failed to restrain the publication of a daily halfpenny paper published at 3 a.m., also called the *Mail*. The intention of the publisher of the second newspaper to deceive the public does not make him liable, if the public are not in fact deceived, although he may be deprived of his costs on this ground.⁴ On the other hand the defendant is not protected by the absence of any intention to deceive, if the actual result has been to damage the plaintiff by deceiving the public.⁵ Besides deceiving the public, the second work must cause, or in the natural course of events, must be likely to

¹ [1869] 18 W. R. 33.

² [1882] 46 L. T. 897.

³ [1885] 54 L. J. Ch. 1059.

⁴ *Bradbury v. Beeton*, *supra*; *Borthwick v. The Evening Post*, [1888] 37 Ch. D. 449.

⁵ *Clement v. Maddick*, [1859] 1 Giff. 98, 5 Jur. N. S. 592 (*sed quære* if this does not rest on the exploded ground of copyright); per Bowen L. J. in *Walter v. Emmott*, 54 L. J. Ch. at p. 1064.

cause damage to the sale of the first. Without this there is no cause of action. Thus in *Borthwick v. The Evening Post*,¹ the proprietor of the well-known, daily newspaper, *The Morning Post*, sought to restrain the publication of a daily evening newspaper under the title of *The Evening Post*. The Court found as a fact that the name had been taken for the purpose of deceiving the public into the belief that there was some connection with *The Morning Post*, and that a certain number of people had been deceived. But, as it was not suggested that *The Evening Post* would be mistaken for *The Morning Post*, and it was difficult to see how a single copy the less of *The Morning Post* would be sold in consequence of the issue of *The Evening Post*, an injunction was refused. "There has been an attempt to deceive the public, but there has not been shewn to be within any measurable distance any probability of injuring *The Morning Post*. A person would not buy *The Morning Post* the less because he buys *The Evening Post*."² This case was, however, very near the line. The fact that the new paper might hamper the development of the old (*e.g.*, that the old might be unable to bring out an evening edition under the most appropriate name), or that discredit might be thrown on the old by reason of the inferior character of the new, and its different attitude with regard to politics, is not considered damage of which the Courts can take note.³

The appearance of the works, the times of publication, if newspapers, and the prices, are all taken into consideration, as well as the similarity of title, but the following cases may be useful as examples. In *Ingram v. Stiff*,⁴ the proprietor of a weekly journal, *The London Journal*,

¹ [1888] 37 Ch. D. 449.

² Per Bowen L. J. 37 Ch. D. at p. 464.

³ *Borthwick v. The Evening Post* (*supra*) and *Walter v. Emmott*, [1855] 54 L. J. Ch. 1059.

⁴ [1859] 5 Jur. N. S. 947.

succeeded in preventing the publication of *The Daily London Journal*, and in *Clement v. Maddick*,¹ the publishers of *Bell's Life* restrained the publication of a *Penny Bell's Life*, and in *Mack v. Petter*,² the publisher of "The Birthday Scripture Text Book" restrained the publication of "The Children's Birthday Text Book." On the other hand in *Kelly v. Byles*,³ the proprietor of the *Post Office Directory of the West Riding of Yorkshire* failed to restrain the publication of the *Post Office Bradford Directory*. But each case depends so much on its own particular facts that, apart from the general principles, now so well settled, on which the Court proceeds, the cases are only valuable as illustrations.⁴ The Court will also restrain the proprietor of one work from advertising it in terms calculated to induce the public to believe it is another work.⁵

Author's Reputation.

When the author has sold the copyright in his work, the purchaser is entitled to alter the work as he pleases⁶; but, if he injures the author's reputation by publishing the work in its altered shape as being entirely the work of the original author, he is liable to an action for libel.⁷

¹ [1859] 1 Giff. 98, 5 Jur. N. S. 592.

² [1872] L. R. 14 Eq. 431.

³ [1879] 13 Ch. D. 682.

⁴ See also *Chappell v. Sheard*, [1855] 2 K. & J. 117; *Kelly v. Hutton*, [1868] L. R. 3 Ch. 703; *Metzler v. Wood*, [1878] 8 Ch. D. 606; *Walter v. Head*, 25 Sol. J. 742, 757; *The Primrose Press Agency Co. v. Knowles*, [1885] 2 Times L. R. 404; *Talbot v. Judges*, [1887] 3 Times L. R. 398; *Reed v. O'Meara*, [1888] 21 L. R. Ir. 216; *Prowett v. Mortimer*, [1856] 2 Jur. N. S. 414; *Chance v. Sheppard*, [1869] *Sebastian's Digest*, p. 189; *Edmonds v. Benbow*, [1821] *Sebastian's Digest*, p. 16.

⁵ *Seeley v. Fisher*, [1841] 11 Simons 581.

⁶ *Cox v. Cox*, [1853] 11 Hare 116.

⁷ *Archbold v. Sweet*, [1832] 5 C. & P. 219; *Lee v. Gibbings*, [1892] 67 L. T. 263.

SPECIAL PART.

CHAPTER III.

LITERARY COPYRIGHT.

Statutes.

PRIOR to the 1st July, 1912, the law of literary copyright rested on The Copyright Act, 1842. Since then it rests on The Copyright Act, 1911.

Definition of a "Book."

The Copyright Act, 1842, confers copyright only on books, and defines a book as meaning and including "every volume, part, or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published."¹ A copy of every "book" is required to be delivered to the British Museum.² The Act of 1911 confers copyright on "literary" works,³ but requires delivery of copies of "books" to the British Museum⁴; and a "book" is defined to include "every part or division of a book, pamphlet, sheet of letterpress, sheet of music, map, plan, chart, or table separately published."⁵ It would seem, therefore, that the Act of 1842 restricts copyright to works of such a character as to be furnished to the British Museum. Thus writing on a tombstone would probably not be protected under the Act of 1842. Apart from this, no particular shape or binding is necessary to constitute a "book"; the one thing needful is the power of communicating information by words or signs.⁶

¹ 5 & 6 Vict. c. 45, s. 2. ² s. 6.

³ 1 & 2 Geo. V. c. 46, s. 1 (1). "Literary work" includes maps, charts, plans, tables, and compilations, s. 35 (1).

⁴ s. 15.

⁵ s. 15 (7).

⁶ See pp. 76-8, *infra*.

Thus a folding card in the shape of the human hand, containing verses, has been held to be a "book" within the meaning of the Act,¹ and a form of application written out on a single sheet.²

After some difference of opinion newspapers have been held to be within the definition.³

The definition does not include anything which can be described as part of a machine,⁴ nor directions on machines or tools as to the proper method of using them.⁵ This is probably the case under The Copyright Act, 1911.

"Separately Published."

In *Johnson v. Newnes*⁶ the meaning of the words "separately published" was considered. There the author of a serial story in a magazine, who had not parted with his copyright, sought to restrain the publication of the story in separate form by the proprietor. It was objected that he had no title to sue, as his work had not been "separately published." But the Court held that, as the story could be distinguished from the other contributions, it was "separately published" within the meaning of the Act, and therefore the author was entitled to sue without publishing his work in volume form.

In *Aflalo v. Lawrence*⁷ Romer and Stirling, L. JJ., followed *Johnson v. Newnes*,⁸ but Vaughan Williams, L. J., expressed the opinion that "separate publication" did not

¹ *Hildesheimer v. Dunn*, [1891] 64 L. T. 452.

² *Southern v. Bailes*, [1894] 38 Sol. J. 681.

³ *Walter v. Howe*, [1881] 17 Ch. D. 708; *Trade Auxiliary Co. v. Middlesborough Tradesmen's Association*, [1888] 40 Ch. D., at pp. 435-6; *Cate v. Devon Newspaper Co.*, [1889] 40 Ch. D., at p. 503. *Cox v. Land and Water Journal Co.*, [1869] L. R. 9 Eq. 324 must now be taken to be wrongly decided.

⁴ *Boosey v. Whight*, [1900] 1 Ch. 122; *Newmark v. National Phonograph Co.*, [1907] 23 Times L. R. 439.

⁵ *Boosey v. Whight*; *Hollinrake v. Truswell*, [1894] 3 Ch., at p. 426 (per Lindley, L. J.)

⁶ [1894] 3 Ch. 663.

⁷ [1903] 1 Ch. 318.

⁸ [1894] 3 Ch. 663.

include publication with other articles in a collective work which formed a complete whole in itself. The decision of the Court of Appeal was reversed in the House of Lords,¹ but no opinion was expressed about the meaning of the words "separately published."

Qualifications for Copyright.

For a literary work to be capable of protection under the Copyright Acts it must fulfil three conditions.

Literary Nature.

1. *The work must be of a literary nature, i.e., capable of conveying ideas or information by means of words, or signs, or illustrations.* No literary merit is required as the law is quite unable to measure this.² But the work must be literary in nature, for the protection granted to books will not be extended to tools. Thus protection will be extended to a catalogue of books unless it is a mere "dry" list of names,³ and to an alphabetical catalogue of articles, medicines, and drugs of use to veterinary surgeons with their prices sold by the advertiser,⁴ and to a list of brood mares,⁵ and to a Court Calendar.⁶ The calculator of a set of mathematical tables has copyright in his own set.⁷ Again, after some difference of judicial opinion, it has been decided that there is copyright in a descriptive advertise-

¹ *Lawrence v. Aflalo*, [1904] A. C. 17.

² Per Lord Halsbury, in *Walter v. Lane*, [1900] A. C., at p. 549; per Lord Davey, at p. 552; per Lord Brampton, at p. 558; cf. also dicta of Jessel, M. R., in *Maple's Case*, [1882] 21 Ch. D., at p. 377. The contrary opinion is expressed in *Scrutton on Copyright* [4th Ed.], p. 114, and by Parker, J., in *Weatherby v. International Horse Exchange, Limited* [1910] 2 Ch., at p. 304. But it is submitted that the requirement of literary merit is without foundation. The cases only show that the protection intended for books will not be extended to (1) works of art; (2) tools; (3) mere expressions of opinion.

³ *Hotten v. Arthur*, [1863] 1 H. & M. 603.

⁴ *Collis v. Cater*, [1898] 78 L. T. 613.

⁵ *Weatherby v. International Horse Exchange, Limited* [1910] 2 Ch. 297; cf. *Cox v. Land and Water Journal Co.*, [1869] L. R. 9 Eq. 324.

⁶ *Longman v. Winchester*, [1809] 16 Ves. 269; cf. *Matthewson v. Stockdale*, [1806] 12 Ves. 270.

⁷ *Bailey v. Taylor*, [1824] 3 L. J. O. S. 66; *Macnoill v. Williams*, [1847] 11 Jur. 344.

ment¹; and a man may have copyright in the arrangement of a mass of advertisements, although he does not possess copyright in any single advertisement.² A telegraphic code has been protected from infringement,³ and a shorthand system.⁴ In *Trade Auxiliary Co. v. Middlesborough Tradesmen's Association*⁵ the Court of Appeal restrained the copying of lists of bills of sale and deeds of arrangement, a work requiring merely labour and expense, in the plaintiff's periodicals; and in *Leslie v. Young*⁶ the House of Lords protected a compilation of circular tours, described by Lord Herschell as "containing an abridgment of information of a very useful character," although the rest of the case (charging the defendant with having infringed the plaintiff's copyright in a time table, compiled by copying the time tables issued by the railway companies with certain stations left out) was dismissed in the absence of any proof of direct copying from the plaintiff's work.⁷ In *Carnan v. Bowles*⁸ a road book was protected under the Statute of Anne.

Engravings and illustrations composing part of a book are within The Copyright Act, 1842.⁹ It is now settled that there may be copyright in illustrations to a book which contains no copyright letterpress.¹⁰ In *Davis v. Benjamin*,¹¹ Swinfen Eady, J., gave protection under the

¹ *Grace v. Newman*, [1875] L. R. 19 Eq. 623; *Maple v. Junior Army and Navy Stores*, [1882] 21 Ch. D. 369, over-ruling *Cobbett v. Woodward*, [1872] L. R. 14 Eq. 407.

² *Lamb v. Evans*, [1893] 1 Ch. 218.

³ *Ager v. P. and O. Navigation Co.*, [1884] 28 Ch. D. 637.

⁴ *Pitman v. Hine*, [1884] 1 Times L. R. 39.

⁵ [1888] 40 Ch. D. 435. ⁶ [1894] A. C. 335.

⁷ The headnote and some of the dicta of Lord Herschell go further; but this, I submit, is the meaning of the decision. It is admitted that in the case of direct copying the copyright might be infringed (p. 341); and this implies that copyright exists. The only point decided is that copying will not be presumed where it was so easy for the defendants to go to the originals and compile the same tables for themselves.

⁸ [1786] 2 Bro. C. C. 80.

⁹ *Bogue v. Houlston*, [1852] 5 D. G. & S. 267; *Marshall v. Bull*, [1901] 85 L.T. 77. The illustrations need not be physically attached to the work, *Comyns v. Hyde*, [1895] 13 R. 362. Cf. *Petty v. Taylor*, [1897] 1 Ch. 465, p. 475.

¹⁰ *Maple v. Junior Army and Navy Stores*, [1882] 21 Ch. D. 369

¹¹ [1906] 2 Ch. 491

Literary Copyright Act to sheets of drawings with no letterpress except the name of the advertising firm and the names and prices of the articles. In all probability a book of drawings without letterpress would be protected under the Act. In *Maple v. Junior Army and Navy Stores*,¹ Jessel, M. R., said: "There may be such things as picture books for those who cannot read letterpress." On the other hand, in *Schore v. Schmincké*,² Chitty, J., was prepared to hold that an album for holding photographs with pictorial borders containing views of castles with short descriptions attached was not a "book" within the Act: but this was doubted by Kekewich, J., in *Hildesheimer v. Dunn*.³ If an illustration is first published as a poster, it cannot be protected as part of the book.⁴ In *Stannard v. Lee*⁵ a map was held by the Court of Appeal to be within the protection of The Copyright Act, 1842. It was, said James, L. J., intended to convey information, and was therefore properly protected as a literary work. In *Hildesheimer v. Dunn*⁶ a card representing a gloved hand and cut to the exact shape and size of the human hand, which opened bookwise and contained on one side certain verses and on the other the lines of palmistry, was held to be properly registered under both The Literary Copyright Act, 1842, and The Fine Arts Copyright Act, 1862. It was not, however, decided under which Act the representation of the lines of palmistry was properly registered.

In *Hollinrake v. Truswell*⁷ the Court of Appeal refused protection to a cardboard pattern containing upon it scales, figures, and descriptive words, for adapting it to sleeves of

¹ [1892] 21 Ch. D., at p. 377.

² [1886] 83 Ch. D. 540.

³ [1891] 64 L. T. 452, at p. 454.

⁴ *Strong v. Worskett*, [1893] 12 Times L. R. 532.

⁵ [1871] L. R. 6 Ch. 346.

⁶ [1891] 64 L. T. 452.

⁷ [1894] 3 Ch. 420; Contrast *Drury v. Ewing*, [1862] Bond 540, but that was the case of a chart containing diagrams and instructions and not a tool to be used for measurement. It came under the American Act, 1831.

any dimensions, on the ground that it was not a literary production, though it might be protected as a patent or a tool. So also in *Cable v. Marks*¹ Bacon, V. C., held a piece of perforated cardboard, called "The Christograph," perforated so as to throw a shadow closely resembling the picture "*Ecce Homo*," not to be "a literary production in any sense of the word." In *Davis v. Comitti*² Chitty, J., held that the printed face of a barometer was incapable of protection as a literary work, as the face was meaningless apart from the barometer, and the whole barometer could not be considered a literary work. In *Boosey v. Whight*,³ where the infringement complained of consisted in selling perforated rolls of paper representing the musical score of certain songs, on which rolls particular directions as to time and expression had been copied from the plaintiff's sheets of music, it was held that there was no copyright in such directions. And in *Page v. Wisden*⁴ Malins, V. C., refused protection to a cricket scoring sheet in which the only novelty was a line for recording the runs at the fall of each wicket. "To say that a particular mode of ruling a book constituted an object for copyright is absurd." The absence of originality was the reason why protection was refused to the sheet as a whole; thus in *Southern v. Bailes*⁵ Chitty, J., protected a form of application for students issued by a tutor. It would seem to follow from the decision in *Davis v. Comitti*² that a meaningless collection of words is not the subject of copyright; and in *Fournet v. Pearson, Limited*,⁶ where a jury found that a drunken scrawl was not a literary composition on the ground of its utter unintelligibility, the Court of Appeal refused a new trial.

¹ [1882] 47 L. T. 432.

² [1900] 1 Ch. 1122.

³ [1894] 38 Sol. J. 691.

⁴ [1885] 52 L. T. 539.

⁵ [1869] 20 L. T. 435.

⁶ [1897] 14 Times L. R. 82.

There is no copyright in a general subject,¹ or in ideas or opinions. Thus in *Kenrick v. Lawrence*² the plaintiffs had invented a card representing a hand holding a pencil in the act of making a cross on a voting paper, with a view to such cards being used for the guidance and instruction of illiterate voters. The defendants published a card with a hand in a slightly different position making a cross as in the plaintiff's card. Wills, J., held that what had been taken by the defendant was the plaintiff's idea, not the form in which he had clothed it, and that the idea was not the subject of copyright. There is no copyright in a system of treating a subject; thus in *Jarrold v. Houlston*,³ it was held that one author could not prevent another throwing the information he wished to convey into the form of question and answer. So in American cases it has been held that a system of arbitrary signs for maps⁴ and a particular system of book-keeping⁵ are not subjects of copyright. In *Chilton v. Progress Printing Company*⁶ the Court of Appeal refused to protect certain "sporting tips," consisting of the name of a race and the name of a horse, on the ground that such "tips" were merely an expression of opinion which everyone was entitled to make use of, and not a literary composition which was intended to be protected. But the form in which news is conveyed is capable of protection; thus, in *Walter v. Steinkopff*,⁷ the copying of three trivial

¹ *Wilkins v. Aikin*, [1810] 17 Ves. 422.

² [1800] 25 Q. B. D. 99.

³ [1857] 3 K. & J. 708.

⁴ *Ferris v. Hexamer*, [1878] 9 Otto 674 (Am.).

⁵ *Baker v. Seldon*, [1879] 11 Otto 99 (Am.).

⁶ [1895] 2 Ch. 29; *Cf. Millar v. Wane*, [1894] 11 Times L. R. 130.

⁷ [1892] 3 Ch. 489. The infringement complained of was the copying of an important literary article and three trivial news paragraphs. After the commencement of the action the defendants offered an undertaking not to publish the article again, but refused to undertake with regard to the news paragraphs. The plaintiffs were disallowed their costs subsequent to the offer (see p. 105, *infra*).

news paragraphs was restrained. In *Boosey v. Whight*¹ perforated rolls or a mechanical organ were held to be parts of a machine for the purposes of infringement. It is conceived that they would be held incapable of copyright before The Copyright Act, 1911.

As a general rule there can be no copyright in a title.²

Innocency.

II. *The work must be innocent, i.e.—*

(1) Not forbidden by the criminal law. Thus protection will be refused to seditious³ or libellous works, at any rate where the libel is so gross as to affect the public morals,⁴ and probably if they are merely libels on individuals.⁵ And it must not be blasphemous; thus protection was refused by the Court of Chancery to Lawrence's "Lectures on Physiology" as hostile to revealed religion and to the doctrines of the immateriality and immortality of the soul,⁶ until the plaintiff had established his right at law. Lord Eldon also refused protection to Lord Byron's "Cain"⁷ and Sir John Leach to his "Don Juan" on similar grounds. But this case will not be construed so as to prevent the putting forth of heterodox views in a grave and decent manner; thus in the case of *Hopps v. Long*⁸ the Sheriff's Court of Lanarkshire held that a work entitled "The Life of Jesus, re-written for young Disciples," written from the Unitarian point of view, was capable of

¹ [1900] 1 Ch. 122.

² *Crotch v. Arnold*, [1909] 54 S. J. 49; *Dicks v. Yates*, [1881] 18 Ch D. 76. In America it has been held that there is no copyright in a label; *Coffeen v. Brunton*, [1849] 4 McLean 516 (Am.); *Higgins v. Keuffel*, [1890] 33 Davis, 428 (Am.)

³ *Scathey v. Sherwood*, [1817] 2 Mer. 435.

⁴ *Hime v. Dale*, [1803] 2 Camp. 27 n.; *Stockdale v. Onwhyn*, [1826] 5 B. & C. 173.

⁵ *Stockdale v. Onwhyn*. The book was refused protection both on the ground of licentiousness, and also on the ground that parts were libels on individuals.

⁶ *Lawrence v. Smith*, [1822] 1 Jacob 471.

⁷ *Murray v. Benbow*, [1822] 1 Jacob 474 n.

⁸ Cited in Copinger (4th Ed.), p. 78.

copyright. Blasphemy, it would seem, consists in the manner in which doctrines hostile to Christianity are put forward, not in the doctrines themselves.

(2) Not forbidden by the civil law, *e.g.*, not fraudulent; *i.e.*, not a work expressly intended to deceive the public. Thus a work purporting to be a translation of a devotional work by Sturm¹ was refused protection, as this was a serious statement calculated to deceive persons into buying the work who would not otherwise have bought it, and not a mere harmless fiction not calculated to deceive the public, or to injure them if believed, such as the profession that "The Castle of Otranto" was a translation from the Italian; and so also protection was refused to an illustrated catalogue of articles manufactured by the author, in which he represented himself as "Inventor, Patentee and Sole Maker" of large numbers, falsely so far as England was concerned.² But in the case of *Macfarlane v. Oak Foundry Co.*,³ where the plaintiffs were charged with inserting untrue statements in their catalogue to deceive the public, and a few instances were given of articles described as registered which either never had been or had ceased to be registered, and a large number of articles described as "patent" which were not patent, the Court gave judgment for the plaintiffs. It was held not sufficient to show that the authors were guilty of mistakes involving a penalty, but that it must be shown that the book was deliberately intended to make money by misrepresentation. The full scope of this decision is not clear. It is, of course, obvious that mere mistakes do not render the book incapable of copyright. But this decision strongly suggests

¹ *Wright v. Tallis*, [1845] 1 C. B. 893.

² *Slingsby v. Bradford Patent Truck Co.*, [1905] W. N. 122, affirmed by C. A., [1906] W. N. 51.

³ [1883] 10 Scotch Sess. Cases (4th Series) 801; *cf.* *Hayward Brothers v. Lely*, [1887] 56 L. T. 418.

that a book may be capable of copyright although it contains a small proportion of statements calculated and expressly intended to deceive the public, provided that, apart from this small proportion, it is an honest and useful work.

(3) Not immoral or indecent. Thus the memoirs of a courtesan were refused protection.¹ In the event of the indecency being repeated by the infringer an action for infringement will be dismissed without costs.²

The denial of protection to works of a criminal, immoral, or fraudulent nature does not rest on Statute; it is simply an instance of the general policy of the law in its discouragement of vice. The denial of copyright to works infringing the rights of other authors is probably another instance of the same rule,³ but it is convenient to treat it separately.

Originality.

III. *The work must be original.* This has been laid down by all text-writers on the subject,⁴ and is now expressly required by The Copyright Act, 1911,⁵ but it is extremely difficult to say in what sense the work must be original. The work must not be an infringement of another work in which copyright subsists⁶; but, apart from this, it is difficult to say what is required. A work may be capable of copyright which would have infringed the copyright in another work, had not the copyright in that work expired. Thus in *Walter v. Lane*⁷ the defendant published a book called "Appreciations and Addresses: Lord

¹ *Stockdale v. Onwhyn*, [1826] 5 B. & C. 173.

² *Baschet v. London Illustrated Standard Co.*, [1900] 1 Ch. 73.

³ *Cary v. Faden*, [1799] 5 Ves. 24; *Barfield v. Nicholson* [1824] 2 Sim. & St. 1.

⁴ *Copinger*, p. 38 (3rd Edition); *Scrutton*, p. 119.

⁵ s. 1 (1).

⁶ *Barfield v. Nicholson*, [1824] 2 Sim. & St. 1.

⁷ [1900] A. C. 539.

Rosebery." It consisted of reports of public speeches delivered by Lord Rosebery, taken (substantially verbatim) from the reports in *The Times*, but slight alterations were made by comparing them with other reports. The copyright in the speeches had ceased on publication. It was held that a verbatim report, requiring "labour, skill, and capital" to produce it, was a book within The Copyright Act, 1842, of which the reporter was the "author," and was, therefore, capable of copyright. Hence, although the speeches were now *publici juris*, and the defendant was perfectly entitled to reproduce them verbatim, he was not entitled to copy *The Times* reports for that purpose.

It may be that the reporter can only be considered the "author" of the report within The Copyright Act, 1842, when, without him, the work would be entirely lost.¹ Mere copying does not give a copyright; thus in *Wyatt v. Barnard*² Lord Eldon refused to protect specifications of patents copied at the Patent Office. But it may be that this decision is no longer law as far as direct copying from the first copy and not from the originals in the Patent Office is concerned, where there is any real difficulty or trouble in copying them.³ It appears to be settled that there is copyright in law reports; thus in *Butterworth v. Robinson*⁴ an interlocutory injunction until answer, and in *Sweet v. Maugham*⁵ an injunction until action brought, were granted to restrain the copying of law reports. In *Hodges v. Welsh*⁶ a perpetual injunction

¹ *Cf.* judgment of Lord Brampton, [1900] A. C., at p. 559. It has been suggested that any person who first reduces any literary matter to "book" form is the author; and the fact of reduction to "book" form confers sufficient originality; Macgillivray, p. 30. If this is so, the report of a written speech possesses no copyright. See pp. 126-7, *infra*.

² [1814] 3 V. & B. 77; *cf.* dicta of Lord James of Hereford, in *Walter v. Lane*, [1900] A. C., at p. 554.

³ *Cf.* *Parry v. Moring*, *Times*, 4th April, 1903; Copinger, p. 172.

⁴ [1801] 5 Ves. 709.

⁵ [1840] 11 Sim. 51.

⁶ [1840] 2 Ir. Eq. Rep. 266.

was granted after full argument on the point. In *Saunders v. Smith*¹ an injunction was refused until the plaintiffs should have established their right at law, but it was not disputed that there might be copyright in law reports. The only question was whether proper use had been made of them. In *Sweet v. Benning*² all the members of the Court were of opinion that there was copyright in the reports of *The Jurist*. The actual decision was that there was copyright in the headnotes to the reports. The point as to copyright in reports of the verbatim judgments delivered by the members of the Court has not yet arisen. In *Walter v. Lane*³ North, J., expressly refrained from deciding it. In American cases⁴ it has been decided that there is no copyright in them, nor can the judges confer such right on any reporter.

The decision in *Walter v. Lane*, being that of the House of Lords, is of course final with regard to reports made before the commencement of The Copyright Act, 1911, and the copyright in them is preserved by Section 24. But as regards reports after the Act the case is not so. The word "original" does not occur in The Copyright Act, 1842, and considerable stress was laid on this in *Walter v. Lane*.⁵ On the other hand, mere labour has been held enough to create a work worthy of copyright, and it is impossible to deny the expenditure of time and labour by the reporter. The better view appears to be that the Act has made no difference.

¹ [1838] 3 Myl. & Cr. 711. The book complained of was Smith's "Leading Cases."

² [1855] 16 C. B. 450.

³ [1890] 2 Ch., at p. 756. As regards written judgments at any rate, the copyright would seem to be in the Crown; *Roper v. Streater*, [1670]; *Skinner's Reports* 234.

⁴ *Whenton v. Peters*, [1834] 8 Peters 591 (Am.); *Banks v. Manchester*, [1868] 21 Davis 244 (Am.).

⁵ Per Lord Halsbury, [1900] A. C., at pp. 546-7.

A mere compilation has been held worthy of copyright.¹ Thus in *Scott v. Stanford*² statistical returns of all coal imported into London were protected. And in cases where different works must be identical so far as they are accurate, such as mathematical tables, directories, guide books, there is copyright in each individual work that is the fruit of independent labour and inquiry, and not mere copying of another work.

When a new edition is brought out, which is not substantially a reprint of the older edition, there is copyright in the new parts of the work which dates from its issue,³ and this, under the old law giving a fixed period of years, might still be the subject of copyright, although the copyright in the earlier work had expired. But the alterations must be substantial, as immaterial additions will not constitute practically a new work.⁴ The same rule applies to annotated editions of works the copyright of which has expired. In *Hedderwick v. Griffin*⁵ a reprint of a work, which had been originally published abroad and therefore had no copyright in this country, was held not to be a new work merely on account of certain alterations neither important nor extensive, made with the assistance of the author. And in *Black v. Murray*⁶ the Lord President said: "A new edition of a work may be a mere reprint of an old edition, and plainly that would not entitle the author to a new term of copyright running from the date of the last edition. On the other hand, the new edition may be so enlarged and improved as to constitute in reality a new work that will just as clearly entitle the author to a copyright running from the date of the new edition.

¹ *Gray v. Russell*, [1839] 1 Story 11 (Am.); *cf.* *Murray v. Bogue*, [1852] 1 Dr. 353; *Lewis v. Fullarton*, [1839] 2 Beav. 6; *Kelly's Directories, Limited v. Gavin*, [1902] 1 Ch. 631.

² [1867] L. R. 3 Eq. 718.

³ *Murray v. Bogue*, [1852] 1 Dr. 353.

⁴ *Thomas v. Turner*, [1887] 33 Ch. D. 292. In the actual case the alterations were omissions.

⁵ [1841] 3 Scotch Sess. Cas. (2nd Series) 383.

⁶ [1870] 9 Scotch Sess. Cas. (3rd Series), at p. 343.

The difficulty will be to lay down any general rule as to what amount of addition or alteration a new matter will entitle a second or new edition of a book to the privilege of copyright, or whether the copyright extends to the book as amended or improved, or is confined only to the additions and improvements themselves, distinguished from the rest of the book." It is, however, now fairly settled that the new copyright extends only to the additions; if a work is produced which does not infringe the copyright in them, it is not an infringement of the copyright in the new edition, for it could have been produced by making use of the old edition only, and of that edition the later author is entitled to make what use he will.¹ In *Moffatt v. Gill*² it was held that there was copyright in the notes to an annotated edition of Shakespeare, though, of course, the editor has no copyright in the text.

Conditions for Copyright.

Persons who may Acquire the Right.

Under The Copyright Act, 1842, statutory copyright or the post-publication right could be acquired by—

- (1) British subjects wherever resident;
- (2) Alien friends resident at the date of publication in any part of the British Dominions; and
- (3) Alien friends wherever resident (but this only rests on the dicta of Lord Cairns and Lord Westbury in *Routledge v. Low*).³

The last point was considered by the House of Lords in *Jefferys v. Boosey*,⁴ and decided by all the Law Lords in the negative: but this decision turned on the construction of the old Statute of Anne, and the reasoning was doubted by Lord Westbury in *Routledge v. Low*.³

¹ *Murray v. Bogue*, [1852] 1 Dr., at p. 365; Scrutton, p. 125; cf. *Cary v. Longman*, [1801] 1 East 358.

² [1902] 86 L. T. 465.

³ [1898] L. R. 3 H. L. 100, at pp. 110-1; 119-120.

⁴ [1854] 4 H. L. C. 816.

Publication.

According to the unanimous opinion of the Lords in *Routledge v. Low*,¹ publication in the United Kingdom of a book previously unpublished was necessary (and sufficient, according to Lord Cairns and Lord Westbury) to confer statutory copyright under the Act of 1842. Lord Cairns said:² "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 book here." Lord Westbury said:³ "The real condition of obtaining [the Act's] advantages is the first publication by the author of his work in the United Kingdom." But in *Reid v. Maxwell*⁴ the Court of Appeal doubted whether the condition of first publication in this country was required in the case of a British subject. In that case the story was published in parts, and, after several chapters had been published in England, the story was published by permission of the author in America, also in parts, but it was completely published in America before complete publication in England. It was held that the assignee of the British copyright could prevent the American publisher from publishing in England. Cotton, L. J., admitted that the cases clearly showed that in order to entitle a foreigner to copyright in this country the first publication must be in the United Kingdom, but doubted whether this was so in the case of a British subject. But this seems quite inconsistent with the provisions of The International Copyright Act, 1844⁵ which enacts that there shall be no copyright in a book first published outside

¹ [1868] L. R. 3 H. L. 100, at pp. 110-1; 119-120.

² L. R. 3 H. L., at p. 110. ³ At p. 118. ⁴ [1886] 2 Times L. R. 790.

⁵ s. 16. This section was not cited to the Court in *Reid v. Maxwell*. In the case of a drama written by a British subject first publication abroad will destroy both copyright and playwright; *Boucicault v. Delafield*, [1863] 1 H. & M. 507; *Boucicault v. Chatterton*, [1876] 5 Ch. D. 267.

the *British Dominions*. Nor does it in any way fit in with the policy of The Copyright Act, 1842, as laid down in *Routledge v. Low*.¹ If the theory of Cotton, L. J., were right, an author would be able to deprive the inhabitants of the United Kingdom of access to a book in full circulation abroad, and this does not tend to the "encouragement of native literature," and constitutes a direct invitation to the author to publish abroad and so secure copyright in two countries instead of one. The actual decision in *Reid v. Maxwell*² is that the prior publication of parts of a book abroad does not involve the destruction of copyright in the whole, or, perhaps more strictly, in the parts first published here; and there seems no reason to doubt the correctness of this decision. It was suggested at the Bar that in the case of a serial work the date of publication of the first part was taken to be the date of the publication of the whole work for the purpose of acquiring British copyright; and the suggestion met with the approval of Lopes, L. J. But it seems inconsistent with the decision in *Low v. Ward*.³ There a citizen of the United States published his work in the consecutive parts of a monthly magazine published in the United States from January to December. In October he went to reside in Canada, and subsequently, before the last six chapters had been published in the United States, the whole work was published in England. It was held that he had acquired British copyright in the last six chapters only. The case of a work published in the British Dominions other than the United Kingdom does not seem to have arisen, but the unanimous opinion of the House of Lords in *Routledge v. Low*⁴ required first publication in the United Kingdom. But now under The International Act, 1886, the Copyright Acts are to apply to any literary

¹ [1868] L. R. 3 H. L. 100.

² [1868] L. R. 6 Eq. 415.

³ [1886] 2 Times L. R. 700.

⁴ [1868] L. R. 3 H. L. 100.

or artistic work first "produced" in a British Possession as if it had been "produced" in the United Kingdom.¹ The point is, however, still open as to a publication in the British Dominions before 1886; and, as the copyright under the Act extends throughout the British Dominions, it may well be that publication in any part of them is sufficient; and, in fact, it is very difficult to see any reason why it should not. Simultaneous publication here and abroad will confer British copyright.² As regards books published after the 30th June, 1912, they fall within the rules laid down in The Copyright Act, 1911.³

Duration and Extent of Right.

Under The Copyright Act, 1842, the term of copyright is the life of its author and seven years, or forty-two years from publication, whichever of these periods should be the longer.⁴ The Act of 1911 gives a period of life and fifty years, or fifty years from publication where the book is published after the death of its author. This goes to the owner of the copyright under the earlier Act, except in the cases where the author is the first owner of the copyright, when it reverts to the author on certain conditions.⁵ The right under the Act of 1842 extended throughout the British Dominions. The right under the Act of 1911 extends throughout the British Dominions other than self-governing Dominions, but it is provided that the legislature of a self-governing Dominion may declare the Act to be in force in that Dominion with or without modifications of procedure or remedies.⁶ If any self-governing Dominion passes legislation substantially identical with the Act of 1911 (except as regards works

¹ s. 8.

² *Cocks v. Purday*, [1848] 5 C. B. 860; *Buxton v. James*, [1851] 5 D. G. & Sm. 80.

³ See pp. 50-2, *supra*.

⁴ 5 & 6 Vict. c. 45, s. 3.

⁵ See p. 54, *supra*.

⁶ s. 25 (1).

first "published," or where authors are residents there) and the Secretary of State certifies it by notice in the *Gazette*, then such Dominion is to be treated whilst such legislation continues in force as a Dominion to which the Act of 1911 extends.¹

Ownership.

First Owner.

The first owner of the copyright in a book under the Act of 1842 was the man who legally published it for the first time. The right to publish the book is derived by assignment from the author in the case of books published in his lifetime; in the case of books published after his death, the right is derived from the proprietor of the author's manuscript from which the book is first published.² In the case of *Macmillan v. Dent*³ it was decided that the word "manuscript" meant the written document, not the literary composition. Fletcher Moulton, L. J., said, "In the first part of the section which relates to a publication during the life of the author [the Legislature] uses language which shows that the source of copyright in that case is the author, and that ownership of the copyright must be derived from him. In the latter part of the section which relates to a publication after the death of an author, it uses language which shows that the source of copyright must be derived from the owner of the manuscript."⁴

Where one person employs another to compose a book or any part of a book or article in an encyclopædia or periodical—(1) on the terms that the copyright therein

¹ s. 25 (2).

² 5 & 6 Vict. c. 45, s. 3.

³ [1907] 1 Ch. 107.

⁴ At p. 122. The rule in *Macmillan v. Dent* has been abolished by The Copyright Act, 1911, but under Section 17, Sub-Section (2), where ownership of an author's manuscript is acquired by a testamentary disposition and the work has not been published in any form, such ownership is *prima facie* proof of the ownership of the copyright. No provision is made for the existence of two or more manuscripts.

shall belong to the employer, and (2) the employer shall have actually paid for the work—then the employer shall be the owner of the copyright in the book or article, and shall enjoy the same right therein as if he were the actual author thereof.¹ The writer of the work in question must be actually paid, a mere contract for payment is not enough.² The question as to whether the copyright was intended to belong to the employer is a question of fact. There need be no contract in writing nor express words, and the inference that the copyright was intended to belong to the employer may fairly be drawn from the facts of employment and payment alone.³ “I think that what the Court has to do is to look at all the circumstances of the case and to say to the jury, What is the inference which you would draw?; or, as Bowen, L. J., puts it in judgment in *Lamb v. Evans*,⁴ ‘What is the way in which business men would look at the question?’ ”⁵ The difficulty is to ascertain when the copyright is to belong to the employer. Thus in *Bishop of Hereford v. Griffin*⁶ Sir L. Shadwell held that the copyright did not pass, where the former wrote an article for an encyclopædia published by the latter and received payment for it. There were no special circumstances in the case, and the presumption is that copyright remains with the author. In *Waller v. Howe*⁷ Sir George Jessel refused to hold that the copyright in an obituary article written for and published in *The Times* was intended to pass to the

¹ 5 & 6 Vict. c. 45, s. 18.

² *Brown v. Cooke*, [1846] 16 L. J. Ch. 140; *Richardson v. Gilbert*, [1851] 1 Sim. N.S. 336; *Collingridge v. Emmott*, [1887] 57 L. T. 864; but see *Ward v. Long*, [1906] 2 Ch. 350. If this decision is right it would seem that Section 18 only applies to unwritten agreements; and, if the agreement is in writing, the employer can sue as an ordinary assignee of the copyright without payment to the author.

³ *Sweet v. Benning*, [1855] 16 C. B. 459; *Lawrence v. Aflalo*, [1904] A. C. 17 cf. *Lamb v. Evans*, [1893] 1 Ch. 218; *Chantrey v. Dey*, [1912] 28 Times L. R. 499.

⁴ [1893] 1 Ch. 218.

⁵ Per Lord Davey, in *Lawrence v. Aflalo*, [1904] A. C., at p. 23.

⁶ [1848] 16 Sim. 190; *Trade Auxiliary Co. v. Jackson*, [1887] 4 Times L. R. 130.

⁷ [1881] 17 Ch. D. 708.

proprietor of *The Times*. But in *Lawrence v. Aflalo*¹ the House of Lords drew that conclusion merely from the facts of employment and payment, in the absence of special circumstances. And in *Lamb v. Evans*,² where the question incidentally arose as to the copyright of the proprietor of a trades directory in the headings composed by his agent for a mass of advertisements furnished by tradesmen and paid for, a very strong Court of Appeal held, from the mere facts of employment and payment, that the proprietor had copyright in the headings, although he could not have copyright in any single advertisement, because the tradesman must be at liberty to insert it elsewhere.

Where the writer is not employed directly by the original employer, but is employed by A's employer B, the copyright will vest in A, where B is a mere agent for A³; if B is the person employed by A to do the work it is doubtful whether the copyright would vest in A under this section. Probably it would not, as A does not employ the writer, and the section only contemplates a direct relationship between the employer and the employed.⁴

The section in question appears to deal primarily with collective works; but the words are wide enough to include the case of a work written as a whole by a single author for an employer. This was the view taken by Lord Romilly in *Grace v. Newman*.⁵ On the other hand *Shepherd v. Conquest*⁶ seems to be a direct authority that, where one person employs another to write a book for him and pays him for it,

¹ [1904] A. C. 17; cf. also *Sweet v. Benning*, [1855] 16 C. B. 459, not cited to the Court in *Walter v. Howe*.

² [1893] 1 Ch. 218.

³ *Stubbs v. Howard*, [1895] 11 Times L. R. 507; 19 Eq. 623.

⁴ *Macgillivray*, p. 68.

⁵ [1875] L. R. 10 Eq. 623; cf. *Hazlitt v. Templeman*, [1866] 13 L. T. N. S. 593; *Ward Lock & Co. v. Long*, [1906] 2 Ch. 550.

⁶ [1856] 17 C. B. 427. The actual question in the case was whether the playright in a drama passed to the employer without writing, but copyright and playright are treated in exactly the same manner by English law; 5 & 6 Vict. c. 45, s. 20.

the copyright does not pass without a written transfer. In the case of a composite work, where one person designs the whole work and employs others to write parts of it, he may be the "author" of the whole, although not the writer.¹

In the case of an article or essay published in a review or periodical, but not an encyclopædia,² composed on the terms that the copyright shall belong to the proprietor, the proprietor is not at liberty to publish the article separately without the consent of the author³; and at the end of twenty-eight years the right of publishing the article separately reverts to the author.³ It was held that the right to prevent the proprietor from publishing the article separately was not "copyright" under the Act of 1842, but was of the nature of a contractual right.⁴ From this it has been deduced that the author has no right to prevent separate publication by any person other than the proprietor⁵; but this seems very doubtful in principle. The author possesses a legal and valuable, although reversionary, proprietary interest in the work; he is protected against the only other person who has any property in it; it seems contrary to all principles of English law that this right should be unprotected against all other persons except at the discretion of another person who possesses an adverse right in the subject-matter. It cannot be said that his interests are unaffected by the manufacture of infringing copies, for in any case they will injure the market; and, if they are lawfully made with the consent of the proprietor, the author cannot prevent them from being sold when his interest falls into possession.⁶ It is true that the infringer

¹ Per Leach, M. R., in *Barfield v. Nicholson*, [1824] 2 L. J. O. S., at p. 102; *Hatton v. Keau*, [1859] 7 C. B. N. S. 208. *A fortiori* the man who collects information and sets it out in a book is the author; *Nisbet v. Golf Agency*, [1907] 23 Times L. R. 370.

² Per Shadwell, V. C., in *Bishop of Hereford v. Griffin*, [1849] 10 Sim., at p. 194.

³ 5 & 6 Vict. c. 45, s. 15.

⁴ *Mayhew v. Maxwell*, [1860] 1 J. & H. 312.

⁵ *Scrutton*, p. 132 (i.).

⁶ *Taylor v. Pillow*, [1869] L. R. 7 Eq. 418.

may be exposed to two actions, but this would probably be the case where there are two copyrights as in *Lamb v. Evans*.¹

In a case where he has not parted with the copyright the author can sue an infringer without publishing the article in a separate form.²

As regards separate publication Romer, J., said,³ "If you find in a volume separate parts, each distinguished or perfectly distinguishable from the other parts, and the volume is published, each part that is separate and clearly distinguished in the volume itself is separately published within the meaning of Section 2," and this was approved of by the Court of Appeal in *Aflalo v. Lawrence*.⁴ That case was reversed in the House of Lords, but no opinion was expressed about the meaning of "separately published." The dictum of Romer, J., is, it is submitted, correct.⁵ In *Mayhew v. Maxwell*⁶ a story written for the Christmas number of the "Welcome Guest" was advertised to be republished along with other stories, one or more of which had not been published in the Christmas number, and this was held an infringement of the author's rights. It was held that the proprietor could not publish the story otherwise than in reprints of the Christmas number.

As regards publication in a separate form where the copyright passes to the employers, the rights of the author were held to be infringed in *Smith v. Johnson*,⁷ where the proprietors of the *London Journal* republished certain tales written by the plaintiff for and published in the Christmas number. Stuart, V. C., said that the Act of Parliament was

¹ [1893] 1 Ch. 218.

² *Ibid.*, p. 669.

³ Copinger, p. 106.

⁷ [1863] 4 Giff. 632.

² *Johnson v. Newnes*, [1894] 3 Ch. 663.

⁴ [1903] 1 Ch. 318, reversed [1904] A.C. 17.

⁶ [1860] 1 J. & H. 312.

intended to give a licence only to the proprietors of periodical works, purchasing and paying for a literary composition to print that composition as part of a periodical work, and that any other use of it was unlawful. "To reprint in numbers which may be had with or without the concurrent number of the work is an act not permitted by the Legislature."¹

The point has never been decided whether under the Act of 1842 the copyright in a work can be vested in an employer without a written transfer, apart from Section 18. It has been suggested that a contract of service is enough. In *Hildesheimer v. Dunn*² Kekewich, J., said: "I entertain a strong impresssion that where a person has composed verses, we will say on behalf of another, that is to say as his servant or agent, whether for pay or not, the person on whose behalf such verses are composed is properly registered under the Act as the proprietor, notwithstanding that there is no assignment in writing, or, indeed, any assignment at all." During the argument in *Sweet v. Benning*,³ Maule, J., hinted that employment alone would vest the copyright in the employer; but this must be confined to the case of servants or agents; it is certainly not true in the case of an independent contractor. It is submitted, however, that the copyright will only pass (apart from Section 18) where the work done by the servant or agent is only part of a general whole, of which the employer is the "author."⁴ The Act provides for conditions under which the copyright passes to the employer; and the presumption is that, where these conditions are not fulfilled the copyright does not pass.

Under The Copyright Act, 1911, the copyright in a work written by one person for another will not vest in the latter

¹ [1863] 4 Giff., at p. 637.

² [1891] 64 L. T., at p. 454.

³ [1855] 16 C. B. N. S., at p. 408.

⁴ Cf. *Barfield v. Nicholson*, [1824] 2 L. J. O. S., at p. 102; *Hatton v. Kean*, [1859] 7 C. B. N. S. 268. *Contra Macgillivray*, pp. 73-4.

as first owner, except under the following conditions. The writer must be under a contract of service or apprenticeship, and the work must be written in the course of his employment; then, in the absence of agreement to the contrary, the copyright vests in the employer as first owner. If the work is a contribution to a newspaper, magazine, or other periodical, the writer is deemed to have reserved the right to restrain the publication of the article otherwise than as part of a newspaper or periodical,¹ in the absence of agreement to the contrary. He retains no right of publication himself.² Payment is not required.²

A mere agreement to write a book will not vest the copyright in the employer without a written transfer. The writer must be the servant of the employer, not an independent contractor. The provision applies to books written as a whole by one man, as well as to contributions to a collective work.

Transfer.

The transfer of copyright must be in writing³ except under Section 18 of the Act of 1842, but transfer by entry on the Register was sufficient.⁴ But according to Kekewich, J., there may be a good assignment by an agreement to purchase the copyright of a yet unwritten book at a fixed price, good as against a subsequent purchaser for value without notice; and in that case the transferee can sue although the case falls within Section 18, and payment has not been made.⁵ Any portion of the assignor's interest

¹ Cf. *Smith v. Johnson*, [1863] 4 Giff. 632.

² 1 & 2 Geo. V. c. 46, s. 5 (1).

³ *Leyland v. Stewart*, [1870] 4 Ch. D. 419.

⁴ s. 13.

⁵ *Ward Lock and Co. v. Long*, [1906] 2 Ch. 550; *sed quare* as to the exact meaning of the decision. The headnote treats the assignment as equitable, but good as against a subsequent purchaser of the legal interest for value without notice. This seems contrary to principle. The judgment on the other hand strongly suggests that the legal interest passed. There is no authority for the proposition that the legal ownership in an unwritten book can be assigned; and *Sweet v. Shaw*, [1839] 8 L. J. Ch. 216, is an authority the other way. The decision, so far as regards the subsequent purchaser, is of very doubtful authority.

may be transferred.¹ In *Dennison v Ashdown*,² where the defendant had exercised the rights of the owner of the copyright for several years unquestioned, Bruce, J., held that he must assume a proper assignment.

Destruction by Waiver.

It seems doubtful whether copyright can be lost by waiver. In *Platt v. Button*³ and *Rundell v. Murray*⁴ it was suggested at the Bar that the right had been lost by waiver, and Lord Eldon refused an injunction on the ground of delay until the right was established at law. But in *Weldon v. Dicks*⁵ Malins, V. C., held that an author did not lose his copyright in the title of his book merely because the book had been out of print for several years and was completely forgotten.

Infringement.

General Principles.

There is no property in the subject of a work,⁶ or in the ideas expressed, or in the words themselves, but only in the form in which those ideas have been clothed, or, as it is sometimes put, in "the order of words."⁷ The principle has perhaps been pushed too far at times; thus in *Stowe v. Thomas*⁸ Grier, J., defined the right of the author to be "the exclusive right of multiplying copies of that particular combination of characters which

¹ s. 13; thus providing for the difficulty raised by Lord St. Leonards' opinion expressed in *Jefferys v. Boosey* that copyright is one and indivisible (4 H. L. C., p. 992), decided under the Statute of Anne.

² [1897] 13 Times L. R. 226; but cf. *Latour v. Bland*, [1818] 2 Stark 382.

³ [1815] 19 Ves. 447.

⁴ [1821] Jac. 311; cf. dicta of Willes, J., in *Millar v. Taylor*, [1769] 4 Burr at p. 2311; but there the learned Judge was deciding in favour of copyright in perpetuity and wished to minimise its inconveniences.

⁵ [1875] 10 Ch. D. 247. In this case Malins, V. C., held that there was copyright in a title; and this part of his judgment has been universally treated as wrong. see pp. 69-70, *supra*.

⁶ *Wilkins v. Aikin*, [1810] 17 Ves. 422; *Pike v. Nicholas*, [1869] L. R. 5 Ch. 251.

⁷ Cf. *Jefferys v. Boosey*, [1854] 4 H. L. C. 815; opinion of Erle, J., at pp. 806-870.

⁸ [1853] 2 Am. Law. Reg., at p. 228 (Am.).

exhibits to the eye of another the ideas intended to be conveyed." As has been justly pointed out, this doctrine would sanction any piracy not consisting in literal extracts; "it would prohibit the literary plagiarist from compilations by scissors and paste, but allow him to construct his piracy by aid of a dictionary of synonyms";¹ but the principle at bottom is sound, although, in view of certain recent decisions, it ought to be extended so as to cover *information* compiled by the author as well as the form in which it is cast.²

The author's property is also subject to the further qualification that, where absolute originality is excluded by the nature of the work, as in the case of scientific or mathematical tables or directories (and probably where it is not excluded), there may be several independent copyrights in the same set of words or figures in the same order, provided that each work was the result of original work and not of copying or making illegitimate use of a previous copyright work.³ And in *Lamb v. Evans*⁴ the Court of Appeal was prepared to hold that there were two separate copyrights in the advertisements in a newspaper; one, that of each advertiser in his separate advertisement, the other, that of the proprietors in the general mass as arranged.

Copyright then consists in the right to prevent an unfair use of the work. But what is an unfair use? Three distinct tests have been applied at various times to decide whether the substantial use of a copyright work in the composition of another is legitimate. Down to a point which may roughly be put between

¹Scrutton, p. 143.

²*Weatherby v. International Horse Exchange*, [1910] 2 Ch. 297.

³*Matthewson v. Stockdale*, [1806] 12 Ves. 270; *Longman v. Winchester*, [1809] 16 Ves. 269; *Wilkins v. Aikin* [1810] 17 Ves. 422; *Leslie v. Young* [1894] A.C. 335 (per Lord Herschell, at p. 341).

⁴[1893] 1 Ch. 218.

1800 and 1830 the question is, Has the borrower put original thought and labour into the new work? Not merely does "addition condone subtraction"¹; subtraction itself, if done with care, is sufficient to produce a new and legitimate work.² With the doubtful exception of abridgments,³ this test must now be considered insufficient though necessary. Afterwards another test is applied. Will the new work compete with the old work, or with any new work which the owner of the copyright in the old can compile out of the old practically by the mere use of scissors and paste? This is the test applied in the cases of translation and dramatization of novels (where it is held that the exhibition of a play on the stage does not interfere with the sale of copies of the novel on which it is founded, but that the printing of the play does), and in cases like *Bradbury v. Hotten*.⁴ The third has not been fully worked out, but perhaps the following is fairly accurate. Has the borrower in fact taken valuable results from the copyright work instead of going to the original sources⁵ for a work in which the value of the material borrowed is not completely lost in the merit of the new work? This is the principle which was adopted by The Copyright Act, 1911, with respect to dramatization and translation, and seems to be the one adopted by Parker, J., in *Weatherby v. International Horse Exchange*.⁶ Very probably it will be applied to all cases not yet settled by the application of the earlier

¹ Cf. dictum of Shadwell, V. C., in *Martin v. Wright*, [1833] 6 Simons, at p. 298. "Any person may copy and publish the whole of a literary composition, provided he writes notes upon it, so as to present it to the public, connected with matter of his own."

² *Dodsley v. Kimmersley*, [1761] Ambler 403, where the abridger was held to have made a new and laudable work out of Dr. Johnson's "Rasselas" by "leaving out the moral reflections." Cf. *Newbery's Case* [1774] Lofft 775.

³ See pp. 105-9, *infra*.

⁴ [1872] L. R. 8 Ex. 1; see p. 103, *infra*.

⁵ The test might possibly stop here, but the words following are necessary to keep within the actual decisions.

⁶ [1910] 2 Ch. 297.

principles alone. It appears, however, that an amount of borrowing which is legitimate in the case of a non-competitive work would be illegal in the case of a competitive one.¹

The only ways in which copyright can be infringed are by—(1) The unauthorised copying of the whole or a substantial part of the work; and (2) The illegitimate appropriation of the fruits of the author's labour embodied in it. The first has been described by James, L. J., in *Dicks v. Yates*² as *Piracy*, the second as *Literary Larceny*.

Piracy.

There is no difficulty about the piracy of the whole work, the only thing to be said is that the addition of notes will no longer excuse the piracy.³ In the case of smaller extracts anything exceeding the limits of fair quotation is a piracy; and the facts that the matter was taken in good faith, and with full acknowledgment of its source, will make no difference.⁴ Extracts are allowed for the purpose of illustration or criticism.⁵ But criticism to be fair must conform to the following rules:—(1) The amount taken must not be sufficient to compete with the original work⁶; (2) The extracts must be genuinely used as illustrations, and not in fact constitute the principal part of the work. Thus in *Campbell v. Scott*⁷

¹ Per Parker, J., [1910] 2 Ch., at p. 305.

² [1881] 18 Ch. D., at p. 90.

³ Cf. *Weatherby v. International Horse Exchange*, [1910] 2 Ch. 207.

⁴ *Scott v. Stanford*, [1867] L. R. 3 Eq. 718.

⁵ *Whittingham v. Wooler*, [1817] 2 Sw. 428; *Bell v. Whitehead*, [1839] 8 L. J. Ch. 141.

⁶ *Roworth v. Wilkes*, [1807] 1 Camp. 94, per Lord Ellenborough, at p. 97: "A review will not in general serve as a substitute for the book reviewed; and even there, if so much is extracted that it communicates the same knowledge with the original work, it is an actionable violation of literary property." So also per Lord Eldon in *Mawman v. Tegg*, [1826] 2 Russ., at p. 393: "Quotation for instance is necessary for the purpose of reviewing; and quotation for such a purpose is not to have the appellation of piracy affixed to it; but quotation may be carried to the extent of manifesting piratical intention"; cf. *Wilkins v. Aikin*, [1810] 17 Ves., at p. 424.

⁷ [1842] 11 Sim. 31.

the defendants had published a work consisting of an original essay on modern English poetry, biographical sketches of forty-three modern poets and selections from their poems, including six short poems and parts of longer poems by the plaintiff. The essay comprised thirty-four pages out of seven hundred and ninety, and the selections seven hundred and fifty-eight, those from the plaintiff eighteen. The Court held that in fact the resulting work was a selection of poems with an introductory essay, not a critical essay with illustrations, and therefore was unlawful; and that *animus furandi* was inferred from the taking. "If there were critical notes appended to each separate passage, or to several passages in succession, which might illustrate them and show from whence Mr. Campbell had borrowed an idea, or what idea he had communicated to others, I could understand that to be a fair criticism. But there is, first of all, a general essay, then there follows a mass of pirated matter, which, in fact, constitutes the value of the volume."¹ In *Sweet v. Benning*² the defendants published in their work "The Monthly Digest," the headnotes of the law reports published in the preceding month, analytically arranged under appropriate headings, and were restrained on the application of the proprietors of *The Jurist*, although the extracts only constituted a twentieth part of the Digest, the Court holding that the resulting work was not original nor demanding thought or skill, but was merely a compilation of headnotes. In *Roworth v. Wilkes*³ the proprietor of an encyclopædia had in one of the articles taken seventy-five out of one hundred and eighteen pages of the plaintiff's work and was held liable in damages. The test suggested in that case was whether the new work would serve as a substitute for the old, but this is evidently an insufficient test to-day.

¹ Per Shadwell, V. C., at p. 38.

² [1855] 16 C. B. 459.

³ [1807] 1 Camp. 94.

The case of *Bradbury v. Hotten*¹ is a particularly instructive one on the subject of fair extracts for the use of criticism or illustration. The defendants published a book called "The Man of his Time" consisting, first, of the "Story of the Life of Napoleon III.," by James M. Haswell, and, secondly, of "The same Story as told by Popular Caricaturists of the last Thirty Years." Among the caricatures were copies of nine cartoons from *Punch*. It was held, though not without some doubt, that the defendant had exceeded the limit of fair extraction for the purpose of illustration, for the proprietors of *Punch* might desire to issue a collection of all the cartoons dealing with Napoleon, and the circulation of such a work would be interfered with by the defendant's book. The case was, however, very near the line.

In some of the earlier cases stress was laid on the presence or absence of *animus furandi*. Thus in *Cary v. Kearsley*² Lord Ellenborough said, "That part of the work of one author is found in another is not of itself piracy or sufficient to support an action; a man may fairly adopt part of the work of another; he may so make use of another's labours for the promotion of science, and the benefit of the public, but having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term the *animus furandi*?" And the learned Judge goes on to say that the test was "whether what was so taken or supposed to be transmitted from the plaintiff's book, was fairly done with a view of compiling a useful book for the benefit of the public, upon which there has been a totally new arrangement of such matter, or taken colourable, merely with a view to steal the copyright of the plaintiff." But in *Campbell v. Scott*³ it was decided that *animus furandi* would be inferred from

¹ [1872] L. R. 8 Ex. 1; *cf.* *Smith v. Chatto*, [1874], 31 L. T. 775.

² [1802] 4 Esp. 168, at p. 170.

³ [1842] 11 Sim. 31.

the mere fact of unlawful taking, and in *Scott v. Stanford*¹ the defendant was restrained from copying statistical returns of all the coal imported into the London market, although he had done so in good faith and with full acknowledgment of the source of his information. "Mere honest intention on the part of the appropriator will not suffice, as the Court can only look at the result, and not at the intention, in the man's mind at the time of doing the act complained of, and he must be presumed to intend all that the publication of his work effects."² And this must be taken as settling the law, in conformity with principle, for copyright is a species of property, and in wrongs done to property the wrongdoer is not protected by the absence of wrong intentions. It has been suggested that the presence of *animus furandi* will render a smaller amount of borrowing unlawful than would otherwise be culpable,³ but this seems very doubtful. If a man has only made a legitimate use of a predecessor's book, why should this become unlawful because his intentions were wrong? The most that can be said is that where there is evidence of *animus furandi* the Court will be inclined to find doubtful questions against the defendant, e.g. questions whether he took certain information directly from the prior copyright work instead of going to the original sources, but this is a different thing from saying that, given a certain amount of unquestioned taking, the question of lawfulness or unlawfulness depends on the intention with which it was taken.

Quotations in the usual sense, such as single lines or verses of poetry, are permitted, probably on the principle *de minimis non curat lex*.

There appears to be copyright, but not monopoly in quotations.⁴

¹ [1867] L. R. 3 Eq. 718; cf. *Moffatt v. Gill*, [1902] 86 L. T. 465.

² Per Page Wood, V. C., at p. 723.

³ *Spers v. Brown*, [1852] 6 W. R. 352; Scrutton, p. 138.

⁴ Per Collins, M. R., in *Moffatt v. Gill*, [1902] 86 L. T., at p. 471. The second writer is not entitled merely to take a quotation, verify it, and copy it into his work.

In *Walter v. Steinkopff*¹ the defence was set up of a general practice among newspapers to copy from each other if the following conditions were observed:—(i) That the source was acknowledged; (ii) That there was no direct competition between the newspapers; (iii) That the newspaper which had been copied had itself taken matter from the other; and (iv) That the editor of the newspaper which had been copied had not objected. This contention was, however, overruled.

Abridgments.

The law with regard to abridgments cannot be regarded as settled; in the first place, all the decisions are those of a court of first instance, and, secondly, the cases in favour of the lawfulness of a fair abridgment are all old cases, and proceed on the principle that, where the new author expends genuine thought and labour on the new work, his borrowing is lawful—a principle which is no longer followed to-day. In *Gyles v. Wilcox*,² the earliest case in point, Lord Hardwicke stated the law thus:—“Where books are colourably shortened only, they are undoubtedly within the meaning of the Act of Parliament, and are a mere evasion of the Statute, and cannot be called an abridgment. But this must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may with great propriety be called a new book, but the invention, learning and judgment of the author is shown in them, and in many cases are extremely useful, though in some cases are prejudicial, by mistaking and curtailing the sense of the author.” And in *Tonson v. Walker*³ he stated that a fair abridgment would be entitled to protection. In *Dodsley v. Kinnersley*⁴ an abridgment of Dr. Johnson’s

¹ [1802] 3 Ch. 489. As a matter of fact these conditions were not fulfilled. Cf. *Wyatt v. Barnard*, [1814] 3 V. & B. 77; and *Maxwell v. Somerton*, [1874] 30 L. T. 11.

² [1740] 2 Atk. 141; Cf. *Bell v. Walker*, [1785] 1 Bro. C. C. 451.

³ [1752] 3 Sw., at p. 681.

⁴ [1761] Amb. 403.

“Rasselas,” less than one tenth the size of the original and formed by “leaving out the moral reflections,” was held a fair abridgment. Sir Thomas Clarke plainly stated that a fair abridgment was not a piracy. “No certain line can be drawn to distinguish a fair abridgment but every case must depend on its own circumstances.” He, however, materially relied upon the conclusion which he drew that it could not tend to prejudice the plaintiffs, when they had before published an abstract of the work in the *London Chronicle*—a very doubtful inference. And in ———— *v. Newbery*¹ Lord Chancellor Apsley expressed his opinion to be: “That to constitute a true and proper abridgment of a work the whole must be preserved in its sense, and then the act of abridgment is an act of understanding, employed in carrying a large work into a smaller compass and rendering it less expensive and more convenient both to the time and use of the reader, which made an abridgment in the nature of a new and a meritorious work. That he had consulted Blackstone, J., whose knowledge and skill in his profession was universally known, and who, as an author himself, had done honour to his country. That they had spent some hours together and were agreed that an abridgment, where the understanding is employed in retrenching unnecessary and uninteresting circumstances, which rather deaden the narration, is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work.”

The later cases have been strongly against the abridger. In *D'Almaine v. Boosey*,² Lord Abinger admitted that an abridgment might be lawful, “but it must be a *bonâ fide* abridgment, because if it contains many chapters of

¹ [1774] Lofft 775.

² [1835] 1 Y. & C. Ex., at p. 301. The case was a musical case, and the remark was obiter.

the original work, or such as made that work most saleable, the maker of the abridgment commits a piracy." And he required "such a modification of an original work as shall absorb the merit of the original into the new composition." In *Dickens v. Lee*,¹ the last English case on the subject, Knight Bruce, V. C., expressed himself as follows: "Now this has been said to be an abridgment, and, as an abridgment, to be protected. *I am not aware that one man has a right to abridge the works of another.* On the other hand, I do not mean to say that there may not be an abridgment which may be lawful, which may be protected; but to say that one man has the right to abridge, and so publish in an abridged form the work of another, without more, is going much beyond my notion of what the law of this country is." He held that the work in question, Dickens' "Christmas Carol" in a condensed form, was an infringement of the copyright in the original work.

In the United States the question arose much later than in England; and it was reluctantly held on the authority of the English cases that a fair abridgment was no piracy,² but the principle was severely criticised, particularly in *Story's Executors v. Holcombe*, where the learned judge pointed out that every abridgment, however fair, effects more or less adversely the sale of the original work, and that the theory that it adds to the value of the original by making it more extensively known is unfounded in fact. The very merit of an abridgment is in the fact that it contains the principle of the original work and conveys the same knowledge in a condensed form. Story, J., on the other hand, placed among the elements to be considered in deciding whether

¹ [1844] 8 Jur. 183, at p. 184.

² *Folsom v. Marsh*, [1811] 2 Story 100 (Am.); *Gray v. Russell*, [1839] 1 Story 11 (Am.); *Story's Executors v. Holcombe*, [1847] 4 MacLean 306 (Am.).

an abridgment was innocent, or not the question "Whether the abridgment in its present form would prejudice or supersede the original work."¹ There is little as to what constitutes a fair abridgment, but in *Folsom v. Marsh*² Story, J., required "a real substantial condensation of the materials and intellectual labour and judgment bestowed thereon, and not merely the facile use of the scissors or extracts of the essential parts constituting the chief value of the work." A mere selection from or different arrangement of parts of the original work so as to bring the whole into a smaller compass will not be held to be such an abridgment.

The English cases are quite irreconcilable. Thus in *Dodsley v. Kinnersley*,³ and in *Newbery's Case*⁴ the abridgment appears to have been made by leaving out "the moral reflections" in the one case and "unnecessary and uninteresting circumstances" in the other, the very process condemned in *D'Almaine v. Boosey*⁵ and in *Dickens v. Lee*.⁶ The principle laid down in *D'Almaine v. Boosey*,⁵ that the abridgment must not contain "many chapters of the original work or such as made that work most saleable," is sufficient to condemn any abridgment which is not an original work on a smaller scale, *i.e.*, in effect not an abridgment at all. But will the cases be followed? In the first place the decisions in favour of the abridger are all old cases and all decisions of a court of first instance. Secondly, they proceed on a principle which is no longer law to-day, *viz.*, that where a man has mixed his own labour with the original work, the resulting work is not a piracy. The principle followed to-day is that laid down by Lord

¹ *Gray v. Russell*.

² [1761] Amb. 403.

³ [1835] 1 Y. & C. Ex. 301.

⁴ [1841] 2 Story, at p. 107.

⁵ [1774] Loft 775.

⁶ [1844] 8 Jur. 183.

Herschell in *Leslie v. Young*,¹ viz., that where you find "a substantial appropriation by the one party of the independent labour of another," there is an infringement of copyright. The explanation is of course historical; the question as to abridgments came before the Courts when the protection afforded by copyright was at its narrowest, the judges, believing that copyright was perpetual, did all that they could to prevent it interfering to any great extent with the right of other persons to make use of an earlier work in the composition of a new one. Thirdly, the argument in favour of an abridgment, that it does not compete with the original work, but on the contrary serves as an advertisement for it,² is admittedly false.³ On the whole it is conceived that the Courts will refuse to follow the old cases in favour of abridgments as contrary to modern principle. But if they shrink from over-ruling a rule of law laid down so long ago, and possibly so long relied on, there is the uncertainty as to what constitutes a fair abridgment which gives them an opportunity of declaring that any actual abridgment which comes before the Courts is not a fair one. The balance of convenience is greatly in favour of declaring all abridgments of copyright works illegal.

An abridgment of a non-copyright work is, of course, an original work capable of copyright.⁴

Translations.

Apart from the International Acts there is no definite decision binding on the English Courts as to whether a translation of a copyright work is an infringement of the copyright. The only case in the English Courts was that

¹ [1894] A.C., at p. 341.

² *Dodsley v. Kinnersley*, [1761] Amb., at p. 405.

³ Per McLean, J., in *Story's Executors v. Holcombe*, [1847] 4 McLean, at p. 308.

⁴ *Leslie v. Young*, [1894] A. C. 335; cf. *Springfield v. Thame*, [1903] 89 L. T. 212.

of *Burnett v. Chetwood*¹ in 1720, where the executor of Dr. Burnett sought to restrain the printing of an English translation of the treatise "Archæologia Sacra" written in Latin. The Lord Chancellor held that, although a translation might not be a piracy of the original, yet that particular book was one containing strange notions, intended by the author to be concealed from the vulgar in the Latin language, and he granted an injunction to restrain printing and publishing in English, in exercise of "the superintendency over all books," which he ascribed to the Court of Chancery. That "superintendency" was repudiated by Lord Eldon in *Southey v. Sherwood*,² so that no authority attaches to the decision. There are, however, dicta by two of the three judges in the majority in *Millar v. Taylor*,³ and by Knight Bruce, V.C., in *Prince Albert v. Strange*⁴ to the effect that a translation is lawful. And in the United States in the case of *Stowe v. Thomas*⁵ where the lawfulness of a German translation of "Uncle Tom's Cabin" was in question, the decision was in the translator's favour. Grier, J., expressed himself as follows: "By the publication of her book the creations of the author have become as much public property as those of Homer and Cervantes. Uncle Tom and Topsy are as much *publici juris* as Don Quixote and Sancho Panza. All her conceptions and inventions may be used and abused by imitators, playwrights, and poetasters. They are no longer her own—those who have purchased her book, may clothe them in English doggerel, in German or Chinese prose. In tropical but not very precise phraseology, a translation may be called a transcript or copy of her thoughts or conceptions, but in no correct sense can it be called a copy of her book."⁶ There are,

¹ 2 Mer. 441.

² [1817] 2 Mer. 435.

³ [1769] 4 Burr, 2303, per Willes, J., at p. 2311, per Aston, J., at p. 2314.

⁴ [1848] 2 D. G. & Sm., at p. 693.

⁵ [1853] 2 Am. Law Reg. 210 (Am.)

⁶ At p. 231.

besides, two Indian decisions that a translation is not piracy.¹ The reason given in *Burnett v. Chetwood*² for this rule of law is "that the translator has bestowed his care and pains upon it." This, however, cannot be the reason, for in *Murray v. Bogue*³ the Court stated that if C re-translates into English a translation into German by B of A's work in English, A's book will be protected against C's re-translation. Yet C has bestowed the same care and pains on the translation from the German that B did on the translation of the original English work. The real reason must be that C's re-translation would seriously compete with A's work while B's translation would not.⁴ This is the principle which English law proceeds on with respect to dramatization. On principle, therefore, and having regard to the dicta of the eminent judges and to the American case referred to, it may well be held that a translation is no infringement of the original. On the other hand, the judges are always ready to extend the protection enjoyed by the author to all cases in which he can show any claim to be protected, and, although the test of competition is too firmly established to be overruled as to dramatization, it can easily be overruled as to translation.⁵ A distinction might, perhaps, be drawn between a literal and mechanical translation and a translation of original and literary merit, such as a translation of verse into verse.⁶ Some translations of course are as original as many professedly original works; and these will be treated, it is conceived, as original works.

¹ *Munshi Shaik Abdurrahman v. Mirza Mahomet Shirazi*, [1890] 14 Ind. L. R. Bomb. 586; *Macmillan v. Shamsul Ulama Zaka*, [1895] 19 Ind. L. R. Bomb. 557.

² 2 Mer. 441.

³ [1852] 1 Dr., at p. 368.

⁴ This would be doubtful with regard to a translation into Gaelic or Welsh, or into one of the native languages in India.

⁵ Cf. principles laid down by Parker, J., in *Weatherby v. International Horse Exchange, Limited*, [1910] 2 Ch., at p. 305. Of text-writers Scrutton, p. 142, and Copinger, p. 187, are of opinion that a translation of a copyright work is illegal.

⁶ Scrutton, p. 142.

A translation of a non-copyright work is protected.¹

Under The Copyright Act, 1911, the right of translation is expressly included in the definition of copyright.²

The law as to dramatization of a novel is discussed under Dramatic Copyright.³

Unfair Use.

Copyright may be infringed by making an unfair use of an earlier work in composing a new one. The question as to what constitutes a fair use of an earlier work is by no means easy to answer; it varies with the nature of the subject, and it has also varied with the same subject from time to time. In the earlier cases nothing short of a fraudulent attempt to reprint the original work under a colourable disguise was held to be illegal; if a man honestly endeavoured to write a new work the new work was legitimate, no matter what use he made of his predecessor's works. Thus in *Sayre v. Moore*⁴ Lord Mansfield considered that a new edition of sea charts taken in the main from the plaintiff's original charts for which the materials had been collected at great expense would be a legitimate work, provided the defendants had been correcting errors and not servilely copying. But a much more stringent rule has been applied in later cases. The principle was thus laid down by Lord Langdale, in *Lewis v. Fullarton*,⁵ "While all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves for their own profit of other men's works still subject to copyright and entitled to protection." In *Jarrold v. Houlston*⁶ Page Wood, V. C., stated the law

¹ *Wyatt v. Barnard*, [1914] 3 V. & B. 77.

² 1 & 2 Geo. V. c. 46, s. 1 (2).

³ See pp. 146-8, *infra*.

⁴ [1785] 1 East 361 n. Contrast *Trusler v. Murray*, [1780] 1 East 363 n, before Lord Kenyon; but *cf.* *Cary v. Kearsley*, [1802] 4 Esp. 108, and dictum of Shadwell, V. C., in *Martin v. Wright*, [1833] 6 Simons, at p. 298, quoted p. 100, *supra*.

⁵ [1839] 2 Beav. 6, at p. 8.

⁶ [1857] 3 K. & J., at p. 716. The work in question was "The Guide to Science," a book intended to explain some of the ordinary phenomena of nature, thrown into the form of questions and answers.

as follows—"I take the illegitimate use, as opposed to the legitimate use, of another man's work on subject-matters of this description to be this; if, knowing that a person whose work is protected by copyright has, with considerable labour, compiled from various sources a work in itself not original, but which he has digested and arranged, you being minded to compile a work of a like description, instead of taking the pains of searching into all the common sources, and obtaining your subject-matter from them, avail yourself of the labour of your predecessor, adopt his arrangements, adopt moreover the very questions he has asked, or adopt them with but a slight degree of colourable variation and thus save yourself pains and labour by availing yourself of the pains and labour which he has employed, that I take to be an illegitimate use." And he elsewhere states that the second writer might make what use he pleased of common sources, but that the only uses which he could make of the earlier work¹ were—(1) To use it as a guide to the common sources; and (2) To use it as a test of the completeness and correctness of his own work. These principles were approved of in *Pike v. Nicholas*.² There the Court of Appeal reversed the decision of James, V. C., but there was no difference of opinion as to the law, only as to the right conclusions to be drawn from the evidence. The two works in question were books written to prove the descent of the modern English from the Ancient Britons, and were extremely alike in scheme, arguments, and even in the quotations from the original authorities. It was held—(1) That in the circumstances similarities of that nature must

¹ In the actual case the defendant pleaded that he had taken nothing from "The Guide to Science," and therefore these were the only uses which he could have made of the book consistent with his plea. It is conceived, however, that these are the only uses which can be made of an earlier work by the author of a competing one; and that the statements of law in the case are true, independently of the particular facts in it. See the "directory" cases and *Weatherby's Case*.

² [1869] L. R. 5 Ch. 251.

be expected in works dealing with the same subject and intended to prove the same theories, and were, therefore, no proof of direct copying; (2) That, in the absence of direct copying, the first author had no monopoly in his theory or in the arguments used to prove it, or in the plan of his treatise¹; (3) That, in the case of quotations from an earlier work, the former author could not prevent his successors from quoting the same passages, provided that he went to the original sources, although he might have been led to make them by his predecessor's work.²

In the case of works where an original result is impossible, such as Court circulars and directories, the principles are those laid down in the "directory cases." There it was held that the compiler of a rival directory was not entitled to compose his directory by means of slips cut from an earlier one, although he took steps to verify them;³ but that he was entitled to use the slips to guide him to the sources from which information could be obtained.⁴ "The subsequent compiler is not entitled to take one word of the information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information."⁵ So also in the case of a map the author must himself have the measurements taken, and in the case of mathematical tables he must work out the calculations himself.⁶

¹ It appears, however, that there is copyright in the plan of a work; per Lord Ellenborough, in *Roworth v. Wilkes*, [1807] 1 Camp., at p. 97.

² But *cf.* dictum of Collins, M. R., in *Moffatt v. Gill*, [1902] 86 L. T., p. 471, showing illegitimate appropriation of quotations.

³ *Kelly v. Morris*, [1868] L. R. 1 Eq. 697; *Morris v. Ashbee*, [1868] L. R. 7 Eq. 34.

⁴ *Morris v. Wright*, [1870] L. R. 5 Ch. 270.

⁵ Per Page Wood, V. C., *Kelly v. Morris*, L. R. 1 Eq., at p. 701, quoted with approval by Giffard, L. J., in *Morris v. Wright*, L. R. 5 Ch., at p. 284.

⁶ Per Lord Eldon, in *Longman v. Winchester*, [1809] 16 Ves., at p. 271; *Cary v. Longman*, [1801] 1 East 356; *Wilkins v. Aikin*, 17 Ves., at p. 424.

The principle has been extended even to cases where there was no likelihood of competition. In the case of *Weatherby v. International Horse Exchange, Limited*.¹ the plaintiffs had published in the "General Stud Book" lists of all the thoroughbred brood mares at the stud in Great Britain, one in alphabetical order, another under their sires, who were arranged in alphabetical order. The defendants published a book which contained two lists practically the same as these, and Parker, J., found as a fact that so much use had been made of the "General Stud Book" in compiling these lists that they might be treated as having been practically copied from it. To the name of each mare in the defendants' lists was appended the "Bruce-Lowe" number, *i.e.*, the number by which the late Bruce-Lowe distinguished the family to which the mare belonged.² It was held that this book infringed the plaintiffs' copyright. Parker, J., said³: "It is no doubt true that where, as is often the case, it is a difficult matter to determine whether in preparing one publication an unfair use has been made of another, the nature of the two publications and the likelihood or unlikelihood of their entering into competition with each other is not only a relevant but may be even the determining factor in the case. But in my opinion an unfair use may be made of one book in the preparation of another, even if there is no likelihood of competition between the former and the latter. In preparing this book the defendants have utilised, wholesale and without permission, lists prepared by the plaintiffs at much trouble and expense. In so doing they have appropriated the result of this labour and expense to their own use.

¹ [1910] 2 Ch. 297.

² The late Bruce-Lowe had previously issued a book in which all thoroughbreds were grouped into families, descent being traced through the females only; and each family was distinguished by a number denoting its position in order of merit as indicated by the success of its members on the turf.

³ At p. 304.

and even if they have injured the plaintiffs in no other way, they have at any rate deprived them of the advantage which their copyright conferred on them, of being able to publish such a book as the defendants' book at much less labour and expense than anyone else. That this consideration is relevant appears from the case of *Bradbury v. Hotten*." ¹

The decision in this case is unquestionably correct, as, on the facts found, the defendants had practically copied the plaintiffs' lists wholesale, but some of the dicta go very far, unless they are carefully confined to the actual facts proved. They all but assert an exclusive right to information merely on the ground that the compiler might like to use it himself. To act on such a principle, it is submitted, would be practically to abandon all claim to take a former labourer's results for the purpose of furthering knowledge. An author has a perfectly valid claim to be protected against unfair competition. But that does not justify the claim that every writer has an exclusive right to the information collected in his book. It is conceived that (1) where there is no likelihood of competition, and (2) where the resulting work is of such a nature that the merit of the matter taken is entirely lost in that of the new work, the latter is perfectly legitimate, although the writer may have taken some of his information from copyright sources.

In the case of *Spiers v. Brown* ² a much less severe test was applied. There the question was whether B had made an improper use of A's dictionary, and Page Wood, V. C.,

¹ [1872] L. R. 8 Ex. 1. It should be noted, however, that in *Bradbury v. Hotten* the new work could have been prepared by the mere use of scissors and paste, while in the later case considerable labour and research was required. Having regard to the English law as to dramatization, it cannot be contended that in all cases the author has an exclusive right to the use of the results of his work in preparing a new one. In certain cases it has been definitely decided that others can make use of it. The tendency of the courts is, however, strongly in favour of the author, and it may well be that, upon all points still open, the use of the results of his labours will be reserved to him exclusively.

² [1858] 6 W. R. 352 (the French Dictionary Case).

found as a fact that B had taken a considerable amount of his work directly from A's dictionary and had made far more use of it than of other dictionaries, although he had tested it by comparison with other dictionaries, and had added much of his own. He held, however, that B's work was a different one from A's, and therefore legitimate, although he had to a great extent reaped the fruit and benefit of another man's labour. The only way in which this decision can be reconciled with the later cases on the point is by referring it to the peculiar nature of the work in the case. In the case of dictionaries the only original sources are other dictionaries, and it is very difficult to distinguish the legitimate from the illegitimate use of them. Still the case is of very doubtful authority, particularly as the Vice-Chancellor appears to have been much influenced by the fact that the defendant had bestowed labour and pains on what was taken.

Part taken must be substantial.

Summing up, the law appears to be that if any substantial part of a copyright work is taken, the taking is piracy, whether the infringer has bestowed labour and pains on his work or not, or whether the resulting work is likely to interfere with the original or not. The part taken must be substantial,¹ but in connection with this point Lord Cottenham said: "It is not only quantity but value that is always looked to"²; a dictum repeatedly quoted with approval. And it appears, from the dictum of Parker, J., quoted above,³ that the amount necessary to constitute piracy depends to a large extent upon the likelihood of competition between the works. The amount also varies with the nature of the subject; in cases like

¹ *Chatterton v. Cave*, [1878] 3 App. Cas. 483; per Lord Herschell, in *Leslie v. Young*, [1894] App. Cas., at p. 341.

² *Bramwell v. Halcomb*, [1836] 3 Myl. & Cr. at p. 738; cf. *Planchè v. Braham*, [1837] 4 Bing. N. C. 17.

³ *Weatherby v. International Horse Exchange, Limited*, [1910] 2 Ch., at p. 305.

directories, mathematical tables, and other works where the results if accurate are identical, it appears that the smallest direct taking constitutes piracy.¹

In certain cases only a very small portion of the original work may be taken, but this may constitute an important part of the defendant's work; and in such a case the new work will constitute an infringement of the original. Kekewich, J., put the matter as follows:—"The test was not so much what proportion of the plaintiff's work had been taken, but rather what proportion of the defendant's work was the plaintiff's."²

Piracy will be committed by the multiplication of copies for gratuitous distribution, however small the issue, and whatever the means by which the copies may be multiplied.³ And it is quite irrelevant whether the pirated matter is copied directly from the original, or from another reproduction of the same matter whether legal or illegal.⁴

Under The Copyright Act, 1911,⁵ short literary passages from a copyright work not itself published for the use of schools may be included in a collection of passages mainly composed of non-copyright matter, and *bonâ fide* intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, on the following conditions:--

- (i) The original work must itself have been published.
- (ii) The source from which the passages are taken is acknowledged.

¹ Per Page Wood, V. C., in *Kelly v. Morris*, [1806] L. R. 1 Eq., at p. 701; *cf.* *Trade Auxiliary Co. v. Middlesborough Tradesmen's Protection Association*, [1859] 40 Ch. D. 425, at pp. 428-9.

² *Neale v. Harmer*, [1897] 13 Times L. R. 209; *cf.* *Kelly v. Hooper*, [1839] 4 Jur 21.

³ *Cf.* *Novello v. Sudlow*, [1852] 12 C. B. 177; *Warne v. Seebohm*, [1888] 39 Ch. D. 73.

⁴ *Cute v. Devon & Exeter Constitutional Newspaper Co.*, [1889] 40 Ch. D. 500.

⁵ 1 & 2 Geo. V. c. 46, s. 2 (i).

(iii) And not more than two passages from the same author are published by the same publisher within five years.

It is doubtful whether the recitation or reading aloud of a copyright book in public constitutes an infringement of copyright. The Copyright Act, 1911, expressly provides that the reading aloud in public of a reasonable extract from a "published" work shall not infringe the copyright.¹ This would seem to imply that the reading aloud of a larger portion would constitute an infringement. The author is given the exclusive right of "performing" his work²; and "performance" is defined³ as "any acoustic representation of a work and any visual representation of any dramatic action in a work." This definition seems wide enough to cover the reading aloud of a non-dramatic literary work.

Crown and University Copyrights.

The Crown still claims perpetual copyright in the Authorised Version of the Bible⁴ and the Book of Common Prayer, and, probably, in the various works of the Established Church of Scotland.⁵ Various reasons have been given for the existence of these copyrights: in *Millar v. Taylor*⁶ Lord Mansfield ascribed it to a right of property in the Crown, acquired by King James paying for the translation, and declared that there was no prerogative right in the Bible in the original tongues; in *Manners v. Blair*⁷ the right is ascribed to the King in virtue of his Headship of the Church. In any case,

¹ 1 & 2 Geo. V. c. 46, s. 2 (1).

² s. 1 (2).

³ s. 35 (1).

⁴ *Universities of Oxford and Cambridge v. Richardson*, [1802] 6 Ves. 607; *Manners v. Blair*, [1828] 3 Bligh N. S. 391; *In re Red Letter New Testament*, [1900] 17 Times L. R. 1.

⁵ *Manners v. Blair*.

⁶ [1769] 4 Burr, at p. 2405.

⁷ 3 Bligh N. S. 391.

however, no claim has been made to a prerogative right in the Bible in its original languages, and this seems to conflict with the latter theory. No objection has ever been made to printing the Authorised Version with notes.¹

The Treasury claim copyright in the following works:—

- (1) Reports of Select Commissions.
- (2) Papers required by Statute to be laid before Parliament.
- (3) Papers laid before Parliament by Command.
- (4) Acts of Parliament.²
- (5) Official Works.
- (6) Literary or quasi-literary works.
- (7) Charts and Ordnance Maps.

The intentions of the Treasury as to enforcing the copyright in these various classes of works are expressed in a Treasury Minute dated the 28th June, 1912.

Broadly speaking, the first four classes are open to the general public; the copyright in the last three will be strictly enforced.

There is no decision as to the term of copyright in Government publications before The Copyright Act, 1911, but the opinion has been expressed that they have only the statutory period.³ Under The Copyright Act, 1911, they have fifty years from publication; and this applies to all Government publications, whether existing before the Act or not.⁴

Under The Copyright Act, 1775, the Universities have perpetual copyright in all works given or bequeathed to

¹ Copinger, p. 263.

² *Baskett v. University of Cambridge*, [1758] 1 W. Bl. 105.

³ *Scrutton*, p. 130.

⁴ s. 18.

them.¹ Under The Copyright Act, 1911, these copyrights are preserved; but the remedies for infringement are to be those given by the Act of 1911.² As regards any future copyrights the Universities will only have the usual term—the life of the author and fifty years after his death.

Registration.

Registration as a necessary preliminary to suing for infringement of copyright has been abolished. But, as the title to an existing work may depend upon a transfer by registration, and as certain precedents are unintelligible without some knowledge of the system, the following outline is given:—

The old law as to registration under The Copyright Act, 1842, was governed by Sections 11 to 14. A Registry Book was to be kept at Stationers' Hall, and in this the owner of the copyright in any book had the right, if he so pleased, of entering himself as proprietor of such copyright on payment of a fee of five shillings.³ The entry was to be in the form set out in the Schedule to the Act and comprised the title of the book,⁴ the time of first publication,⁵ the name and place of abode of the first publisher,⁶ and the name and place of abode

¹ 15 Geo. III. c. 6, s. 1.

² 1 & 2 Geo. V. c. 40, s. 33.

³ 5 & 6 Vict. c. 45, s. 11.

⁴ s. 13; *Harris v. Smart*, [1889] 5 Times L. R. 594. It seems that if the book has no title registration of a short description will suffice (per Lord Coleridge, *C. J. Lindley and Lopes, L.JJ.*, expressed no opinion).

⁵ s. 13. The day of first publication must be accurately given, *Low v. Routledge*, [1864] 10 L. T. N. S. 838; *Mathieson v. Harrod*, [1868] L. R. 7 Eq. 270; *Page v. Wisden*, [1869] 20 L. T. 435; *Collingridge v. Emmott*, [1887] 57 L. T. 864, following a dictum of Blackburn, J., in *Wood v. Boosey*, [1867] L. R. 2 Q. B. 340, at p. 355. *Cf.* also *Thomas v. Turner*, [1887] 33 Ch. D. 292 (reprint of old edition). The object is to inform all persons interested when the period of copyright will run out (per Kay, J., in *Collingridge v. Emmott*, 57 L. T., at p. 865).

⁶ s. 13; *Cooté v. Judd*, [1883] 23 Ch. D. 727. In the case of a firm, the trade name is sufficient (*Weldon v. Dicks*, [1878] 10 Ch. D. 247). According to Field, J., in *Nottage v. Jackson*, [1883] 49 L. T., at p. 340, it is sufficient to enter the place of business. A mistake in the name was held fatal, *Low v. Routledge*.

of the proprietor of the copyright.¹ Registration in the name of an agent or a director was bad,² unless he was a trustee.³ No assignments previous to the first entry of proprietorship need be entered,⁴ but the registration did not protect the copyright in the hands of subsequent assignees without a fresh registration.⁵ (Under The Fine Arts Copyright Act, 1862, all subsequent assignments were to be registered⁶). Assignments might be made by entry in the registry in like manner on payment of the fee of five shillings, and in that case assignment in any other way was to be unnecessary.⁷ The publication referred to must actually have taken place; entry of the proprietorship of the copyright in a yet unpublished book was bad, although the day given as the date of publication was that on which the book was actually published afterwards, as there could be no copyright in a yet unpublished work.⁸ Registration of the *name* of a periodical before publication gave no exclusive property in the name,⁹ property in a title can only be acquired in the manner previously explained,¹⁰ *i.e.*, by constant usage giving rise to property analogous to that in a trade name.

The effect of registration was to enable the owner of the copyright to sue for infringements of his copyright. Prior to registration he could not sue, but after registration he

¹ s. 13. If the proprietor has no place of business in England it has been held that the place of business of his publisher is sufficient (*Lover v. Davidson*, [1856] 1 C. B. N. S. 182). The object is to provide for means of communicating with him (per Cresswell, J., at p. 160).

² *Petty v. Taylor*, [1897] 1 Ch. 465.

³ *London Printing Alliance v. Cox*, [1891] 3 Ch. 291; per Lindley, L. J., at p. 301, per Fry and Lopes, L.J.J., at p. 303.

⁴ *Weldon v. Dicks*; *cf.* per Kennedy, J., in *Liverpool General Association v. Commercial Press Telegram*, [1897] 2 Q. B. 1, at pp. 3, 4.

⁵ *Liverpool General Association v. Commercial Press Telegram*, dissenting from a dictum of Cockburn, C. J., in *Wood v. Boosey*, L. R. 2 Q. B., at p. 351.

⁶ 25 & 26 Vict. c. 68, s. 4.

⁷ 5 & 6 Vict. c. 45, s. 13.

⁸ *Henderson v. Maxwell* (No. 2), [1877] 5 Ch. D. 892; *cf.* *Correspondent Newspaper Co., Limited, v. Saunders*, [1865] 12 L. T. N. S. 540.

⁹ *Maxwell v. Hogg*, [1867] L. R. 2 Ch. 307.

¹⁰ See pp. 69-73, *supra*.

was entitled under the Act of 1842 to sue for infringements committed before registration.¹

The Registry Book was to be open for inspection to anyone on payment of a fee of one shilling, and a copy certified by the officer and impressed with the stamp of the company was to be given on payment of five shillings; and such copies were admissible in evidence in all Courts, and to be *prima facie*,² but not conclusive,³ evidence of the proprietorship of the copyright.⁴ Assignments might be made by entry in the Register in like manner on payment of the fee of five shillings, and any other assignment was to be unnecessary.⁵

Delivery of Books to Libraries.

Under The Literary Copyright Act, 1842, it was the duty of the publisher to deliver at his own expense a copy of every book and of every subsequent edition (other than reprints) to the British Museum within one month after publication in the United Kingdom or twelve months after publication in any other part of the British Dominions.⁶ He was also to deliver a copy within one month after the receipt of a written demand for the same to each of the following libraries: viz.—The Bodleian Library, Oxford, the University Library, Cambridge; the Library of the Faculty of Advocates at Edinburgh, and the Library at Trinity College, Dublin.⁷ The copy for the British Museum was to be one of the best copies,⁶ the copy for each of the other libraries was to be one of the copies, of which the largest number were printed for sale.⁷

¹ s. 24; *Goubaud v. Wallace*, [1877] 36 L. T. 704.

² s. 11; *Hildesheimer v. Dunn*, [1891] 61 L. T. 452.

³ *Lucas v. Cooke*, [1880] 13 Ch. D. 872.

⁴ s. 11. Means were provided for expunging false entries. s. 14.

⁵ s. 13. If unnecessary portions are added they will not affect the portions which are correct (*Fairlie v. Boosey*, [1879] 4 App. Cas. 711), at any rate so long as they are not misleading (p. 724, per Lord O'Hagan; but see p. 731, per Lord Blackburn); Scrutton thinks they must not be misleading, p. 151.

⁶ 5 & 6 Vict. c. 45, s. 6.

⁷ s. 8.

These provisions have been preserved by The Copyright Act, 1911,¹ with regard to books published in the United Kingdom. A written receipt is to be given for the copy delivered to the British Museum.² In the case of the other libraries the copy is to be delivered to some depôt in London named in the written demand.³ The National Library of Wales is added to the libraries entitled to demand a copy, but the Board of Trade may make regulations excluding their right to demand copies of books belonging to any particular classes.⁴ The publisher is liable to a fine on summary conviction not exceeding five pounds and the value of the book in the event of non-compliance, and the fine is to be paid to the library.⁵ A book is defined to include "every part or division of a book, pamphlet, sheet of letterpress, sheet of music, map, plan, chart, or table separately published."⁶ In the case of a work published in a series of books or parts the written demand may include a demand for all parts to be published subsequently.⁷

¹ 1 & 2 Geo. V. c. 46, s. 15.

² s. 15 (1).

³ s. 15 (2).

⁴ s. 15 (5); see p. 205, *infra*.

⁵ s. 15 (6).

⁶ s. 15 (7)

⁷ s. 15 (2).

CHAPTER IV.

LECTURES.

Lectures under The Copyright Act, 1835.

A LECTURE is a species of literary work, and might therefore be expected to be governed by the Act dealing with copyright in books. Such, however, is not the case. Down to The Copyright Act, 1911, the law relating to published lectures was governed by The Lectures Copyright Act, 1835,¹ and the duration of copyright by the Statute of Anne as amended by the Act of 1814.² The law, however, with regard to infringements of copyright rests purely on judicial decisions, and therefore it is conceived that the law relating to infringements of copyright in books holds good with respect to copyright in lectures.³ No case has arisen with regard to an infringement of copyright in a published lecture, but the Act of 1835 appears only to contemplate the case of printing a lecture, and does not deal with the unauthorised oral reproduction of it.

Two points arise with regard to copyright in published lectures. The first is whether prior to The Copyright Act, 1911, there was such a thing as a right to the exclusive delivery of a lecture. That Act has expressly conferred the right of delivery on the lecturer,⁴ but the Act of 1835 speaks only of the right of "printing and publishing"; it seems to confer on the lecturer only the rights which he would have had at that date under the amended Statute of

¹ 5 & 6 Will. IV. c. 65.
See pp. 98-110, *supra*.

² 8 Anne c. 19; 54 Geo. III. c. 156.
³ 1 & 2 Geo. V. c. 40, s. 1 (2).

Anne if he had first published his work as a book. There is no actual decision as to whether unauthorised reading aloud of a book constitutes an infringement of the copyright in the book, but in *Hanfstaengl v. Empire Palace*.¹ Stirling, J., said: "Suppose that at a public meeting some portion of a copyright work was recited or read from an authorised copy of a book; that would be no infringement of the rights of the owner of the copyright." And this view seems in accordance with the principles of English law with regard to dramatization.² If there were a right to restrain unauthorised oral reproduction of a book it could not be said that the performance of a dramatized version of a novel on the stage was not an infringement of the copyright in the novel. On the other hand, the law of the United States seems to forbid such unauthorised recitations.³

The point is now only of interest in so far as it throws light on the second point, viz.—In the case of a written work, does its character as a book or a lecture depend on the method in which it is first published? There is no doubt that, in the case of an unwritten speech, delivery in public destroyed all copyright in the speech unless notice was given under the Act of 1835. On the other hand, in the case of a drama, public performance on the stage did not divest the Common Law right to restrain publication,⁴ and was certainly not an infringement of statutory copyright.⁵ Now public performance on the stage amounts to no more than recitation of the words of the play with the assistance of action and scenery. It would seem, therefore, that the same rules apply to the reading aloud

¹ [1894] 3 Ch., at p. 116. The dictum was purely *obiter* as the actual case related to the copying of a picture. Cf. also dicta of Page Wood, V. C., in *Tinsley v. Lacy*, [1863] 1 H. & M. 747, at p. 751.

² See pp. 146-8, *infra*.

³ *Boucicault v. Fox*, [1862] 5 Blatchford 67, at p. 98; *Palmer v. De Witt*, 1872] N. Y. 530.

⁴ *Macklin v. Richardson*, [1770] Amb. 694.

⁵ *Coleman v. Wathen* [1793] 5 T. R. 245.

of a book. Take the case of a work composed and intended to be published as a book. Suppose the author has a large edition printed and prepared for issue. Is he to lose all copyright in the book if, prior to the issue of these copies to the public, he reads or recites it aloud in public? Yet no distinction can be drawn between this case and the reading aloud of a written speech from a single written manuscript.

Distinction between Lectures and Books.

The question whether a non-dramatic work was to be treated as a lecture or a book depended, prior to the Act of 1911, on whether it was first published as a lecture or a book. If the first publication was in the form of a book it was protected as a book¹ and the fact that it had previously been delivered as a lecture was immaterial, provided such delivery had not amounted to publication. If it was first published as a lecture, then there was copyright in the work for twenty-eight years or the life of the author, whichever should be the longer,² provided that at least two days' notice in writing had been given to two justices of the peace living within five miles of the place where the lecture was delivered.³ If no such notice was given then the author's property in his composition ceased on delivery.

Publication.

The chief point of difficulty with regard to lectures is the question as to what amounts to publication.⁴ The principle seems to be that where the lecturer exercises

¹ This of course leaves open the question whether the reading aloud of a written work amounts to publication of it as a lecture or as a book.

² 5 & 6 Will. IV. c. 65, s. 4. The term of copyright therein referred to is that given by 54 Geo. III. c. 156. The reader should, however, be warned that previous text-writers have placed the term given for copyright in lectures at twenty-eight years only; Scrutton, p. 08; Copinger, p. 57.

³ 5 & 6 Will. IV. c. 65, s. 5.

⁴ See also pp. 30-40, *supra*.

any control over the composition of his audience, the law will infer that the lecture was delivered to them under a contract of secrecy, and hence there was no publication.¹ "The understanding between the lecturer and the audience is that whether the lecture has been committed to writing beforehand or not the audience are quite at liberty to take the fullest notes they like for their own personal purposes, but they are not at liberty, having taken these notes, to use them afterwards for the purpose of publishing the lecture for profit."² Conversely, where all the world is invited to listen, as in the case of a political speech, or of a sermon in a church which is open to all mankind, the lecture is published and the author loses all rights in it.³

University Lectures.

The Act of 1835 expressly exempts all lectures delivered "in any University or Public School or College or on any Public Foundation or by any Individual in virtue of or according to any Gift Endowment or Foundation" from its operation.⁴ With regard to these the law is settled by *Caird v. Sime*.⁵ It seems that where the lecture is delivered on behalf of a University to the public at large, the lecture is published and all the lecturer's rights are gone and cannot be saved by notice under the Act. But if the publication is to members of a University or School only,⁶ or to an audience, no matter how composed, limited by ticket,⁷ then the law implies conditional publication only:

¹ *Nicols v. Pitman*, [1884] 26 Ch. D. 374; *Caird v. Sime*, [1887] 12 App. Cas. 326. In *Boucicault v. Delafield*, [1863] 1 H. and M. 597, and *Boucicault v. Chatterton*, [1878] 5 Ch. D. 267, a play was held to be "published" by being publicly acted on the stage, admission presumably being by ticket and paid for; but the point that this did not amount to publication was not taken.

² Per *KING, J.*, *Nicols v. Pitman*, 26 Ch. D., at p. 381. "For profit" seems superfluous; cf. *Novello v. Snodlow*, [1852] 12 C. B. 177.

³ Per Lord Halsbury, *Caird v. Sime*, 12 App. Cas., at p. 338.

⁴ 5 & 6 Will. IV. c. 65, s. 5.

⁵ [1887] 12 App. Cas. 326; cf. *Abernethy v. Hutchinson*, [1825] 3 L. J., Ch. (O. S.) 209.

Per Lord Halsbury, *Ibid.* at p. 337-8. ⁷ *Nicols v. Pitman*, [1884] 26 Ch. D. 374

and it does not matter whether the lectures were reduced into writing or not, or whether the lecturer was legally bound to deliver them or not.¹

Alterations Introduced by The Copyright Act, 1911.

By The Copyright Act, 1911, the author of any lecture has copyright in it² for the term of his life and fifty years from his death;³ and no notice is necessary to acquire copyright. The owner's rights now include the exclusive right to deliver the lecture;⁴ but his right to prevent reports in newspapers is limited in various ways. In the case of a political speech delivered at a public meeting, a report in a newspaper is expressly permitted; and it does not seem necessary that such report should be contemporaneous.⁵ In the case of any other lecture delivered in public, a report may be published in the newspapers, unless expressly prohibited by a conspicuous written notice affixed before and maintained during the lecture at the main entrance of the building in which the lecture is given, and, except where the building is used for public worship, near the lecturer.⁶ In no case can a lecturer prevent a newspaper summary.⁶ This provision appears to apply to lectures given in private; but any report or abstract of these will be forbidden by the general law implying a contract of secrecy under such circumstances.⁷ "Lecture" includes address, speech, or sermon.⁸

¹ Caird v. Sime, 12 App Cas. 320.

² s. 1 (1).

³ s. 2 (1).

⁴ s. 3.

⁵ s. 1 (2).

⁷ See pp. 44-7, *supra*.

⁶ s. 20.

⁸ s. 35 (1).

CHAPTER V.

DRAMATIC COPYRIGHT.

Copyright and Playright.

IN the case of the typical¹ dramatic composition there are two distinct rights under the law of copyright—the right to publish the drama as a book, and the right to have it acted on the stage. These rights are entirely distinct from each other, may arise and end at different times, and be vested in different persons. The former right is exactly the same as that in non-dramatic literary works, and down to 1912 depended on 5 & 6 Vict. c. 45 alone, and is dealt with in Chapter III. The performing right depended on 3 Will. IV. c. 15 and 5 & 6 Vict. c. 45, and is hereafter referred to as “playright” in the present work, following Drone and Scrutton.²

Prior to 1833, playright rested on the Common Law. In *Morris v. Kelly*,³ Lord Eldon restrained the unauthorized performance of a comedy which appears to have been previously performed by assignees of the author, although it is not expressly stated so in the report. And in *Macklin v. Richardson*⁴ Lord Commissioner Smythe speaks of the double right of the author of a dramatic piece: the right to the advantage of performance and the right to the profits of printing and publishing. The point actually decided in this case was that performance on

¹ See pp. 130-9, *infra*, as to whether both rights are essential for a dramatic piece.

² “Stage-right” is another name given to the performing right by Charles Reade.

³ [1820] 1 J. & W. 451.

⁴ [1770] Aurb. 634.

the stage does not destroy the author's Common Law right to prevent publication in print, and it is the first case that establishes the principle of law—viz., that copyright and playwright move in such entirely different planes from each other, that the one may exist without the other, and that infringements of the one are not infringements of the other—which down to 1912 lay at the root of the English law as to dramatization of novels. On the other hand, in *Murray v. Elliston*¹ the Court of King's Bench certified to the Lord Chancellor that the representation of an altered and abridged version of Lord Byron's tragedy "Marino Faliero" was not an infringement of the plaintiff's copyright. But the weight of this case as an authority against Common Law playwright is diminished by two considerations. First, the version actually represented was an abridgment, and, as such, would, on the principle of *Dodsley v. Kinnersley*,² be considered a new work. Secondly, the plaintiff was the assignee of the *copyright* in the work, and it is not certain whether the playwright was vested in him or Lord Byron. No reasons are given for the decision. And in *Wall v. Taylor*³ in the Divisional Court Field and Cave, JJ., said: "Previous to 1833 the liberty of performing dramatic pieces was not the subject of property," but the dictum was purely *obiter*. Playwright was not within the Statute of Anne. In *Coleman v. Wathen*,⁴ an action for penalties under the Statute, it was held that representation on the stage was not a publication within the Statute.

In 1833, the Act 3 Will. IV. c. 15,⁵ commonly known as "Bulwer-Lytton's Act," conferred playwright on the author of any "tragedy, comedy, play, opera, farce, or

¹ [1822] 5 B. & Ald. 657.

² [1761] Ambler 403; see pp. 105-6, *supra*.

³ [1882] 9 Q. B. D., at p. 730.

⁴ [1793] 5 T. R. 245.

⁵ s. 1. I have disregarded the provisions as to dramas already published.

any other dramatic piece or entertainment” for the following periods:—(1) If printed and published, for the period of twenty-eight years from the date of the printing and publication, or for the life of the author or the surviving author, whichever period should be the longer; and (2) If not printed and published, for a period not stated in the Act, but, on reading this provision for unpublished works together with that for published, clearly amounting to perpetuity so long as the work is not printed and published and then for the period of twenty-eight years or life from the date of such publication.¹ The Act imposed certain penalties on persons guilty of infringements of playwright² which were preserved by The Copyright Act, 1842.³ The Copyright Act, 1842,⁴ after reciting that it is expedient to extend the term of the sole liberty of representing dramatic pieces to the full time provided by that Act, *enacts* that the sole liberty of representing such dramatic piece shall be the property of the author “*for the term in this Act provided for the duration of copyright in books,*” except that the first public representation shall be deemed equivalent for this purpose to the first publication of the book.

There seems to be little doubt as to the meaning of this provision. Playright extends from the first public representation of the piece for the period of forty-two years or the life of the author and seven years, and is entirely independent of the copyright in the play. A doubt has been suggested whether the Act of 1842 was intended to apply to unprinted pieces,⁵ on the ground that the section refers to extending the period of playwright

¹ Scrutton on Copyright, p. 75. In *Tate v. Fullbrook*, [1908] 1 K. B., at p. 831, Farwell, L. J., notes that no express limit is given to the right. It is, however, obvious that the right lasts as long as the work is not published in print.

² s. 2.

³ s. 21.

⁴ s. 20.

⁵ Scrutton, p. 76.

and, if it applies to unprinted pieces, the period is cut down. The words of the enacting part of the section are, however, perfectly plain and cannot be controlled by words of preamble.¹ In *Chappell v. Boosey*² North, J., and in *Tate v. Fullbrook*³ Farwell, L. J., expressly stated that the combined effect of the Acts was to give playwright to the author for forty-two years, or life and seven years, to be computed from the date of the first public representation. The author has, therefore, two distinct rights in his work under the Act of 1842. He has copyright (including the right to prevent publication in print of the work while yet unpublished) or the right of multiplying copies for his life and seven years, or for forty-two years from the first publication. He has also playwright (including the right to prevent publication by representation of the play while yet unrepresented) or the exclusive right of public representation for life and seven years, or for forty-two years from the first representation in public. These rights are entirely independent of each other,⁴ may arise and expire at different times, and may be assigned separately to different persons.⁵

Now, under The Copyright Act, 1911, copyright and playwright are united and included in the general term "copyright" as defined by that Act.⁶ They come into being at the same time and end at the same time, viz., fifty years after the death of the author, or fifty years after the first publication, whether by issue of copies to the public or by public performance.⁷

¹ Per Jessel, M. R., in *Maple's Case*, [1882] 21 Ch. D., at p. 377.

² [1882] 21 Ch. D., at pp. 238-9.

³ [1908] 1 K. B., at p. 831. But see dicta of Wills, J., in *Hardacre v. Armstrong*, [1905] 21 Times L. R. 189; cf. also Macgillivray, pp. 126-8.

⁴ *Macklin v. Richardson*, [1770] Amb. 694.

⁵ *Chappell v. Boosey*, [1882] 21 Ch. D., at pp. 238-9.

⁶ 1 & 2 Geo. V. c. 46, s. 1 (2).

⁷ s. 17 (1).

In the case of an existing work where the playwright and copyright were in different hands on the 30th June, 1912, the owner of the playwright becomes the owner of the performing right, but the owner of the copyright becomes the owner of all the other rights included in copyright as defined by the Act.¹

Conditions for acquiring Playright.

In the Digest of Copyright Law appended to the Report of the Copyright Commission of 1878, Sir James Fitzjames Stephen expressed the opinion that playright was destroyed by publication in print before public performance²; and the Commission treated the point as doubtful.³ There seems to be no authority for such a suggestion. It is clear that the Act of 1833 confers playright on the author of a drama published in print, and says nothing about public representation preceding such printing; and the Act of 1842 in no way refers to the matter. The cases on which this proposition is based are *Murray v. Elliston*⁴ and *Toole v. Young*.⁵ Of *Murray v. Elliston*⁴ it need only be said that it refers exclusively to the Common Law and not to the statutory right, while even with regard to the Common Law it is quite impossible to say what it actually did decide.⁶ *Toole v. Young*⁵ is a case of the dramatization of a novel. A wrote a novel and subsequently dramatized it; B also dramatized the novel, going direct to the novel and not to A's version. It was held (1) that it was no infringement of the copyright in the novel to represent a dramatized version of it on the stage, and that, therefore, all persons were at liberty to do so; (2) that the fact that the author of one of the

¹ s. 21 and First Schedule.

² s. 73.

³ [1874] L. R. 9 Q. B. 523.

⁴ Articles 14 & 16.

⁵ [1822] 5 B. & Ald. 657.

⁶ See p. 131, *supra*.

dramas was also the author of the novel on which it was founded did not entitle him to prevent other members of the public from making legitimate use of the source on which his drama was founded.¹ The case shows that publication *in the form of a drama* must precede publication *in the form of a novel*, if the author desires to prevent other persons *from dramatizing his novel*; but it does not show that publication *of a drama* by public performance on the stage must precede publication in print if the author desires to preserve his *playright*.

In *Chappell v. Boosey*,² the only case on the point up to the present, North, J., held that prior publication in print did not destroy the author's playright. This, it is submitted, may be taken as settling the law.

The other qualification related to publication out of the British Dominions. By the provisions of The International Copyright Act, 1844,³ in the case of a play first published out of the British Dominions, whether the publication were in print or by public representation on the stage, the author lost both copyright and playright, except such rights as he might enjoy under the Act. In *Boucicault v. Delafield*⁴ it was argued for the author that the Act was not intended to apply to British subjects, but Page Wood, V. C., held that no distinction was made. And in *Boucicault v. Chatterton*,⁵ where the publication abroad was by public representation only, the Court of Appeal held that, even in this case, the Act applied to British subjects, and that the author had lost both copyright and playright.

The rule rested on statute, and was probably opposed to that of the Common Law.⁶ In the case of *Palmer v.*

¹ See pp. 146-8, *infra*.

² [1882] 21 Ch. D. 232; *cf.* also dicta of Lord Blackburn, in *Fairlie v. Boosey*, [1879] 4 App. Cas., at p. 727 (musical case).

³ 7 Vict. c. 12, s. 19.

⁴ [1863] 1 H. & M. 597.

⁵ [1876] 5 Ch. D. 207.

⁶ *Cf.* *Macklin v. Richardson*, [1770] Amb. 604.

De Witt,¹ a case decided on the principles of the Common Law, the Courts of the United States held that representation of a play in London, written by a British subject but never published in print, did not prevent him from restraining the unauthorised publication of it in print. In other words, playwright was destroyed by public representation abroad, but not copyright.

From 1886 publication in any part of the British Dominions vested the right equally with publication within the United Kingdom.²

It is doubtful whether publication before 1886 within the British Dominions other than the United Kingdom would have destroyed copyright or playwright, as the case might be.³ But, if this was so, it is submitted that only copyright was destroyed by publication in print, and only playwright by public representation.

The conditions for acquiring copyright rights in a drama now rest on The Copyright Act, 1911.⁴

Qualifications for Playright.

The Act of 1833 gave protection to any "tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment."⁵ As regards the interpretation of this provision two questions have arisen:—

1. *Is the subject matter of playwright something which can be put into writing or are scenic effects, situations, &c. protected as well?*

The earliest case is that of *Lee v. Simpson*⁶ where the representation of a *written* introduction to a pantomime was restrained, but it is extremely difficult to collect anything in point from the report. In the case of

¹ [1872] 47 N. Y. 532 (Am).

² 45 & 50 Vict. c. 33, s. 8.

³ See pp. 88-90, *supra*.

⁴ 1 & 2 Geo. V. c. 46, s. 1 (1); see pp. 50-2, *supra*.

⁵ s. 1.

⁶ [1847] 3 C. B. 871.

*Chatterton v. Cave*¹ in the Court of Common Pleas Brett, J., is reported in the *Law Times* as saying: "Now it was first said that the subject-matter of the action was not the subject of copyright; that the Act gives a property in words, but not in situations and scenic effects, but I think that these latter are more peculiarly the subject of copyright² than the words themselves." These words do not appear in the *Law Reports*. In the same case Grose, J., said: "A very striking stage situation or important novel scenic effect might very well be, under some circumstances, the subject of dramatic copyright The intention is to protect original merit; it would be descending to absurdity to give protection to the application of a commonplace expedient of scenic art to the end of a version of a drama."³ But in *Tate v. Fullbrook*⁴ the Court of Appeal held that the subject of playwright is something which can be printed and published. Farwell, L. J., stated the law as follows⁵:—"It is clear that the only things which are protected by it are things which are capable of being printed and published. It follows, therefore, that scenic effects, taken by themselves, and apart from the words and incidents of the piece, are not the subject of copyright, because they cannot be the subject of printing and publication. Nor do I say that scenic effects may not be protected as part and parcel of the drama; scenes do, of course, form part of a drama, and it is the dramatic piece, as a whole, that is protected by the Act.⁶ It is essential, however, to such protection that there should be something in the nature of a dramatic entertainment, for a mere spectacle standing alone is no more within the Act than a singer who sings in character costume is within it. The

¹ [1875] 33 L. T., at p. 256.

² *I.e.* playwright.

³ L.R. 10 C. P., at p. 579.

⁴ [1908] 1 K. B. 821.

⁵ At p. 832.

⁶ *Cf.* judgment of Lord Blackburn in *Chatterton v. Cave*, [1878] 3 App. Cas., at p. 503.

scene can only be protected as part of a whole which is within the Act, and as such carries the statutory protection to its accessories. *In order to obtain protection there must be matter capable of being printed and published, and the plagiarist must copy a material part thereof.*"

In *Karno v. Pathé Frères*,¹ Jelf, J., held, on the authority of *Tate v. Fullbrook*,² that a pantomimical sketch entitled "The Mummie Birds," the permanent part of which consisted mainly in dumb show, was not within the protection of the Copyright Acts. The Court of Appeal upheld his decision on another ground, but expressed no opinion as to this point.

The result seems to be this: unless the work can be printed and published it is incapable of playwright³; if it is capable of playwright, there is, of course, no property in the *idea* of any scenic effects;⁴ but the point still seems open whether there can be infringement of playwright in a drama otherwise than by taking the actual words, or (to put it in a different form) whether the *playright* in one drama can be infringed by the *representation* of another, although the *copyright* in the first would not be infringed by the *printing* of the second. The dicta in the English cases quoted above seem in favour of an affirmative answer. The point was neatly raised in the American case of *Daly v. Palmer*,⁵ where the stage action in one play was only a colourable imitation of that in another, although the words used

¹ [1908] 99 L. T. 114, affirmed by the C. A., [1909] 100 L. T. 260. There was no plot, and although a good deal of "gag" was employed by the performers, the whole of this varied from night to night.

² [1908] 1 K. B. 821.

³ *Tate v. Fullbrook*; cf. *Martinetti v. MacGuire*, [1867] 1 Dendy 216 (Am.) where protection was refused to the "Black Crook" on the ground that it was a "mere spectacle." The force of this decision is considerably weakened by the fact that the judge also based his decision on an alternative ground—the immoral and undesirable character of the "spectacle."

⁴ *Chatterton v. Cave*, [1878] 3 App. Cas. 483.

⁵ [1868] 6 Blatchford 256. It might possibly be urged against this case as an authority that the learned judge did not lay sufficient stress on the rule that there is no copyright in ideas.

by the characters were totally different. It was decided that this was an infringement of the playwright.

2. *What constitutes a dramatic piece?*

The leading case on this subject is *Fuller v. Blackpool Winter Gardens*,¹ and the earlier decisions are of somewhat doubtful authority, though no opinion was expressed as to their soundness except in the case of the decision in *Roberts v. Bignell*.² In *Russell v. Smith*,³ a song which related to the burning of a ship at sea and the escape of those on board, describing their feelings in vehement language and sometimes expressing them in words supposed to be spoken by persons on board, was held to be dramatic, although it was sung by one person only, sitting at a piano and giving effect to the verses by his delivery, but without any assistance from scenery or appropriate dress. The Court held that the Act protected⁴ "any piece which, on being presented by any performer to an audience, would produce the emotions which are the purpose of the regular drama, and which constitute the entertainment of the audience."

In *Clark v. Bishop*⁵ a comic song sung in costume and accompanied by appropriate gestures and expression was held

¹ [1895] 2 Q. B. 429.

² [1887] 3 Times L. R. 552.

³ [1848] 12 Q. B. 217.

⁴ At p. 236.

⁵ [1872] 25 L. T. (N. S.) 908. The facts in that case were as follows:—A was the proprietor of the right of printing the words of a song, and of singing it in public. The song had never been published, except by being sung in public. B printed and published a volume of songs, including one which was a colourable variation of A's song. A was held entitled to restrain the printing of B's song, although he had not registered his own, on the ground (1) that the printed song was not a "book" within the meaning of The Copyright Act, 1842, and therefore did not require registration; (2) that the printing of the song constituted an infringement of A's property in it as a dramatic piece. It is respectfully submitted that the *reasoning* is entirely wrong. In the first place, if the song was not a "book" within the Act there was no copyright (in the narrower sense) in it and B's action was no infringement of A's copyright. But it is quite clear that the words of a song printed on a sheet constitute a sheet of letterpress, and come within the Act. And, on the other point, the printing of a drama does not constitute an infringement of its playwright. Can the opinion of the Court as to what constitutes a dramatic piece carry much weight? The decision is quite right, as the performance in public does not constitute such a publication as to destroy the author's Common Law right with regard to publishing in print.

a dramatic piece. And in *Roberts v. Bignell*¹ a song called "Oh, Jenny Dear," set to music not of the proprietor's authorship; was held a dramatic piece.

But in *Fuller v. Blackpool Winter Gardens*² the Court of Appeal held that a song called "Daisy Bell" was not a dramatic piece, although intended to be sung in appropriate costume, but without dramatic effect or scenery. Lord Esher expressed the view³ that the words "any other dramatic piece or entertainment" must be read as *ejusdem generis* with the things previously enumerated, "tragedy, comedy, play, opera, or farce."⁴ A. L. Smith, L. J., said⁵ "In each case it is a question of fact, I think, that to constitute a song a dramatic piece it must be such a song as for its proper representation acting, and possibly scenery, forms a necessary ingredient, and that if neither of these be a requisite to the efficient representation of the song it is not a dramatic piece." Lord Denman is treated as having confused two questions, viz., what is "dramatic" in the usual sense of the word and what is "dramatic" within the meaning of the Act.

By the Interpretation Section⁶ of The Copyright Act, 1911, "dramatic work" includes "any piece for recitation, choreographic work, or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production . . . of original character." It is very difficult to say what the words "or otherwise" mean.

The other qualifications for playwright are innocency and originality. It is conceived that these qualifications

¹ [1887] 1 Times 3 L. R., 552; doubted by Kay, L. J., in *Fuller's Case*, [1895] 2 Q. B., at p. 437.

² [1895] 2 Q. B. 429.

³ At p. 433.

⁴ 3 Will. IV. c. 15, s. 1.

⁵ [1895] 2 Q. B., at p. 442.

⁶ 1 & 2 Geo. V. c. 46, s. 35 (1).

are exactly the same as in the case of Literary Copyright.¹ Thus, in *Hatton v. Kean*² an adaptation of "Much Ado About Nothing" was held sufficient to constitute an original work in which playwright might exist.

Duration and Extent of Right.

These are the same as in the case of Literary Copyright (see p. 90, *supra*).

Ownership.

First Owner.

The first owner of the playwright in a dramatic work was the person who first publicly performed it, having the right to do so; and, as a general rule, his right to do so must be traced from the author. It has not yet been decided whether, under the Act of 1842, the playwright of a drama published after the death of its author belonged to the owner of the manuscript from which such drama was first published.³ It would probably be decided that it did, as it is expressly provided that all provisions in the Act dealing with the ownership of the copyright shall apply to playwright also.⁴ Moreover, the copyright in the drama unquestionably belonged to the owner of the manuscript, and it would seem very anomalous if the playwright did not.

Under the Act of 1842 mere employment of the author to write a play and payment by the employer did not vest the playwright in the employer without a written transfer,⁵ nor does the fact that the employer

¹ See pp. 81-7, *supra*.

² [1859] 7 C. B. N. S. 268; *cf.* *Tree v. Bowkett*, [1896] 74 L. T. 77.

³ *Cf.* *Macmillan v. Dent*, [1907] 1 Ch. 107, 5 & 6 Vict. c. 45 s. 3.

⁴ 5 & 6 Vict. c. 45 s. 20: "and the provisions hereinbefore enacted in respect of the property of such copyright . . . shall apply to the liberty of representing . . . any dramatic piece . . . as if the same were herein expressly re-enacted and applied thereto." This would bring playwright within the meaning of Section 3.

⁵ *Shepherd v. Conquest*, [1856] 17 C.B. 427; *Eaton v. Lake*, [1888] 20 Q.B.D. 378; see pp. 93-4, *supra*.

suggested the subject make any difference.¹ The only case in which playwright in the work vested in a person other than the author was where that work formed an accessory to another work the playwright of which was in that other person.² In that case, if the author was paid to compose the accessory work on the terms that the playwright should belong to the employer, then the playwright vested *ab initio* in the employer, without any need for a written transfer.³

To constitute joint authorship with another person there must be a preconcerted joint design. Mere alterations of or additions to an already completed work by another person will not constitute him a joint author, whether such alterations or additions were made with or without the consent of the true author.⁴

Transfer.

The assignment of playwright must be in writing.⁵ In the case of a licence, the licence need not be in the writing of the author but may be given by a duly authorised agent.⁶ It has not been decided whether this applies to the case of an assignment.⁷ The assignment need not be attested⁸ or by deed.⁹ No particular form appears necessary. Thus in *Lacy v. Toole*,¹⁰ a written agreement by A to "let B have" a particular drama in discharge of a

¹ *Levy v. Rutley*, [1871] L. R. 6 C. P. 523; *Shelley v. Ross*, [1871] L. R. 6 C. P. 531 n. But see pp. 91-7, *supra*.

² The reason is that the person who designs the whole is considered the author of the whole; *Barfield v. Nicholson*, [1823] 2 L. J. (O. S.) 90, per Sir John Leach, at p. 102.

³ *Hutton v. Kean*, [1859] 7 C. B. N. S. 268; *Wallerstein v. Herbert*, [1867] 16 L. T. 453.

⁴ *Levy v. Rutley*.

⁵ *Shepherd v. Conquest*, [1856] 17 C. B. 427; *Eaton v. Lake*, [1898] 20 Q. B. D. 378, and general opinion of text-writers; but see dicta of Byles, J., in *Lacy v. Toole*, [1867] 15 L. T. 512.

⁶ *Morton v. Copeland*, [1855] 16 C. B. 517; given by the secretary of the Dramatic Authors' Society.

⁷ *Scrutton* treats it as sufficient, p. 92.

⁸ *Cumberland v. Copeland*, [1862] 1 H. & C. 104.

⁹ *Marsh v. Conquest*, [1864] 17 C. B. N. S. 418.

¹⁰ [1867] 15 L. T. 512.

debt was held sufficient to pass all A's interest in a drama already written. A sole licensee cannot sue in his own name.¹

Unless expressly mentioned, the assignment of copyright in a drama did not convey the playwright therein under the Act of 1842.² *Cumberland v. Planché*,³ which seems to decide the contrary, is purely a decision on the Act of 1833, not on the Act of 1842. And a valid assignment of one right was not vitiated by the attempted but invalid assignment of the other in the same instrument.

Under the Copyright Act, 1911, an assignment of "copyright" would convey all the owner's rights, unless expressly limited.⁴

Infringement.

Public Representation.

Playright is infringed by the unauthorised representation of the drama in public. Under 3 Will. IV. c. 15, it was necessary that the performance should be in a place of dramatic entertainment, *i.e.*, a place habitually used for dramatic entertainments.⁵ Under 5 and 6 Vict. c. 45, it was not necessary that the performance should be at a place of dramatic entertainment, but it must be in public,⁶ and in *Duck v. Bates*⁷ it was held that a performance in a room in Guy's Hospital for the entertainment of the nurses, attendants, and physicians and medical students was not "in public" for the purposes of the Act, and that the admission of reporters made no difference. But it is not necessary that the entertainment shall be for profit. Playright may, of course, be infringed by representing a drama, in the composition of which an unfair use has been made of

¹ *Neilson v. Horniman*, [1909] 26 Times L. R. 188.

² 5 & 6 Vict. c. 45, s. 22; *Marsh v. Conquest*.

³ [1834] 1 A. & E. 580.

⁴ See the definition of "copyright" in s. 1 (2).

⁵ s. 2.

⁶ *Wall v. Taylor*, [1883] 11 Q. B. D. 102; 1 & 2 Geo. V. c. 46 s. 1 (2).

⁷ [1884] 13 Q. B. D. 843.

an earlier work, whether the second drama has been derived directly or indirectly from the first.¹ Mere similarity is not enough to constitute an infringement,² thus in the case of two plays founded on the same novel each of them possesses playwright of its own.³ The principles governing the use of earlier plays by a new author are, it is conceived, the same as those in the case of books.⁴ There is no copyright in ideas.⁵ Beyond this, there must also be a taking of a substantial and material part;⁶ but what amounts to a substantial and material part is a question of fact, and in *Planché v. Braham*⁶ a jury was held to be justified in finding that the singing of two or three songs from the plaintiff's work was an infringement of his playwright.

Permitting Theatre to be used for Unlawful Representation.

Under The Copyright Act, 1911, it is an infringement for any person, for his private profit, to permit a theatre or other place of entertainment to be used for the performance in public of a copyright drama, unless he was not aware and had no reasonable grounds for suspecting that the performance would be an infringement of copyright.⁷

There is no definition of "place of entertainment." In The Dramatic Copyright Act, 1833, the words "place of dramatic entertainment" are used, and have been interpreted by the Courts. In the case of *Russell v. Smith*⁸ a place of dramatic entertainment is defined as "a place used for the time for the public representation for profit of a dramatic piece," whether that was its

¹ *Schlesinger v. Turner*, [1890] 63 L. T. 764.

² *Reichardt v. Sapte*, [1893] 2 Q. B. 308; *Rohl v. Palace Theatre*, [1911] 28 Times L. R. 69.

³ *Toole v. Young*, [1874] L. R. 9 Q. B. 523; *Schlesinger v. Bedford*, [1890] 63 L. T. 762.

⁴ See pp. 98-119, *supra*.

⁵ *Chatterton v. Cave*, [1878] 3 App. Cas. 483; 1 & 2 Geo. V. c. 46 s. 1 (2).

⁶ [1837] 4 Bing N. C. 17.

⁷ 1 & 2 Geo. V. c. 46, s. 2 (3).

⁸ [1848] 12 Q. B. 217.

general use or not. This definition was considered again in *Duck v. Bates*,¹ and the Judges of the Court of Appeal seem to have held (1) that "for profit" is unnecessary; (2) that any performance *in public* was sufficient to constitute the place where it was held "a place of dramatic entertainment," but that private and domestic representations were allowable.

The dicta (all but the last) were purely obiter.

It would appear that the proprietor must retain control over the theatre to be responsible under this section. Thus under the old law in *Russell v. Briant*² the letting of a room by the proprietor, who derived no profit from the play except the rent of the room, was held not to render him liable. And in *Lyon v. Knowles*³ the proprietor of a theatre was not held responsible, although he paid for the printing and advertising, furnished the lighting, workmen, and supernumeraries, and paid the band, his lessee having the right of selecting the pieces to be represented. But in *Marsh v. Conquest*⁴ where the proprietor let the theatre together with the services of his company to one of them, his son, for one night for the son's benefit, at the price of thirty pounds, he was held liable on the ground that he retained entire control over the theatre, and that what was done was done by his permission. In *Monaghan v. Taylor*⁵ it was held that, where the proprietor of a theatre had engaged a singer to sing what songs he liked, and exercised no control or supervision over his choice of songs, there was evidence to go to the jury of agency and a general authority to sing the song in question, and therefore a verdict

¹ [1884] 13 Q. B. D. 843; *cf.* *Glenville v. Selig Polyscope*, [1911] 27 Times L. R. 554.

² [1849] 8 C. B. 836.

³ [1863] 3 B. & S. 556. These cases were approved in *Kelly's Directories v. Gavin*, [1901] 1 Ch. 374, [1902] 1 Ch. 631; *cf.* also *French v. Day*, [1893] 9 Times L. R. 548.

⁴ [1864] 17 C. B. N. S. 418.

⁵ [1896] 2 Times L. R. 685.

against the proprietor ought to stand. In another case the proprietor of a music hall was held liable for the unauthorised singing of a song which he knew was being sung there.¹

Apart from the provision requiring guilty knowledge or reasonable grounds for suspicion, these cases are probably still good law; but in view of this provision it is submitted that a mere general authority to an employé to perform what dramas he pleased is not in itself sufficient to render the proprietor or occupier of the theatre liable.

Representation of a copyright drama by mechanical means without the consent of the owner of the copyright is an infringement of copyright.² It is doubtful what the old law was on this point.³ Arguing from the analogy of mechanical reproductions by musical instruments, it would seem that it was not an infringement.⁴ The point may arise with regard to money invested in the production of such exhibition prior to the commencement of the Act.

Dramatization of Novels.

The principles governing the old law as to dramatization of novels and the "novelization" of dramas were, it is submitted, as follows:—

- (1) A drama possesses both playright and copyright.
A novel only possesses copyright.
- (2) Playright and copyright are so completely different in character, that the same act cannot infringe both at the same time.⁵
- (3) (Doubtful.) When a drama and a novel by the same author are published at different times, the

¹ *Roberts v. Bignell*, [1887] 3 Times L. R. 552.

² 1 & 2 Geo. V. c. 46, s. 35 (1).

³ *Cf. Karno v. Pathé Frères*, [1908] 99 L. T. 114.

⁴ *Cf. Boosey v. Whight*, [1900] 1 Ch. 122.

⁵ *Cf. Macklin v. Richardson*, [1770] Amb. 694.

law concludes that the work published first is the original and that the other was derived from it.¹

Hence it was no infringement of the copyright in a novel to represent a play founded upon it;² but to print such play was an infringement of the copyright.³

If, however, the novel was founded upon a drama, *i.e.*, the drama was published (in any form) first, then the representation of a dramatized version of the novel infringed the playwright in the original play.⁴ Printing such dramatized version infringed the copyright in both the novel and the original play.⁵ Absence of guilty knowledge did not protect the infringer.⁶ It follows, therefore, that to prevent anyone else from dramatizing his novel the author must publish his work in dramatic form first,⁷ or (probably) simultaneously with the novel. The novel, once published, became a common source to which all the world might go, and a dramatization of a novel, if fairly and directly taken from the novel, did not infringe the playwright in another dramatization of the novel, even if made by the author of the novel.⁸

¹ This principle is strongly suggested by the cases, but none of them actually goes so far. In all cases where the facts are fully given it is stated that the work published first, whether drama or novel, was the original on which the other was actually founded. In *Schlesinger v. Turner*, [1890] 63 L. T. 764, and in *Schlesinger v. Bedford*, [1890] 63 L. T. 762, it is not stated whether the work published after the other was actually derived from it; and there the work published first was treated as the original. In the former case Kekewich, J., said:—“(This is) the case of a defendant dramatizing a novel published by the plaintiff before his, the plaintiff’s, dramatic version of it.” The headnotes go the whole way, and may possibly be justified by the facts of the case, but those facts are not stated in the report.

² *Reade v. Conquest*, first case, [1831] 9 C. B. N. S. 755; *Schlesinger v. Bedford* [1890] 63 L. T. 762.

³ *Tinsley v. Lacy*, [1803] 1 H. & M. 747.

⁴ *Reade v. Conquest*, second case, [1802] 11 C. B. N. S. 479; *Schlesinger v. Turner*, [1890] 63 L. T. 764.

⁵ *Reade v. Lacy*, [1801] 1 J. & H. 524; *Tinsley v. Lacy*. ⁶ *Reade v. Lacy*.

⁷ Per Page Wood, V. C., *Tinsley v. Lacy*, 1 H. & M., at p. 751.

⁸ *Toole v. Young*, [1874] L. R. 9 Q. B. 523. All this is subject to the doubt previously expressed as to whether the law considers prior publication conclusive or *prima facie* proof of originality.

It seems clearly to follow from these principles, that the "novelization" of a drama was an infringement of the copyright in the drama. The reason, it is submitted, why the acting of a dramatized version of a novel was not an infringement of copyright is, not that the dramatization was a new and original work (for in that case the printing of the dramatization would be lawful), but that representation on the stage was a question of playwright only, and there was no playwright in a novel.

Although the dramatization of a novel was lawful, this did not give the dramatizer the right of multiplying copies of his dramatic version, even for the sole purpose of having the drama acted. In *Warne v. Seebohm*¹ the defendant dramatized "Little Lord Fauntleroy" and caused four copies of his version to be made, one for the Lord Chamberlain and three for the performers. The owners of the copyright in the book admitted that the representation was legal, but contended that the making and distributing of these copies of the play was an infringement of the copyright in the novel.² The Court upheld their contention and decided that all passages from the plaintiff's book in the copies must be cancelled. But, as was pointed out at the trial, this could have been evaded by buying a few copies of the novel and cutting out the passages taken from it and pasting them in the necessary copies of the play.

By The Copyright Act, 1911, the right of dramatizing a novel and of "novelizing" a drama is reserved for the owner of the copyright.³

¹ [1888] 30 Ch. D. 73.

² Cf. *Novello v. Sudlow*, [1852] 12 C. B. 177.

& 2 Geo. V. c. 46, s. 1 (2).

CHAPTER VI.

MUSICAL COPYRIGHT.

Definition of a Musical Composition.

THERE is no definition of a musical composition in The Copyright Act, 1911, nor in the Act of 1842. In The Musical (Summary Proceedings) Copyright Act, 1902,¹ a musical work is defined as "any combination of melody and harmony, or either of them, printed, reduced to writing or otherwise graphically produced or reproduced."

It is doubtful whether anything more than a fixed sequence of sounds is required. This view is strongly supported by the provision as to copyright in contrivances for the mechanical reproduction of sounds, where no qualification as to the nature of the sounds is required.²

Copyright and Playright in Musical Compositions.

The law with respect to copyright in Music closely resembles that in Drama. There are the same two distinct rights—the exclusive right of multiplying copies or copyright in its narrower sense, and the exclusive right of performing the music or playright. The right of multiplying copies of a composition has always been protected under the various Literary Copyright Acts; thus, in *Bach v. Longman*,³ the Court of King's Bench held that a musical composition was within the Statute of Anne.⁴ Lord Mansfield compared it to the case of a work

¹ 2 Edw. VII. c. 15, s. 3 (unrepealed).

² 1 & 2 Geo. V. c. 46, s. 19 (1).

³ [1777] 2 Cowper 623; followed in *Storace v. Longman*, [1788] 2 Camp 27 n., and in *Clementi v. Goulding*, [1809] 2 Camp 25, where the Court gave protection to a musical composition written on a single sheet. In *Bach v. Longman*, the plaintiff pleaded a royal grant.

⁴ 8 Anne c. 19.

on algebra or mathematics, or a treatise in hieroglyphics, all of which were included in the Act.¹ The performing right was not protected until The Copyright Act, 1842,² which expressly extends to musical compositions the remedies given to dramatic compositions by itself and The Dramatic Copyright Act, 1833³; but there was some doubt as to whether the Act had a retrospective operation with regard to musical compositions published before the Act.⁴ It was by The Copyright Act, 1842, incorporating the Act of 1833 that protection was given to music down to The Copyright Act, 1911.

The law with respect to the copyright in musical compositions thus rests on the same Acts as that with respect to dramatic compositions, and is for the most part identical with it. There are, however, certain points peculiar to musical copyright: viz., originality, infringement, certain summary remedies reserved for musical copyright only,⁵ and notices necessary to preserve the right in the case of musical compositions published after 1882. Under The Copyright Act, 1911, protection has been extended to mechanical instruments for the reproduction of sounds as if they were musical works, but with certain modifications.⁵

Qualification.

Originality.

As in the case of Literary copyright,⁶ almost any dealing with, and the expenditure of labour and trouble on the alteration of, a musical composition is sufficient to

¹ 2 Cowper, at p. 621.

² 5 & 6 Viet. c. 45, s. 20-21. See also s. 2 for protection of the copyright.

³ 3 Will. IV. c. 15.

⁴ In *Ex parte Hutchins & Romer*, [1878] 4 Q. B. D. 483, the C. A. expressed the opinion that it had a retrospective operation, dissenting from the Queen's Bench Court which thought that it had not (4 Q. B. D., p. 10). The actual decision was affirmed, but on other grounds. The point is, however, of no practical importance to-day.

⁵ 1 & 2 Geo. V. c. 46, s. 19.

⁶ See pp. 83-7, *supra*.

create a new work with an independent copyright, provided that the new work is not an infringement of the copyright in the old. It is not necessary that the new work should be one which would not have been an infringement, if the copyright in the old had been still subsisting and the new work had been made without the permission of the owner. Thus in *Wood v. Boosey*¹ A composed and published an opera in full score, and B arranged the score of the opera for the pianoforte, the overture for the piano, and the whole opera *pour le piano seul*; it was held that the arrangements were independent compositions of which B was the author. Lord Cockburn said²: "It may be, if the arrangement be made without the consent of the composer of the opera, such an adaptation would be an infringement of his copyright. It is not necessary to decide that. But it may be that, after the copyright has expired, an arrangement for the pianoforte might be made in the first instance, or some musical composer, thinking that an arrangement that already existed of some well known and popular opera is not so good as it can be made, might apply his hand to the work, and make a new arrangement. Can it be said that such an arrangement, useful as regards the musical world, shall not be the subject of protection under the Copyright Acts?"

Thus an accompaniment composed for words adapted to an old air is a new and original composition.³ There appears to be no case where the addition of original matter or the alteration of old has been held to be too small to confer a new copyright.

¹ [1867] L. R. 2 Q. B. 349.

² L. R. 2 Q. B., at p. 350.

³ *Lender v. Purday*, [1840] 7 C. B. 4; *Lover v. Davidson*, [1856] 1 C. B. N. S. 1-2 (prelude and accompaniment).

Condition.

Notice to be given where the work was first published after the 10th August, 1882.

In the case of musical compositions published after the 10th August, 1882, and before the 1st July, 1912, The Copyright Act, 1882,¹ required that, where the proprietor of the right of public representation desired to retain such right in his own hands, he must have a notice reserving such right printed on the title page of every published copy. Where the performing right and the copyright in any such musical composition should become, after the passing of the Act, vested in different hands *before* publication then the owner of the performing right was required to give, before publication, notice to the owner of the copyright to print the required notice on each copy.² Where the separation of the two rights took place *after* publication, and the required notice had been printed on all copies previous to the separation, the owner of the performing right was required to give, before publication of any further copies, notice in writing to the owner of the copyright to print the required notice on each copy.² In case the owner of the copyright failed to comply with such notice given under the conditions prescribed by the Act he was to forfeit a sum of twenty pounds to the owner of the performing right.³

The Act of 1882 touches the nadir of bad drafting even for Copyright Acts. It is not clear whether failure to print or give the required notice destroys the performing right for ever, or only affects the right to sue an infringer who fails to receive notice. The better opinion

¹ 45 & 48 Vict. c. 40, s. 1.

² s. 2. The section is very badly drafted, and does not explicitly state whether it only applies to musical compositions first published after the Act. Reading it together with the first section, it clearly must apply only to them.

³ s. 3.

is that it destroys the right.¹ In the first place the words "retain the right of public representation" are used; and these words imply that the right itself is lost, not merely that the owner has no remedy against an infringer. Secondly, in the second section it is required that the common owner should have printed the notice on all copies issued before the copyright and the performing right came into different hands. This points strongly against the right surviving any omission to print the required notice. If the owner of the copyright failed to print the notice on being required by the owner of the playright to do so, it seems fairly clear that the playright was not destroyed.

This notice was required in the case of all musical compositions, although they might come within the definition of dramatic compositions as well.¹ It is not required in the case of copies issued on or after the 1st July, 1912.

Infringement.

It is an infringement of the copyright in a musical composition to multiply copies of it, or of an unlawful imitation of it. Likewise it is an infringement of the performing right to perform publicly either it or an unlawful imitation of it. The law as to public performance is the same as in the case of Drama,² with the exception of the notices to be given in the case of works published after 1882.³

Test of Piracy.

The question as to what constitutes such a modification of a copyright musical composition as to be an original and allowable work was considered in *D'Almaine v. Boosey*.⁴ In that case certain airs in an opera were adapted to waltzes and quadrilles, and this was held to be piracy.

¹ Cf. *Fuller v. Blackpool Winter Gardens*, [1895] 2 Q. B. 429, 434, 436.

² See pp. 143-6, *supra*.

³ See pp. 152-3.

⁴ [1835] 1 Y. & C. (Ex.) 266.

Lord Abinger said:¹ "It must depend on whether the air taken is substantially the same with the original. Now the most unlettered in music can distinguish one song from another, and the mere adaptation of the air, either by changing it to a dance or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. *The ear tells you that it is the same.* The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or accompaniment. *Substantially, the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognised by the ear.* The adding variations makes no difference in the principle." It does not matter whether the unlawful adaptation is made directly from the original or from a licensed or unlicensed adaptation of it.²

Under The Musical (Summary Proceedings) Copyright Act, 1902, "Musical Copyright" as used in that Act is defined as "the exclusive right (1) to make copies by writing or otherwise of such musical work; (2) to abridge such musical work; (3) to make any new adaptation, arrangement, or setting of such musical work or of the melody thereof in any notation or system."³ This seems to be an accurate summary of the rights included in musical copyright (in the narrower sense).

Mechanical Contrivances.

It was not, however, every reproduction of a sheet of music that was forbidden by the earlier Acts. In *Boosey*

¹ At p. 302.

² *Fairlie v. Boosey*, [1879] 4 App. Cas. 711. A composed an opera. B made two "arrangements" of it for the voice with A's permission. The copyright in the opera and the "arrangements" became the property of C. The opera was registered; the "arrangements" were not. D produced another opera, taking his music from the "arrangements." C obtained an injunction on the ground that it was an infringement of his rights in the opera.

³ 2 Edw. VII. c. 15, s. 3.

v. Whight,¹ the question arose as to the legality of perforated rolls of paper representing the musical score of certain songs, to be used in a mechanical organ called an "Æolian." It was held both by Stirling, J., and the Court of Appeal that the rolls were not "copies" within the meaning of The Copyright Act, 1842, but were "part of a mechanical contrivance for producing musical notes,"² and were therefore perfectly legitimate. This decision was applied in *Mabe v. Connor*³ to a similar case under The Musical Copyright Act, 1902.

Now under The Copyright Act, 1911,⁴ it has been made an infringement of copyright to make any mechanical contrivances for reproducing musical compositions in which copyright subsists, except under the following conditions:

A. In the case of a musical work published by issue of copies before the commencement of the Act.

The prescribed notice must be given and the prescribed royalties paid: viz.—

(i) In the case of a contrivance sold before the 1st July, 1913, where contrivances reproducing the same work have been lawfully made or placed on sale before the 1st July, 1910, within the British Dominions to which the Act extends, nothing.

(ii) In all other cases $2\frac{1}{2}$ per cent. on the retail selling price, but in no case less than a halfpenny per contrivance for each separate musical work reproduced thereon; and in calculating the royalty all fractions of a farthing are to be reckoned as a farthing.⁵

¹ [1899] 1 Ch. 836; [1900] 1 Ch. 122; cf. *Monckton v. Gramophone Co., Limited*, [1912] L. T. 84.

² Per Lindley L. J., [1900] 1 Ch., at p. 124; cf. *Stirling, J.*, [1899] 1 Ch., at p. 842.

³ [1903] 1 K. B. 515.

⁴ 1 & 2 Geo. V. c. 46, s. 1 (2).

⁵ s. 19 (7) & (3).

This right of making or authorizing the making of mechanical contrivances and of receiving the royalty, is to belong to the author or his personal representatives, notwithstanding any assignment of the copyright before the passing of the Act.¹ It is doubtful whether this would apply to a case where the copyright had vested in another *ab initio* under The Copyright Act, 1842.²

The saving of existing rights by the Act³ does not entitle anyone who has lawfully made any contrivances to sell them except under these conditions.¹ Where the work is only protected by International Copyright, these rights shall not be included in the copyright, except so far as they are expressly provided for by the Order in Council conferring the copyright.¹

B. In the case of works not published by issue of copies before the commencement of the Act.

(1) Such contrivances must have been previously made by, or with the consent or acquiescence of, the owner of the copyright.⁴

(2) The prescribed notice must be given and the prescribed royalties paid⁴: viz.—

(i) For a contrivance sold within two years after the commencement of the Act, $2\frac{1}{2}$ per cent. on the retail selling price.

(ii) In all other cases 5 per cent.;

but in no case less than a halfpenny per contrivance⁵ for each separate musical work reproduced thereon; and all fractions of a farthing shall be reckoned as a farthing.

(3) There shall be no alterations or omissions with regard to the work reproduced unless such alterations or

¹ s. 19 (7) & (3).

³ s. 24 (1); see pp. 54-5, *supra*.

⁵ s. 19 (3).

² See pp. 91-6, *supra*.

⁴ s. 19 (2).

omissions are reasonably necessary for the adaptation of the work to the contrivances in question, or unless contrivances reproducing the work, subject to similar alterations and omissions, have been previously made by, or with the consent or acquiescence of, the owner of the copyright.¹

Where contrivances have been made, the owner of the copyright is deemed to have given his consent, if he fails to reply to the prescribed inquiries within the prescribed time.²

The Board of Trade may in all cases make regulations respecting the notice to be given, the manner in which royalties are to be paid, and any inquiries to be made under this section³; and it is provided that where any mechanical contrivances have been made, they shall, in relation to any person who makes the prescribed inquiries, be deemed to have been made with the consent of the owner of the copyright, if he fails to reply within the prescribed time.² The Board of Trade may also, at the expiration of seven years from the commencement of the Act, make an order increasing or decreasing the rate at which royalties are calculated; but such order is only provisional until confirmed by Parliament. Such revisions can only be made at intervals of fourteen years at least.⁴

In exercise of these powers, the Board of Trade issued The Copyright Royalty System (Mechanical Musical Instruments) Regulations, 1912, which came into force on the 1st July, 1912.⁵ Under these Regulations the notice required by the Act must contain:—

(a) The name and address of the person intending to make the contrivance;

¹ s. 19 (2).

19 (3).

² s. 19 (5).

³ App. II., pp. 261-4.

⁴ s. 19 (6).

- (b) The names of the musical work and of its author (if known), and a description sufficient to identify the work if necessary;
- (c) The class of contrivance;
- (d) The ordinary retail selling price and the royalty payable;
- (e) The earliest date at which a contrivance will be delivered to a purchaser;
- (f) Whether any other musical work will be reproduced on the same contrivance.

Not less than ten days before any contrivance is delivered to a purchaser this notice must be sent to the owner of the copyright or his agent, by registered post, if the name and an address within the United Kingdom is known or can be discovered with reasonable diligence; if not, an advertisement must be inserted in the *London Gazette* containing (a) and (b) and an address from which the prescribed notice can be obtained.¹ Unless otherwise agreed, royalties are to be payable by adhesive labels, purchased from the owner of the copyright and affixed to the contrivance, or in the case of cylinders, to a carton or box enclosing it. The owner of the copyright is to intimate (in writing sent by registered post) to the person intending to make the contrivances, some reasonably convenient place within the United Kingdom from which the labels can be obtained; and to supply them on demand in writing and tender of the price. If labels are not available because the owner of the copyright has not sent an intimation of such place after the expiration of five days after the date of the prescribed notice, or advertisement, or fails to supply them within three days after demand duly made, the contrivances may be sold without having

¹ Regulation (3).

labels affixed, and the royalties payable will be a debt due to the owner of the copyright; otherwise no contrivances may be sold without having labels affixed.¹

The ordinary retail selling price is to be calculated at the marked or catalogued selling price of single copies, or, if there is no marked or catalogued selling price, at the highest price at which single copies are sold.²

The inquiries under Section 19 (5) must contain:—

- (a) The name of the musical work and of its author (if known), and (if necessary) a description sufficient to identify it;
- (b) The name, address, and occupation of the person making the inquiries;
- (c) An allegation that contrivances reproducing the work have been previously made, and a description of the contrivances;
- (d) An enquiry whether the contrivances were made with the consent or acquiescence of the owner of the copyright.³

The inquiries must be sent by registered post to the owner of the copyright if an address within the United Kingdom is known or can be discovered with reasonable diligence; if not, then the inquiries must be advertised in the *London Gazette*.⁴

The prescribed time for reply is seven days after the time when the inquiries would in ordinary course of post be delivered, or after the date of the advertisement in the *London Gazette*.⁵

¹ Regulation (4).

² *Ibid.* (5).

³ *Ibid.* (6).

⁴ *Ibid.* (7)

⁵ *Ibid.* (8).

Copyright in Mechanical Contrivances.

Copyright is conferred on mechanical contrivances for reproducing sounds in the same way as if they were musical works; but the period is fifty years from the making of the original plate, and the person who is the owner of that plate is deemed to be the author of the work.¹

This applies to all mechanical contrivances made before the commencement of the Act, unless they would have infringed the copyright in another contrivance, if this provision had been in force at the time they were made. The first owner of the copyright is the owner of the original plate at the commencement of the Act.²

The provisions allowing the reproduction of musical works by mechanical contrivances on payment of royalties do not apply to the case of mechanical contrivances.³ In all other respects the principles of musical copyright apply. As in all other branches of Copyright Law, protection is commensurate with originality.

Summary Remedies.

Under The Copyright Act, 1902, a Court of Summary Jurisdiction, upon the application of the owner of the copyright in any musical work, may authorize a constable to seize, without warrant, any pirated copies of that work which may be hawked about, sold, or offered for sale, and to bring them before the Court; and such copies may be destroyed or delivered up to the owner of the copyright.⁴ Any constable may seize, without warrant, any pirated copies which are hawked about, at the request of the apparent owner of the copyright or of his agent duly authorized in writing; and such copies

¹ s. 10 (1).

² s. 10 (8).

³ s. 10 (2).

⁴ 2 Edw. VII. c. 15, s. 1.

on seizure are to be brought before a Court of Summary Jurisdiction and forfeited, destroyed, or otherwise dealt with as the Court thinks fit.¹ For the purposes of this Act, a perforated roll is not a copy of the musical work which it is intended to reproduce.²

In *Ex parte Francis*,³ it was held that the Court had no power to make any order under the Act dealing with the copies which had been seized, unless the person from whom they had been seized had been served with a summons notifying him of the intention to apply for such an order. In consequence of this decision the Act became practically nugatory,⁴ and more stringent remedies were provided by the Act of 1906.⁵ Under that Act, any person printing, selling, or having in his possession for sale any pirated copies of a musical work, or having in his possession any plates for printing such copies, is, unless he proves that he acted innocently, liable on summary conviction, to a fine of five pounds, and on a second conviction to a fine of ten pounds, or imprisonment for two months.⁶ If the defendant has not been previously convicted, and he proves that the copies had a name purporting to be that of the printer or publisher on the title, he is not liable to any penalty unless actual knowledge is proved.⁶ A constable may arrest, without warrant, anyone offering, or having in his possession, for sale in any public place, any pirated copies of any musical work specified in any general written authority addressed to the Chief Officer of Police, and signed by the apparent owner of the copyright, or by his agent, authorized thereto in writing, requesting the arrest of any hawkers of such pirated copies, at the owner's risk.⁷ Any such written authority is to be open to inspection, without fee, at

¹ s. 2.

² *Mabe v. Connor*, [1909] 1 K. B. 515.

³ [1903] 1 K. B. 275.

⁴ Per Lord Alverstone, C. J., in *Mabe v. Connor*, [1909] 1 K. B., at p. 527.

⁵ 6 Edw. VII. c. 36.

⁶ s. 1 (1).

⁷ s. 1 (2).

reasonable hours.¹ An appeal from conviction lies to Quarter Sessions.² A Court of Summary Jurisdiction may grant a search warrant to enter any house on which there is reasonable ground to suspect that an offence against the Act is being committed, and to seize any copies of any musical work or any plates.³ Any copies or plates so seized are to be brought before the Court, and, if proved to be pirated copies or plates intended for the reproduction of pirated copies, are to be forfeited, destroyed, or otherwise dealt with as the Court shall think fit.⁴

The Acts of 1902 and 1906 are still in force, and the owner of the copyright has, in addition, the civil and summary remedies provided by The Copyright Act, 1911.

¹ s. 1 (3).
² s. 2 (1).

³ s. 1 (4).
⁴ s. 2 (2).

CHAPTER VII.

ARTISTIC COPYRIGHT.

Section 1.

GENERAL.

Artistic Copyright before the Act of 1911.

BEFORE The Copyright Act, 1911, there was no law dealing with Artistic Copyright as a whole, but there was the Law of Copyright in Engravings, the Law of Copyright in Sculpture, and the Law of Copyright in Paintings, Drawings, and Photographs. The Statutes governing these separate branches of copyright law all proceeded on different principles, and are dealt with in Sections 2 to 4 of this chapter. The Copyright Act, 1911, treats them all on practically the same principles.

Artistic Works protected by The Copyright Act, 1911.

“Artistic work” is defined to include “works of painting, drawing, sculpture, and *artistic craftsmanship*, and *architectural works of art*, and engravings, and photographs.”¹ “Works of sculpture” includes casts and models. “Engravings” includes “etchings, lithographs, woodcuts, prints, and other similar works, not being photographs.” “Photograph” includes “photo-lithograph and any work produced by any process analogous to photography.”¹

These lists are not given as exhaustive.

¹ 1 & 2 Geo. V. c. 46, s. 35 (1). *Italics denote works not previously protected.*

Artistic Merit.

It is very doubtful how far artistic merit is required. The only case in point is *Britain v. Hanks*.¹ There the question was whether certain toy soldiers were protected under The Sculpture Copyright Act, 1814, and it was held that they were within the Act on the ground that the figures were anatomically correct and showed artistic merit and skill. But this leaves the point still open whether the models were protected because they aimed at artistic merit or because they attained it. In the case of Literary Copyright we have seen that only literary nature is required, not literary merit.² Arguing from analogy, it would seem that so long as the work is of a kind in which artistic merit may be displayed it is capable of protection although it possesses no artistic merit.

It seems fairly clear that no artistic merit is required in the cases of engravings and photographs. The case of architecture is more difficult. In all other cases the balance of convenience is in favour of protecting any work that is good enough to be pirated. The only thing that is likely to be taken in the case of a work with no artistic merit is the idea, and the idea of a work is not protected.³

Designs.

The Copyright Act, 1911, does not apply to designs capable of being registered under The Patents and Designs Act, 1907,⁴ except to designs which are not used or intended to be used as models or patterns to be multiplied by any industrial process.⁵ General rules may be made under the Patents Act of 1907 to determine when a design shall be deemed to be so used.⁶

¹ [1902] 86 L. T. 765.

² *Kenrick v. Lawrence*, [1890] 25 Q. B. D. 99.

³ 1 & 2 Geo. V. c. 46, s. 22 (1).

² See pp. 76-81, *supra*.

⁴ 7 Edw. VII. c. 29.

⁶ s. 22 (2).

A design is defined in The Patents and Designs Act, 1907, as "any design (not being a design for a sculpture, or other thing within the protection of The Sculpture Copyright Act, 1814) applicable to any article, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined."¹

By the Designs Rules, 1912,² made under the provisions of The Patents and Designs Act, 1907, and of The Copyright Act, 1911, the following designs are excluded from the protection of the Copyright Act:—

(1) Designs which are reproduced or are intended to be reproduced in more than fifty single articles unless all the articles in which the design is reproduced form only a single set as defined by Rule 5 of the Designs Rules, 1908;

(2) Designs to be applied to (a) printed paperhangings, (b) carpets, floorcloths or oilcloths, manufactured or sold in lengths or pieces, (c) textile piece goods or textile goods manufactured or sold in lengths or pieces, (d) lace, not made by hand.

A "set" is defined as "a number of articles of the same general character ordinarily on sale together, or intended to be used together, all bearing the same design with or without modifications not sufficient to alter the character or not substantially affecting the identity thereof."³

¹ 7 Edw. VII. c. 20, s. 93; Edmunds and Bentwich on Designs.

² See App. II. ³ Designs Rules, [1908] Rule 5. See App. II.

Section 2.
ENGRAVINGS.

Statutes.

The Acts on which copyright in engravings and prints rested before The Copyright Act, 1911, were 8 Geo. II. c. 13; 7 Geo. III. c. 38; and 17 Geo. III. c. 57. The Act 6 and 7 Will. IV. c. 59, extended the protection afforded by the former Acts to Irish works and against breaches of copyright committed in Ireland; and 15 Vict. c. 12, brought prints taken by lithography or any other mechanical process for multiplying prints indefinitely within the Acts.

Subject-Matter of the Right.

The Acts gave to the owner of the copyright the exclusive right of "engraving, etching, working in mezzotinto, or chiaro-oscuro, or in any other manner copying or selling or causing to be engraved in the whole or part, by varying, adding to, or diminishing from the main design" the print in question.¹

A print is defined as being "any historical print or prints, or any print or prints of any portrait, conversation,² landscape, or architecture, *map, chart, or plan,*³ or any other print or prints whatsoever."⁴

In *Stannard v. Lee*,⁵ a "panoramic bird's eye view" of the seat of war in 1870 was pirated, and the owners described the work as a "map" in their bill for an injunction and sought protection under the Engraving Acts. The Court of Appeal held that a map was now only protected under The Literary Copyright Act, 1842, and had been taken out of the scope of the Engraving

¹ 8 Geo. II. c. 13, s. 1.

² "A kind of genre painting representing a group of figures." Murray's Dictionary.

³ Since 1842 protected under 5 & 6 Vict. c. 45, s. 1.

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

⁵ [1871] L. R. 6 Ch. 346 (see in particular judgment of James, L. J., at p. 349), 24 L. T. N. S. 459.

Acts, and hence required registration. In *Stannard v. Harrison*,¹ Bacon, V. C., refused to set aside a consent order made against other persons in respect of the same work giving protection under the Engraving Acts, and took the opportunity of expressing his opinion that such protection was rightly given. He explained the decision in *Stannard v. Lee*,² on the ground that the work had been improperly described as a "map" in the bill and the Court could not go behind it.³ If the dicta of Bacon, V. C., were right, the question under which Act a "bird's-eye view," sketch, or similar work was to be protected probably depended on whether its primary object was to give information or not.

A Christmas card has been held to be rightly registered both under The Literary Copyright Act, 1842, and The Fine Arts Copyright Act, 1862.⁴

The question is now of no importance except to ascertain whether the copyright in a work existing on the 30th June, 1912, had expired or not.⁵

Where the engravings were prepared and published as illustrations to a book, they were protected under The Literary Copyright Act, 1842,⁶ and not under the Engraving Acts, although there might be no copyright in the letterpress but only in the illustrations.⁷

It is not clear whether a book consisting of illustrations only is a literary or artistic work. In *Schore v. Schmincké*,⁸ Chitty, J., expressed an opinion that such a work was not

¹ [1871] 24 L. T. N. S. 570.

² [1871] L. R. 6 Ch. 346 (see in particular judgment of James, L. J., at p. 349), 24 L. T. N. S. 459.

³ 24 L. T. N. S., at p. 573; cf. *Stannard v. Lee* 24 L.T.N.S., at p. 461.

⁴ *Hildesheimer v. Dunn*, [1891] 64 L. T. 452. It is doubtful whether a Christmas card (apart from any writing on it) would come within the operation of The Copyright Act, 1911; see p. 165, *supra*.

⁵ 1 & 2 Geo. V. c. 46, s. 24.

⁶ See pp. 77-8, *supra*.

⁷ *Bogue v. Houlston*, [1852] 5 D. G. & Sm. 267; cf. *Davis v. Benjamin*, [1906] 2 Ch. 491: *aliter* where the copyrights in the letterpress and the illustrations are in different hands; *Petty v. Taylor*, [1897] 1 Ch. 465.

⁸ [1886] 33 Ch. D. 546, 550.

a "book" within The Copyright Act, 1842; but this expression of opinion was not necessary for the decision of that case, and its correctness was doubted by Kekewich, J., in *Hildesheimer v. Dunn*.¹

Under The Copyright Act, 1911, "engravings" includes "etchings, lithographs, woodcuts, prints, and other similar works, not being photographs."²

Qualifications.

There is no copyright in an indecent³ or a libellous print.⁴ Originality is now required by The Copyright Act, 1911,⁵ but this only means that the engraving must not be an exact copy of an earlier engraving,⁶ and that it must not infringe the copyright in another work. This was almost certainly the case under the old law.

Conditions for Copyright.

Under the first three Acts it was necessary that the work should have been made in Great Britain.⁷ Publication in Great Britain did not confer copyright on a work made abroad,⁸ nor apparently was it needed in the case of a work made here.

The Act of 1836⁹ extended the provisions of these Acts to Ireland so that, apart from the second section, it was necessary that the work should be made in the United Kingdom, and publication abroad did not destroy the right. But Section 2 forbids the pirating of any print "which may have been or which shall hereafter be published in any part of Great Britain or Ireland." This is open to two interpretations: either the Act substituted publication here for manufacture here, or required publication here *in addition to* manufacture here.

¹ [1891] 61 L. T., at p. 454.

² 1 & 2 Geo. V. c. 46, s. 35 (1).

³ *Fores v. Johns*, [1802] 4 Esp. 97; cf. *Baschet v. London Illustrated Standard Co.*, [1900] 1 Ch. 73.

⁴ *Du Bost v. Beresford*, [1810] 2 Camp. 511.

⁵ s. 1 (1). ⁶ Cf. *Graves' Case*, [1869] L. R. 4 Q. B. 715. ⁷ 17 Geo. III. c. 57.

⁸ *Page v. Townsend*, [1832] 5 Simons 395.

⁹ 6 & 7 Will. IV. c. 59.

As the Act refers to prints already published it is fairly certain that the latter is the correct view, as otherwise copyright would have been conferred on works which had already fallen into the public domain.

The International Act, 1844, provided that there should be no copyright in any work first published outside the British Dominions except under the Act.¹ And by the International Act, 1886, first "production" in the British Dominions is made the equivalent of first "production" in the United Kingdom.²

Down to 1886, therefore, manufacture and first publication within the United Kingdom were both necessary. From 1886 manufacture and first publication within the British Dominions were both necessary.

The statutory copyright did not attach until publication.³ It was not necessary that the author should be a British subject or domiciled within the British Dominions. Now the conditions for acquiring copyright in engravings are the same as those for any other work.⁴

The name of the proprietor of the copyright must be truly engraved on each plate and printed on each print,⁵ and so must the date of first publication,⁵ otherwise the copyright was lost. It was not necessary, however, that the designation "proprietor" should be added to the name⁶; it has been held a sufficient compliance with the Act if he is merely referred to as the publisher.⁷ In the case of *Rock v. Lazarus*,⁸ Malins, V. C., held that, where the copyright was the property of a firm, the Statute was sufficiently complied with by putting the trading name of the firm on the engraving. Under The Copyright Act, 1911, this is no longer necessary.

¹ 7 Vict. c. 12, s. 10.

² 49 & 50 Vict. c. 33, s. 8 (1).

³ 8 Geo. II. c. 13, s. 1; 7 Geo. III. c. 38, s. 6.

⁴ See pp. 50-2, *supra*.

⁵ 8 Geo. II. c. 13, s. 1; *Brookes v. Cock*, [1835] 4 N. & M. 652; *Newton v. Cowie*, [1827] 4 Bing 234.

⁶ *Newton v. Cowie*.

⁷ *Graves v. Ashford*, [1867] L. R. 2 C. P. 410; *cf. Britain v. Hanks*, [1902] 86 L. T. 765.

⁸ [1872] L. R. 15 Eq. 101.

Duration and Extent of Right.

The period of copyright was twenty-eight years from the date of first publication.¹

There is nothing in the earlier Acts to indicate whether the right extended throughout the British Dominions or only within the United Kingdom. On the analogy of The Fine Arts Copyright Act, 1862, it would seem that the right was limited to the United Kingdom²; although in that Act there is a prohibition of importation into the United Kingdom,³ whereas in the Engraving Acts importation is forbidden, but it is not stated whether that means importation into the United Kingdom or into the British Dominions.⁴ On the other hand, in the Engraving Acts copyright is only conferred on works *made* in the United Kingdom⁵; and this may be taken as an indication that the right is limited to Great Britain and Ireland.

Ownership.

First Owner.

Under the earlier Acts the first owner of the copyright was the person who first published the work, and he derived his title from the author. The author is the person who "invents and designs, engraves, etches, or works,"⁶ or from his own invention *causes* to be designed and engraved, etched, or worked,⁶ or engraves, etches, or works, or *causes* to be engraved, etched, or worked from any picture, drawing, model, or sculpture"⁷ the print in question. In *Stannard v. Harrison*,⁸ Bacon, V. C., expressed the opinion that it is sufficient to furnish the

¹ 7 Geo. III. c. 38, s. 6. ² *Graves v. Gorrie*, [1903] A. C. 490 (see especially p. 499).

³ 25 & 26 Vict. c. 68, s. 10. Section 4 is also referred to as supporting this view ([1903] A. C. at p. 499); why, it is not quite clear. The practice of registration is required by The Copyright Act, 1842, which gives protection extending throughout the British Dominions.

⁴ 8 Geo. II. c. 13, s. 1; 7 Geo. III. c. 38, s. 2; 17 Geo. III. c. 57.

⁵ 17 Geo. III. c. 57, as altered by 6 & 7 Will. IV. c. 59.

⁶ 8 Geo. II. c. 13, s. 1.

⁷ 7 Geo. III. c. 38, s. 2.

⁸ [1871] 24 L. T. N. S., at p. 572.

manual worker with a rough sketch to constitute the employer the author. It does not matter in the least that he is unable to draw.¹

Transfer and Licences.

There is no provision for any formalities for transfer under the Engraving Acts, nor any decision in point. A licence, however, must be in writing, signed by the proprietor, and attested by two credible witnesses.² It would seem to follow, from this, that an assignment, being the transfer of a greater interest, must be made with the same formalities.³ By The Fine Arts Copyright Act, 1862,⁴ the right of engraving from a copyright picture is given to the owner of the copyright; and under that Act it has been held that, if the owner grants to another the right of multiplying engravings of one size from the picture, he retains the right of multiplying engravings of other sizes, and of producing copies of the picture in other ways.⁵

Infringement.

As in the case of Literary Copyright, the protection given to the author is intended to be commensurate with the originality displayed in the creation of the subject of copyright, and does not extend to elements already in existence. Thus, in the case of an engraving made from a picture, it is not an infringement of the copyright in that engraving to make another from the same picture, although it may be of the copyright in the picture.⁶ So where the design is not original the design may be copied, although the engraving may not.⁷ Where a copyright

¹ Kenrick v. Lawrence, [1890] 25 Q. B. D. 99.

² 17 Geo. III. c. 57.

³ Cf. Power v. Walker, [1814] 3 M. & S. 7 (a decision under the Statute of Anne); applied by Sir George Jessel in Leyland v. Stewart, [1876] 4 Ch. D. 419 (Copyright Act, 1842).

⁴ 25 & 26 Vict. c. 68, s. 1.

⁵ Lucas v. Cooke, [1880] 13 Ch. D. 872.

⁶ Berenger v. Wheble, [1819] 2 Stark N. P. C. 548; Dicks v. Brooks, [1880] 15 Ch. D. 22.

⁷ See judgment of Bramwell, L. J., in Dicks v. Brooks, at p. 38.

engraving is made from a picture, and the owner of the copyright sues for infringement, the onus is on him to prove that the copy, which he alleges to infringe his rights, was made from his engraving and not directly from the original.¹

The principles of infringement of Artistic Copyright have been largely altered by The Copyright Act, 1911, and it is unsafe to argue that reproduction in a particular form is permissible under the present law because it was permitted by the old law. The old principles are given here, as they bear on the question of copyright in any existing work; and then any alterations made in the law by the Act are pointed out.

The principles on which protection was given by the old law to the engraving (apart from its design) were discussed in *Gambart v. Ball*,² and they were there stated by Erle, C. J., to be: (1) the protection of the artist's reputation from injury by the dissemination of "base" copies; (2) the protection of its commercial value against the competition of copies made by any process, such as photography, whereby they may be multiplied indefinitely. These principles were approved of in *Dicks v. Brooks*.³

Considerable doubt has been expressed, prior to The Copyright Act, 1911, as to the lawfulness of copies in pen and ink or pencil, on the ground that these do not compete commercially with the original.⁴ Probably the true view was that where a single person made sketches for his own private amusement and not for sale or gratuitous distribution, this did not constitute an invasion

¹ *Lucas v. Cooke*.

² [1863] 14 C. B. N. S. 306.

³ [1880] 15 Ch. D. 22. The copyright in the original picture was in other hands.

⁴ *Gambart v. Ball*, in particular by Willes, J., at p. 318; cf. also Scrutton, pp. 176-7. But in the case of Literary Copyright the multiplication of copies for gratuitous distribution is illegal, however small the number, and whatever the means and object may be: *Novello v. Sudlow*, [1852] 12 C. B. 177; *Warne v. Secbohm*, [1888] 39 Ch. D. 73.

of copyright; but where the copies were made for sale or gratuitous distribution it was illegal, as this might interfere with the commercial value of the prints. Under The Copyright Act, 1911, it is expressly provided that any fair dealing with a copyright work for the purpose of private study or research is permissible.¹ Thus it would seem that the copying of an artistic work by a student in the course of study would now be legitimate; but if the copy was made for any other purpose, it would be an infringement of copyright.

In *Dicks v. Brooks*,² the question was whether a pattern for working in Berlin wool made from an engraving of Millais' picture "The Huguenot" was legitimate. Here there was no question as to the copyright in the *design*; and it was held to be no infringement of the copyright in the engraving. James, L. J., said³ "Nobody would ever take it to be the print, nobody would ever buy it instead of the print, nobody would ever suppose that it was, to use the language of the first Act, a base copy of the print. It is a work of a different class, intended for a different purpose and, in my opinion, no more calculated to injure the print *quâ* print, or the reputation of the engraver, or the commercial value of the engraving in the hands of the proprietor, than if the same group were reproduced from the same engraving by waxwork at Madame Tussaud's, or in a plaster of Paris cast or in a painting on porcelain. I cannot conceive that such a reproduction of the subject in tapestry, in Berlin wool, or upon china or in earthenware, is within the meaning of the Act of Parliament."

In *Martin v. Wright*,⁴ Shadwell, V. C., refused to restrain the exhibition of a copy of a print as a diorama.

¹ 1 & 2 Geo. V, c 46, s. 2 (1).

² At p. 35.

³ [1880] 15 Ch. D. 22.

⁴ [1833] 6 Sim 207. *Sed quære.*

Copies by photography, however, are within the Acts, and any other process, mechanical or otherwise, whereby copies may be indefinitely multiplied.¹ Copies made on a larger or smaller scale or with additions or omissions are all within the Acts.²

Under The Copyright Act, 1911, it is an infringement of copyright to reproduce the work in any form.³ It is probable that the statement of the law given in *Gambart v. Ball*⁴ and *Dicks v. Brooks*⁵ is no longer accurate.

What constitutes a Copy ?

The only definition, until recently, of an imitation so near to the original as to constitute an unlawful copy is that of Bayley, J., in *West v. Francis*⁶: "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." The wording is unfortunate, as (1) it does not explicitly state that the copy must be made directly or indirectly from the original; (2) in the use of the word "idea," as no copyright can exist in *ideas*, using that word in its ordinary sense. In *Hanfstaengl v. W. H. Smith & Sons*,⁷ Kekewich, J., suggested as a substitute: "A copy is that which comes so near to the original as to suggest the original to the mind of every person seeing it."

Design.

It appears that the design of a copyright engraving is also protected. In *Hanfstaengl v. Empire Palace*,⁸ Lindley, L. J., said: "Although it is very true that the

¹ *Gambart v. Ball*, [1803] 14 C. B. N. S. 306; *Graves v. Ashford*, [1867] L. R. 2 C. P. 410. This rests on the provisions of 17 Geo. III. c. 57 "or in any other manner copy," not on 15 Viet. c. 12, s. 14.

² 8 Geo. II. c. 13, s. 1; *Moore v. Clarke*, [1842] 9 M. & W. 692.

³ 1 & 2 Geo. V. c. 46, s. 2 (1).

⁴ [1803] 14 C. B. N. S. 306.

⁵ [1800] 15 Ch. D. 22.

⁶ [1822] 5 B. & Ald. 737, at p. 743; criticized in *Hanfstaengl v. Baines*, [1905] A. C. 20, in particular at p. 27 (Lord Watson).

⁷ [1905] 1 Ch. 519, at p. 524.

⁸ [1894] 2 Ch., at p. 6.