

THE LAW OF COPYRIGHT

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BY

GEORGE STUART ROBERTSON, M.A.

OF THE INNER TEMPLE AND THE OXFORD CIRCUIT

BARRISTER-AT-LAW

FORMERLY FELLOW OF NEW COLLEGE, OXFORD

IRELAND SCHOLAR, ELDON LAW SCHOLAR, ETC.

AUTHOR OF 'CIVIL PROCEEDINGS BY AND AGAINST THE CROWN', ETC.

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FOR
H. L. P.

PREFACE

THE law in this book is stated as on the dates on which the Copyright Act, 1911 (*a*), comes into operation.

The Act not only consolidates, with some small exceptions, the whole of the law relating to copyright, it also makes some changes in the law of great and far-reaching importance. The most serious of these are the following :

1. It substitutes, for the various terms of copyright which have hitherto existed, one uniform term with some important exceptions. This term, which applies alike to published and to unpublished works, is the life of the author and a period of fifty years after his death, subject to certain limitations. Thus the legal term of copyright is not only unified to a great extent, but is also very greatly extended.

2. It merges performing right in copyright.

3. It confers copyright on unpublished as well as published works, and abolishes the quasi-copyright at common law previously enjoyed by the former, preserving, however, the common law right to have a breach of trust or confidence restrained.

4. It entirely abolishes registration, whether for the purposes of legal proceedings or otherwise, though the Crown still has power, for the purposes of international copyright, to impose conditions and formalities.

5. It unifies the law as regards copyright in different classes of works, literary, dramatic, musical, and

(*a*) 1 & 2 Geo. V, c. 46.

artistic, and provides for copyright for the first time in 'architectural works of art'.

6. It introduces a new principle by limiting, or seeking to limit, the power of an owner of copyright to assign the whole of his right, by providing that an author who is the first owner of the copyright may not, otherwise than by will, assign it or grant an interest in it for a period extending more than twenty-five years from his death.

7. It brings mechanical contrivances for producing sound within the scope of the law of copyright, outside which they had been held to lie by judicial interpretation, and enacts elaborate, and sometimes remarkable, provisions in connexion with their admission within the law.

In addition to these main alterations there are many minor changes, all in the direction of simplicity, a simplicity which, it is to be feared, is occasionally more specious than real. It has sometimes been attained by the omission of any proper definition of the terms used. 'Literary work', 'dramatic work', and 'work of sculpture' are not given any full definitions; 'musical work' is not defined at all, neither is 'proprietor', nor 'author'. The consequence is that a large portion of the existing case law will still be found to be of value in the interpretation of the new statute.

The Act must be taken to extend to a very great variety of original literary, dramatic, musical, and artistic work, from the lowest species to the highest, from the curate's sermon to the judge's judgment, from the Punch and Judy show to the latest production of Mr. X, the greatest living dramatist, from the work of the pavement artist to that of Mr. Y, the greatest living painter, and from a book on the law

of copyright to the verses of Mr. Z, the greatest living poet.

As it contains in itself no sufficient guidance as to the boundaries within which it operates, it is necessary, for this reason too, to refer to the case law in order to discover and to fix some limits. The case law will also be found important in deciding the meaning of many other provisions contained in the statute. It must, of course, be used with caution, as, though decided *in pari materia*, it was decided on statutes differing, sometimes widely, in their terms from the present Act.

I have endeavoured, while rearranging in some sort of order the disorderly provisions of the Act, to preserve and apply so much of the store of legal decisions as seemed to be still applicable or capable of being adopted. In addition, as seems to be inevitable in the case of a new statute, I have ventured to express reasoned opinions on a good many points which are not illuminated by authority, and also to illustrate a good many matters from my experience of the various species of work which fall within the law of copyright.

With these prefatory remarks I leave this book to the lenient judgment of its readers.

G. S. R.

TEMPLE,
February 5, 1912.

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CHAPTER I

EXTENT AND COMMENCEMENT OF THE COPYRIGHT ACT, 1911

THE Copyright Act, 1911 (*a*), except such of its provisions as are expressly restricted to the United Kingdom (*b*), extends throughout the King's dominions (*c*). But it does not extend to any self-governing dominion, that is to say, Canada, Australia, New Zealand, South Africa, and Newfoundland (*d*), except under certain conditions (*e*), and the Legislature of any British possession may modify or add to its provisions in its application to such possession with certain limitations (*f*). It may also be extended by Order in Council to any British protectorate and to Cyprus (*g*). There are also provisions for the extension of the Act by Orders in Council to foreign works and foreign authors, and such Orders in Council will apply to all the King's dominions

Extent of
Act.

(*a*) 1 & 2 Geo. V, c. 46; short title given *ibid.*, s. 37 (1), p. 233 *post*.

(*b*) The only provisions so expressly restricted are ss. 11, 12 (summary remedies), by s. 13. Section 15 (delivery of copies to libraries), however, and s. 34 (compensation to libraries) appear to have no application outside the United Kingdom, though s. 15 may be applied by an Order in Council for the purposes of international copyright (s. 29 (1)).

(*c*) Copyright Act, 1911, s. 25 (1), p. 224 *post*.

(*d*) *Ibid.*, s. 35 (1), p. 230 *post*.

(*e*) *Ibid.*, ss. 25, 26; see p. 179 *post*.

(*f*) *Ibid.*, s. 27; see p. 182 *post*.

(*g*) *Ibid.*, s. 28; see p. 183 *post*. The manner in which Orders in Council are to be made is provided in s. 32, p. 229 *post*. They shall not affect prejudicially any existing rights or interests, and must provide for their protection (*ibid.*).

except self-governing dominions and except such parts of the dominions as are excluded by any such Order. The Governor in Council of any self-governing dominion to which the Act extends may make similar Orders in Council as regards such dominion (*h*).

Com-
mence-
ment of
Act.

The Act comes into operation :

(i) In the United Kingdom on July 1, 1912, or such earlier date as may be fixed by Order in Council.

(ii) In a self-governing dominion to which it extends, at such date as may be fixed by the Legislature of the dominion.

(iii) In the Channel Islands at such date as may be fixed by the States.

(iv) In any other British possession, to which it extends, on the proclamation of it within the possession by the Governor (*i*).

It will be seen from these provisions that the difference in time between the passing of the Act (i.e. December 16, 1911) and its commencement is very substantial, and this may lead to difficulties which will be pointed out in due course.

Repeals
pending
com-
mence-
ment.

The repeals effected by the Act, which include every Act relating to copyright, with the exception of the two Acts relating to the summary proceedings in the case of infringement of copyright in musical works (*k*), ss. 7, 8 of the Fine Arts Copyright Act, 1862 (*l*), and the Canada Copyright Act, 1875 (*m*), do not come into force in any part of the King's dominions until the Act comes into operation in that part (*n*).

(*h*) Copyright Act, 1911, ss. 29, 30; see p. 181 *post*.

(*i*) Ibid., s. 37 (2), p. 233 *post*.

(*k*) See p. 161 *post*.

(*l*) 25 & 26 Vict. c. 68, printed p. 198 *post*.

(*m*) 38 & 39 Vict. c. 53, printed p. 200 *post*.

(*n*) Copyright Act, 1911, s. 36, Sched. II., pp. 232, 235 *post*.

CHAPTER II

SUBJECTS OF COPYRIGHT

UNDER the conditions described in the chapter on ^{General provisions.} the Acquisition of Copyright (*a*), copyright extends to every original (*b*), literary, dramatic, musical, and artistic work (*c*). It is now proposed to discuss the various species of works which are the subjects of copyright.

LITERARY WORKS

There is no definition of 'literary work' in the Act, ^{Definition of 'literary work'.} but there is a provision that it includes 'maps, charts, plans, tables, and compilations' (*d*), and we are therefore thrown back to some extent on the existing case law on the subject for an explanation of the term. It must be remembered, however, that the cases were mainly dealing with the meaning of the word 'book' in the Copyright Act, 1842 (*e*), s. 2, which was there defined as 'every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published'. The use of the term 'literary work' removes most of the limitations to which the word 'book' has been interpreted as being subject, inasmuch as the word 'literary' must not be

(*a*) p. 39 *post*.

(*b*) See p. 29 *post*. In the same chapter are discussed the questions relating to sedition, blasphemy, immorality, and deceit which, on general principles, disentitle a work from obtaining copyright.

(*c*) Copyright Act, 1911, s. 1 (1), p. 203 *post*.

(*d*) Copyright Act, 1911, s. 35 (1), p. 230 *post*.

(*e*) 5 & 6 Vict. c. 45.

taken as implying the possession of literary merit ; but rather as the quality of being composed in words (dramatic works being separately dealt with) as opposed to being composed in musical sounds or artistic shapes. That literary merit is not required will be seen from the enumeration of the works which have been held to be subjects of copyright.

Literary
nature
necessary.

It is necessary, nevertheless, that the work should be of a literary nature and not merely a non-literary combination or device, unless it can be called a map, chart, plan, table, or compilation. Thus the following things have been held not to be proper subjects of copyright : ' Frederick Lillywhite's Registered Scoring Sheet,' for recording cricket scores, the only original feature of which was a space or ' tablet ' for recording ' Runs at the fall of each wicket ' (*f*) ; ' The Christograph : the Christian's Puzzle. Suitable for all sects and denominations. Every family should have it. Price, with key, sixpence,' which was a piece of cardboard, throwing a shadow resembling a picture, ' Ecce Homo,' together with a slip of paper with a quatrain by Longfellow, which even the Court was constrained to condemn as doggerel, while it described the whole as ' not a literary work but a child's trick ' (*g*) ; the card or dial of a ' forecast barometer ', which had no use apart from the instrument (*h*) ; ' The Castle Album,' an album for holding photographs with pictorial borders, containing views of castles with short descriptions attached (*i*) ; ' The Cosmopolitan Sleeve Chart, 1886,' a cardboard pattern of the outer side of a woman's sleeve, with lines

(*f*) *Page v. Wisden* (1869), 20 L.T. 435.

(*g*) *Cable v. Marks* (1882), 52 L.J.Ch. 107.

(*h*) *Davis v. Comitti* (1885), 54 L.J.Ch. 419.

(*i*) *Schove v. Schmincké* (1886), 33 Ch.D. 546.

and figures and some explanatory letterpress printed on it, enabling a person to cut a complete sleeve for any arm without computation and with simple measurements (*k*); 'One Horse Selections,' a list of horses selected by various authorities as likely to win on the day in question (*l*); 'Un Cliché Ivrogne, by not Aesop,' a scrawl written by the plaintiff one evening when he 'found himself under the influence of alcohol' and published by him for the benefit of science (*m*).

On the other hand, Kekewich J. held that there could be copyright in 'The Happy Hand', a card with a picture outside of the back of a woman's hand, which opened bookwise and had within on one side a picture of the palm of the hand and on the other verses by a Mr. Weatherley (*n*).

Compilations are now specifically included in literary works by the statute (*o*), but such inclusion cannot be taken to mean that all compilations indiscriminately are included. They must still be 'original' (*p*), and therefore it is still of value to examine the species of compilations which have been held to be entitled to copyright under the old law. Many instances of such compilations will be found in the cases cited below under the headings Editions, Selections, and Trade Catalogues (*q*), and in the chapter on Infringement of Copyright (*r*).

Where a non-copyright text is edited with labour and skill the edited text is the subject of copyright (*s*), and

(*k*) *Hollinrake v. Truswell*, [1894] 3 Ch. 420.

(*l*) *Chilton v. Progress Printing and Publishing Co.*, [1895] 2 Ch. 29.

(*m*) *Fournet v. Pearson, Ltd.* (1897), 14 T.L.R. 82.

(*n*) *Hildesheimer & Faulkner v. Dunn & Co.* (1891), 64 L.T. 452.

(*o*) Copyright Act, 1911, s. 35 (1), p. 230 *post*.

(*p*) *Ibid.*, s. 1 (1).

(*q*) *Infra* and pp. 11, 12 *post*.

(*r*) p. 99 *post*.

(*s*) *Parry v. Moring* (1903), MacGillivray, Cop. Cas. 1901-4, 119.

so, of course, are any original annotations, introduction, or *apparatus criticus*, with which the text is provided (*t*).

It is not clear how far the specific inclusion of 'compilations' among literary works by the Act of 1911 (*u*) covers works of this nature.

New
editions.

Where a new and corrected or altered edition of a literary work is made, (i) if the corrections or alterations are made with labour and skill by the author of the work so edited, the copyright in the corrections and alterations runs for the same time as that in the work, namely the life of the author and fifty years thereafter; (ii) if they are made with labour and skill by another person, copyright in them runs for the life of that person and fifty years thereafter. This is the case whether such person makes such corrections or alterations under a contract of service or apprenticeship or not (*x*), and whether the work so edited is still copyright or not at the time when the new edition is made. Whether sufficient labour and skill has been employed to entitle such other person to copyright will be a question of fact in each case (*y*).

(*t*) See *Tonson v. Walker* (1752), 3 Swan. 672, at p. 678 (Milton, with notes); *Cary v. Kearsley* (1802), 4 Esp. 168; *Saunders v. Smith* (1838), 3 My. and Cr. 711; *Adam & Charles Black v. Alexander Murray & Son* (1870), 9 R. 341 (Lockhart's edition of Scott's *Minstrelsy of the Scottish Border*); *Moffatt & Paige, Ltd. v. George Gill & Sons, Ltd.* (1902), 86 L.T. 465 (*As You Like It*, with notes). See also as to 'collective works' and 'works of joint authorship', pp. 58, 73, *post*.

(*u*) Copyright Act, 1911, s. 35 (1).

(*x*) See p. 44 *post*.

(*y*) These conclusions seem to follow from ss. 1, 3, and 5 of the Copyright Act, 1911. Subject, but only subject, to them, reference may be made to the cases under the old law, *Cary v. Longman* (1801), 1 East, 358; *Robinson's Assignees v. Wilkins* (1805), 8 Ves. 223 n. 1; *Hedderwick v. Griffin* (1841), 3 D. 383; *Murray v. Bogue* (1852), 1 Drew, 353; *Hutchings v. Sheard*, [1881] W.N. 20; *Thomas v. Turner* (1886), 33 Ch.D. 292.

The provisions of the Act of 1911 remove the difficulties which have arisen as to the question whether illustrations form part of a book so as to enable the owner to sue for breach of copyright when he has complied with the provisions relating to literary works only and not with those relating to artistic works (z), and whether a collection of pictures, without letterpress which could be copyright, was a book and the subject of copyright (a). Since both species of works are now placed on the same footing with regard to copyright, subject to certain exceptions immaterial for this purpose, it is now of no importance here whether the illustrations are to be regarded as part of the book or as separate artistic works, though the distinction has some bearing on the question whether a work is one of joint authorship or 'collective' (b). The question has arisen most frequently in connexion with trade catalogues (c), but it was also discussed in connexion with *The Comical Creatures from Wurtemberg, including the story of Reynard the Fox; with twenty Illustrations, drawn from the Stuffed Animals contributed by Hermann Ploncquet, of Stuttgart, to the Great Exhibition*, which was pirated by *The Story Book for Young People, by Aunt Mary* (d).

The Term Reports were regarded as the subject of Law copyright (e), as were the Irish reports by Crawford and Dix (f). In both these cases the copyright was

(z) See *Bogue v. Houlston* (1852), 5 De G. & Sm. 267; *Cemyns v. Hyde* (1895), 72 L.T. 250 (coloured supplement to a newspaper); *Petty v. Taylor*, [1897] 1 Ch. 465.

(a) See *Maple & Co. v. Junior Army and Navy Stores* (1882), 21 Ch.D. 369. (b) See pp. 58, 73 *post*. (c) See p. 12 *post*.

(d) *Bogue v. Houlston* (1852), 5 De G. & Sm. 267.

(e) *Butterworth v. Robinson* (1801), 5 Ves. 709; compare *Saunders v. Smith* (1838), 3 My. & Cr. 711.

(f) *Hodges v. Welsh* (1840), 2 Ir.Eq.R. 266.

regarded as extending to the whole of the reports. In a subsequent case, dealing with an infringement of the *Jurist* reports (*g*), the Court drew some distinction between the marginal or head note and the body of the report, pointing out the special skill required for the composition of the former ; but they apparently held that there was copyright in the report as a whole, though the infringement was only in fact in respect of the marginal or head notes, which the defendants had embodied in a digest of cases. It is not easy to see, however, how there could be copyright in verbatim reports of the judgments of the Courts, particularly where they were written judgments, though there might be where the reported judgment was constructed from that which had been actually delivered by the exercise of meritorious skill. It would seem that the judge is the 'author' of his judgment, whether written or oral, and possesses copyright in it, unless the right is in the Crown (*h*), and such copyright could not be acquired by the reporter or reporters who reported it (*i*). Similarly counsel seem to be the 'authors' of their speeches, but the summaries of the arguments of counsel, which appear in law reports, would usually be the product of such labour and skill as to entitle them to copyright.

Maps,
charts,
plans, and
tables.

These are specifically included among literary works by the statute (*k*). The repealed Copyright Act, 1842, (*l*) s. 2, included in the term 'book' 'every map, chart,

(*g*) *Sweet v. Benning* (1855), 16 C.B. 459. See also *Sweet v. Maugham* (1840), 11 Sim. 51.

(*h*) See p. 66 *post*.

(*i*) The law was otherwise under the Copyright Act of 1842 (5 & 6 Vict. c. 45), s. 3 ; see *Walter v. Lane*, [1900] A.C. 539. See further, p. 138 *post*.

(*k*) Copyright Act, 1911, s. 35 (1), p. 230 *post*.

(*l*) 5 & 6 Vict. c. 45.

or plan separately published'. Previously maps were held to be artistic works (*m*). It has been held that a cardboard pattern sleeve, with lines and figures and some explanatory letterpress on it, is not a 'map, chart, or plan' (*n*). The addition of the word 'tables' (*o*) to the definition by the Act of 1911 does not seem to affect the validity of this decision.

The words 'map' and 'chart', however, are not confined to geographical or topographical maps and charts, but would extend, for instance, to anatomical physiological charts (*p*).

The form of expression in which news is conveyed is *News* the subject of copyright. 'There is or may be copyright in the particular forms of language or modes of expression by which information is conveyed, and not the less so because the information may be with respect to the current events of the day' (*q*). In the case just cited, the *St. James's Gazette* had copied a large number of news articles or paragraphs from *The Times*, and vainly sought to set up a custom permitting such copying under certain conditions and to retaliate on *The Times* with a *tu quoque*. A news agency has been held entitled to an injunction to restrain the unauthorized reproduction of unpublished news as to the prices of stocks and shares supplied to it by the Stock Exchange (*a*). This would now be

(*m*) See *Stannard v. Lee* (1871), L.R. 6 Ch. 346, at p. 349, per Mellish L.J.; *Stannard v. Harrison* (1871), 24 L.T. 570.

(*n*) *Hollinrake v. Truswell*, [1894] 3 Ch. 420.

(*o*) For a case on the infringement of tables of calculations, see *King v. Reed* (1804), 8 Ves. 223 n.; *Bailey v. Taylor* (1824), 3 L.J. (O.S.), Ch. 66.

(*p*) *Hollinrake v. Truswell*, [1894] 3 Ch. 420, at p. 427, per Davey L.J. See also *Hollinrake v. Truswell*, [1893] 2 Ch. 377, at p. 379, Wright J.

(*q*) *Walter v. Steinkopff*, [1892] 3 Ch. 489, at p. 495, North J.

(*a*) *Exchange Telegraph Co., Ltd. v. Gregory & Co.*, [1896] 1 Q.B. 147.

a breach of copyright under the Act of 1911 (*b*). The same agency was granted an injunction to restrain a subscriber from communicating to a third party news collected from a public source and supplied on condition that there should be no such communication, and to restrain such third party from inducing a subscriber so to communicate such news (*c*). A Melbourne paper obtained an injunction against a country paper which had copied without authority Reuter telegrams published in its columns (*d*).

News-
papers.

There have been discussions in reported cases whether a newspaper was a 'book' or not (*e*), but there can be no doubt that it is a 'literary work', at any rate for the purposes of the Copyright Act, 1911. Cases have occurred in which proprietors of newspapers have sued for the infringement of copyright matter prepared for and belonging to them jointly (*f*), and these do not appear to be affected by the provisions as to ownership in the Act of 1911 (*g*). Where an article has been used by a sub-editor as the basis of a paragraph in a newspaper, there may be a doubt as to who is the author of the paragraph for the purpose of a suit for infringement of copyright (*h*).

(*b*) See p. 101 *post*.

(*c*) *Exchange Telegraph Co., Ltd. v. Central News, Ltd.*, [1897] 2 Ch. 48 (horse-racing news); *Exchange Telegraph Co., Ltd. v. Howard* (1906), 22 T.L.R. 375 (cricket news).

(*d*) *Wilson v. Lake* (1875), 1 Vict. L.R.Eq. 127.

(*e*) See *Walter v. Howe* (1881), 17 Ch.D. 708, overruling *Cox v. Land and Water Journal Co.* (1869), L.R. 9 Eq. 324.

(*f*) *Trade Auxiliary Co. v. Middlesborough and District Tradesmen's Protection Association* (1889), 40 Ch.D. 425; *Cate v. Devon and Exeter Constitutional Newspaper Co.* (1889), 40 Ch.D. 500.

(*g*) See p. 70 *post*.

(*h*) See *Springfield v. Thame* (1903), 89 L.T. 242, and p. 145 *post*.

There can be copyright in a selection, if it displays Selections.
sufficient labour and skill to justify it and is not merely a mechanical collection. Thus, it has been held in India that there was copyright in Palgrave's *Golden Treasury of Songs and Lyrics*, and that it was infringed by an almost identical collection published with certain alterations in order and with notes for the purpose of examinations (i).

‘ I do not say that there could not be copyright in Titles.
a title, as, for instance, in a whole page of title or something of that kind requiring invention. However, it is not necessary to decide that. But, assuming that there can be copyright in a title, what does copyright mean ? It means the right to multiply copies of an original work. If you complain that a part of your work has been pirated, you must show that that part is original, and if it is not original you have no copyright ’ (k). In that case it was sought to restrain the publication of a novel by Miss Braddon called *Splendid Misery*, and any other work of the same title or the same title with additions, on the ground that the plaintiff had already published a tale called *Splendid Misery ; or, East End and West End*. It would seem, therefore, that there could only be copyright in a title if the title were of a very special nature (l), in fact something more than a bare title and more akin to a literary composition. So it was said by Cairns L.J. that ‘ it must be held that there cannot be what is termed copyright in a single

(i) *Macmillan v. Suresh Chunder Deb* (1890), Ind.L.R. 17 Cal. 951.
See also *Lennie v. Pillans* (1843), 5 D. 416.

(k) *Dicks v. Yates* (1881), 18 Ch.D. 76, at p. 89, per Jessel M.R.

(l) Cases to the contrary, such as *Mack v. Petter* (1872), L.R. 14 Eq. 431 (*The Birthday Scripture Textbook*), and *Weldon v. Dicks* (1878), 10 Ch.D. 247 (*Trial and Triumph*), must be regarded as no longer law.

word, although the word should be used as a fitting title for a book. The copyright contemplated by the Act must not be in a single word, but in some words in the shape of a volume or part of a volume, which is communicated to the public, by which the public are benefited, and in return for which a certain protection is given to the author of the work ' (*m*).

These principles, however, do not affect the right of the user of a title to prevent the colourable imitation of it by another person by way of a common law fraud (*n*).

It would seem that certain observations made with regard to the titles of newspapers must be taken to be subject to the principles enumerated above. Thus Page Wood L.J. said ' that there is nothing analogous to copyright in the name of a newspaper, but that the proprietor has a right to prevent any other person from adopting the same name for any other similar publication ' (*o*), and Knight Bruce L.J. spoke of ' the right to publish newspapers bearing particular names ' (*p*).

Trade
cata-
logues.

There can be copyright in a catalogue, and it is immaterial that the catalogue is not offered for sale but is merely used to promote the sale of something else (*q*). Thus Hotten's catalogue called *A Handbook to the Topography and Family History of England and Wales* was held to be the subject of copyright (*q*). The following have also been regarded as being capable of copyright: a book of

(*m*) *Maxwell v. Hogg* (1867), L.R. 2 Ch. 307, at p. 318 (on the title of a magazine, *Belgravia*).

(*n*) *Dicks v. Yates* (1881), 18 Ch.D. 76, and p. 172 *post*.

(*o*) *Kelly v. Hutton* (1869), L.R. 3 Ch. 703, at p. 708.

(*p*) *Ex parte Foss, Ex parte Baldwin, In re Baldwin* (1858), 2 De G. & J. 230, at p. 235.

(*q*) *Hotten v. Arthur* (1863), 1 H. & M. 603.

lithographic sketches of monumental designs compiled on behalf of a cemetery mason for trade purposes (*r*); an illustrated catalogue of furniture containing no letterpress which could be the subject of copyright (*s*); an illustrated catalogue with particulars of patent pavement lights (*t*); an *Illustrated Book of Shop-fittings* (*u*); books of designs of carriages (*x*); *The Art and Virtue of Dressing Well*, including drawings of two men in Chesterfield overcoats (*y*); *The Bath Drug Company's Price Current* (*z*); an *Illustrated Catalogue of Some of the Newest and Latest Designs in Suits, Coats, &c., suitable for Autumn and Winter 1898* (*a*); an illustrated catalogue consisting almost entirely of engravings of trucks, trolleys, barrows, and wagons (*b*); a price sheet illustrated with designs of furniture (*c*). These would all fall within the term 'compilations', which are now specifically included by statute in the term 'literary work' (*d*), if original.

It was held in an early case that there was copyright in a translation 'whether produced by personal application and expense, or gift' (*e*). This must now be read subject to the provision in the Copyright Act, Translations.

(*r*) *Grace v. Newman* (1875), L.R. 19 Eq. 623.

(*s*) *Maple & Co. v. Junior Army and Navy Stores* (1882), 21 Ch.D. 369. This decision overruled *Cobbett v. Woodward* (1872), L.R. 14 Eq. 407, a case on a similar catalogue.

(*t*) *Hayward Bros. v. Lely & Co.* (1887), 56 L.T. 418.

(*u*) *Harris v. Smart*, [1889] W.N. 92.

(*x*) *Cooper v. Stephens*, [1895] 1 Ch. 567.

(*y*) *Petty v. Taylor*, [1897] 1 Ch. 465.

(*z*) *Collis v. Cater, Stoffell & Fortt, Ltd.* (1898), 78 L.T. 313.

(*a*) *W. Marshall & Co., Ltd. v. A. H. Bull, Ltd.* (1901), 85 L.T. 77.

(*b*) *Slingsby v. Bradford Patent Truck and Trolley Co.*, [1905] W.N. 122.

(*c*) *Davis v. Benjamin*, [1906] 2 Ch. 491.

(*d*) Copyright Act, 1911, s. 35 (1), and see p. 5 *ante*.

(*e*) *Wyatt v. Barnard* (1814), 3 V. & B. 77.

1911, which reserves the right of translation into any language to the author of the work (*f*), and to the application of the Act to foreign countries. If a foreign work were entitled to the benefits of the Act, an unauthorized translation of it or any substantial part of it would clearly be an infringement and could not acquire copyright.

DRAMATIC WORKS

Meaning
of 'drama-
tic work.'

The term '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 where the arrangement or acting form or the combination of incidents represented give the work an original character (*g*), and 'cinematograph' includes any work produced by any process analogous to cinematography (*g*).

A 'dramatic work', of course, is not confined to the forms above enumerated, but includes these, in addition to the forms which would, in ordinary parlance, be included in the expression.

The words as to the fixing of the scenic arrangement or acting form apply apparently to 'piece for recitation' as well as to 'choreographic work' and 'entertainment in dumb show'. There will be no copyright in such productions, at any rate as dramatic works, if the scenic arrangement or acting form is left to the taste and discretion of the performers, as is so often the case in music-hall entertainments and pantomimes. But the fixing need not be in writing. It would be

(*f*) See p. 120 *post*.

(*g*) Copyright Act, 1911, s. 35 (1), p. 230 *post*.

enough, apparently, if it had become fixed by constant performance.

The last part of the definition gives the protection of Cinematograph productions. dramatic works to cinematograph and similar productions, which are given an original character by their arrangement, acting form, or combination of incidents. This seems to be intended to be limited to productions which are constructed from incidents arranged *ad hoc*, and not to include productions based upon a series of events which happened in the ordinary course of nature, though it is possible that a particular and original combination of pictures of such events might fall within the definition. In the case of cinematographic photographs, however, there seems to be no reason why the provisions as to copyright in photographs (*h*) should not apply, and there may thus be a conflict as to the term for which copyright in such productions runs, since the photograph term runs for fifty years from the making of the negative (*i*), while the cinematograph production term, if the production be a dramatic work, runs for the life of the author and fifty years thereafter. So, too, there may be a conflict as to the ownership of copyright, since the owner in the case of a photograph is the owner of the negative at the time when it was made (*k*), and the owner in the case of a cinematograph production, if a dramatic work, is its author.

It is difficult to see what is meant by 'acting form' as applied to a cinematograph production.

The authorities on the repealed Acts may still be of Case law value in determining what falls within the expression on 'dramatic work', 'dramatic work', apart from the forms included in 'work'.

(*h*) See pp. 21, 25 *post*.

(*i*) See p. 46 *post*.

(*k*) See p. 75 *post*.

the above definition, though the point on which several of them turned, namely, whether a piece was dramatic as well as musical, is now practically immaterial, since both species now stand substantially in the same position with regard to copyright. Thus it has been held that a written introduction to a pantomime called *Princess Battledore, or Harlequin Shuttlecock* was a 'dramatic piece or entertainment' (*l*). Lord Denman C.J. defined as being 'dramatic in its widest sense' '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' (*m*). This is not a very lucid definition; the Chief Justice should have gone on to define 'regular drama'. Subsequent cases, where it was decided that songs, to wit, 'Come to Peckham Rye' (*n*), and 'Oh, Jenny, dear' (*o*), were 'dramatic pieces', are of no value for the present purpose, particularly after the decision which determined that 'Daisy Bell' was not (*p*).

It is not quite clear, in view of the above statutory definition, to what extent the scenic effects or 'business' as distinguished from the verbal substance constitute a dramatic work and are capable of infringement (*q*).

Adaptations.

A copyright can be obtained in an adaptation with substantial alterations of another dramatic work (*r*).

(*l*) *Lee v. Simpson* (1847), 3 C.B. 871.

(*m*) *Russell v. Smith* (1848), 12 Q.B. 217, at p. 236.

(*n*) *Clark v. Bishop* (1872), 25 L.T. 908.

(*o*) *Roberts v. Bignell* (1887), 3 T.L.R. 552.

(*p*) *Fuller v. Blackpool Winter Gardens and Pavilion Co.*, [1895] 2 Q.B. 429.

(*q*) See the discussion of the matter, p. 124 *post*.

(*r*) *Tree v. Bowkett* (1891), 74 L.T. 77 (*Trilby*); *Hatton v. Kean* (1859), 7 C.B. (N.S.) 268 (*Much Ado about Nothing*).

In the case on *Much Ado about Nothing* it was held that music, which was written for the adaptation by the direction and under the superintendence of the defendant, became part of the dramatic work and belonged to the defendant.

Copyright could, *a fortiori*, be obtained in a dramatic work, which borrowed its plot or some incidents from a non-copyright work, as Shakespeare borrowed plots from Bandello and Ser Giovanni, and Peele and others from the Bible.

MUSICAL WORKS

There is no definition of 'musical work' in the Copyright Act, 1911, except in one provision for the purpose of mechanical contrivances, and in its widest meaning it would seem to cover any combination of sounds, whether with or without merit as music in the ordinary western sense. The songs of the Ojibways, for instance, or the music of the Japanese sometimes strike the European ear as not being music at all, but it would seem that they would be capable of copyright, if original. Neither can the number of sounds be a safe criterion. Musical themes not seldom consist of two notes only, and sometimes even of one (see, for instance, Cornelius's song, 'Ein Ton' (s), and would apparently constitute a 'musical work', but in the case of such small combinations it would generally be impossible to establish their originality. When coupled with original harmonization, however, they might be the subject of copyright (t).

(s) Compare Borodin's *Dissonance* for a similar experiment.

(t) As a curiosity, it may be mentioned that the German Reichsgericht has held that the principal theme of Richard Strauss's *Ein Heldenleben* is not a 'melody', and therefore that the reproduction of it in Noren's *Kaleidoskop* was not an infringement of copyright. The position of a Court which has to decide what is or is not a 'melody' deserves much sympathy.

Original harmonic, contrapuntal, or orchestral devices, too, might well be the subject of copyright.

For the purpose of the provision relating to mechanical contrivances 'musical work' is to be deemed to include any words so closely associated therewith as to form part of the same work, but not to include any mechanical contrivance for the reproduction of sounds (*u*). For the other purposes of the Act, therefore, it must be taken that the words forming part of vocal music are not part of the musical work, but are a literary work, and the combination of the two is a collective work (*x*), and if, as might conceivably be the case, the result of collaboration without any distinction between the work of the authors, a work of joint authorship (*y*).

The Musical (Summary Proceedings) Copyright Act, 1902 (*z*), s. 3, defines 'musical work', for the purposes of that Act, as 'any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced' (*a*). This very wide definition includes as music 'melody' without harmony, or harmony without 'melody', or both together, and would cover all the instances suggested above. If this section is ever seriously discussed in Court, the tribunal will find itself in the unfortunate position of the Reichsgericht (*b*).

Arrange-
ments.

Copyright is not limited to music which is in its original form; it may also extend to arrangements of original copyright music, which may thus acquire a copyright of their own; or to arrangements of non-copyright music. Whether such arrangements are

(*u*) Copyright Act, 1911, s. 19 (2), see p. 132 *post*.

(*x*) See p. 58 *post*.

(*z*) 2 Edw. VII. c. 15.

(*b*) See note (*t*), p. 17 *ante*.

(*y*) See p. 73 *post*.

(*a*) See p. 162 *post*.

sufficiently original to entitle them to copyright must be a question of fact in each case. In the case where the original music is copyright, and the arrangement has not been authorized, it seems reasonable to suppose that a high degree of originality in the arrangement would be required to enable it to acquire a copyright of its own (c).

For arrangements of modern orchestral music for other instruments a high degree of skill is usually required, and these would therefore be usually entitled to copyright, at any rate if authorized by the composer.

It has been held that a pianoforte arrangement of Nicolai's *Die Lustigen Weiber von Windsor* was the subject of copyright—an arrangement of a simple opera, which cannot have required a very vast degree of skill (d).

On similar principles, arrangements of non-copyright songs have been held to be entitled to copyright. B took a non-copyright air known as 'Pestal', from the name of the composer, wrote words to it, and procured C to write an accompaniment. The combination was then acquired by A, who added a preface to it, and sued for an infringement of the whole, though in fact the infringement only related to the accompaniment. He succeeded (e). A song called 'Minnie', the words composed by George Linley, the melody taken from a non-copyright song called 'Lillie Dale', and arranged with accompaniments by the same com-

(c) The observations of Kelly, C.B., in *Wood v. Boosey* (1868), L.R. 3 Q.B. 223, at pp. 228, 229, seem not to lay enough stress on the difference between authorized and unauthorized arrangements, and only to require a similar degree of originality for each.

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

(e) *Leader v. Purday* (1849), 7 C.B. 4.

poser, was regarded as entitled to copyright (*f*), and so was 'The Low Back'd Car', adapted from an old air 'The Jolly Ploughboy' (*g*).

These decisions would apply to the collections of folk-songs, which have become so common in recent years, such as those arranged by Balakirev, Bourgault-Ducoudray, Korbay, and Cecil Sharp.

Original
treatment
of non-
copyright
or copy-
right
matter.

On similar principles, copyright will subsist in musical works, which make use in other ways of non-copyright matter, or even of copyright matter, for the purpose of original composition, such, for instance, as the composition of variations on a theme, e.g. Brahms's variations on Haydn's choral *Sancti Antoni* or Chaikovsky's variations in his pianoforte trio (*h*), or the utilization of such matter in the course of a larger composition, such as that of student songs in Brahms's *Akademische Fest-Ouvertüre*, or of national tunes in Wagner's *Kaisermarsch*, or Strauss's use in *Salome* of a trumpet-call already used by Suppé and perhaps by Mendelssohn. The right to copyright here comes from the originality of the treatment. But it might well be that, even in the case of an eminent composer, the originality of the treatment might not be such as to justify copyright. Thus Handel would have been hard put to it to claim copyright, or to resist judgment for infringement, in respect of a large part of *Israel in Egypt* and *The Triumph of Time and Truth*, or for the minuet in *Samson*.

Double
copyright.

Double copyright, no doubt, could be obtained in

(*f*) *Chappell v. Sheard* (1855), 2 K. & J. 117; *Chappell v. Davidson* (1855), 2 K. & J. 123; (1856) 8 D.M. & G. 1.

(*g*) *Lover v. Davidson* (1856), 1 C.B. (N.S.) 182.

(*h*) It was said in *D'Almaine v. Boosey* (1835), 1 Y. & C. 288, at p. 302, that 'the adding variations makes no difference in the principle', but this must be understood *secundum subiectam materiam*.

respect of two different arrangements of the same material by the same composer. Thus Handel could have obtained copyright in respect of the love duet 'No, no, non vo' fidarmi', and also in respect of the pious rearrangement of the same material in the chorus 'For unto us a Child is born'.

There may, of course, be copyright in a musical work, which forms part of a collection, whether the remainder of the collection be or be not copyright (*i*). It would seem that, in certain circumstances, music written for a play may form part of it for copyright purposes (*k*).
Collections.

Records, perforated rolls, and other contrivances by which sounds may be mechanically reproduced are entitled to copyright as though they were musical works, subject to certain differences as to term and ownership (*l*).
Mechanical contrivances.

The words 'other contrivances' must be read as strictly *eiusdem generis* with records and perforated rolls; otherwise one could obtain copyright in a steam siren or a humming-top.

ARTISTIC WORKS

'Artistic work' is described as including 'works of painting, drawing, sculpture, and artistic craftsmanship, and architectural works of art and engravings and photographs' (*m*). Of the contents of this description, 'work of sculpture' is further described as including 'casts and models' (*m*); 'architectural work of art'
Meaning of 'artistic work'.

(*i*) See *White v. Geroch* (1819), 2 B. & A. 298. This case, of course, dealt with a very different state of the law, and is only referred to by way of analogy.

(*k*) Compare *Halton v. Kean* (1859), 7 C.B. (N.S.) 268.

(*l*) Copyright Act, 1911, s. 19 (1); and see pp. 45, 75 *post*.

(*m*) Copyright Act, 1911, s. 35 (1), p. 230 *post*.

is said to mean 'any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection afforded by this Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction' (*m*); 'engravings' are described as including 'etchings, lithographs, woodcuts, prints, and other similar works not being photographs' (*m*), while 'photograph' includes 'photo-lithograph and any work produced by any process analogous to photography' (*m*).

'Works of
artistic
craftsmanship'

'Works of artistic craftsmanship' appear to mean works executed artistically other than the particular species of artistic works enumerated in the definition, and would include such things as art jewellery, art needlework, art beadwork, art basketwork, art furniture, and so on.

Sculpture.

'Sculpture' has been given a wide meaning in the only two reported cases on the matter, having been held to include casts of vegetable objects used for instruction and drawing (*n*), and also toy models of soldiers (*o*). But it must be remembered that these decisions were given on the words of a statute which was couched in extraordinarily wide terms (*p*), and it is doubtful how far the expression 'works of sculpture', including 'casts and models' (*m*), would be held to cover such things. Probably, however, it would be held to embrace them.

(*m*) Copyright Act, 1911, s. 35 (1), p. 230 *post*.

(*n*) *Caproni v. Alberti*, [1891] W.N. 200.

(*o*) *Britain v. Hanks Bros. & Co.* (1902), 86 L.T. 765.

(*p*) Sculpture Copyright Act, 1814 (54 Geo. III. c. 56), s. 1, now repealed; set out p. 27 *post*.

Blocks and plates made for the purpose of producing engravings, etchings, woodcuts, and the like, are doubtless protected as artistic works, even if no prints have been made from them, so that it would be an infringement to make unauthorized reproductions from them either in the form of prints or in the form of other blocks (*q*). Blocks and plates.

It appears that the word 'drawings' would include designs which were not intended for sale as such, but were used for the production of dies, by which reproductions were struck off and sold (*r*). Drawings.

It has been held, however, that 'drawing' does not cover such a production as the representation of a hand holding a pencil in the act of marking a cross in a particular square which was used for the guidance of illiterate voters at elections. The Court suggested that perhaps, if an imitation were exact, it might be restrained, but that nothing short of an exact imitation would be enough (*s*). 'The first question which arises is, what is and what is not the nature of the right conferred under the Act upon the author by the registration of the drawing of which he is the author. It is perhaps easier to say what it is not than to give a satisfactory definition of what it is, and I think that I am upon very safe ground in saying that the mere choice of subject can rarely, if ever, confer upon the author of the drawing an exclusive right to represent the subject, and certainly where the subject chosen is merely the representation to the eye of a simple

(*q*) Compare *Cooper v. Stephens*, [1895] 1 Ch. 567; *W. Marshall & Co., Ltd. v. A. H. Bull, Ltd.* (1901), 85 L.T. 77; *Millar & Lang, Ltd. v. Polak*, [1908] 1 Ch. 433.

(*r*) *Millar & Lang, Ltd. v. Polak*, *ubi supra*.

(*s*) *Kenrick & Co. v. Lawrence & Co.* (1890), 25 Q.B.D. 99; compare *Millar & Lang, Ltd. v. Macniven & Cameron. Ltd.* (1908), 16 S.L.T. 56.

operation which must be performed by every person who records a vote, there cannot possibly be an exclusive right to represent in a picture that operation. It may well be that something special in the way of artistic treatment even of this simple operation, if it existed, might be the subject of copyright ; but nothing of the kind has been suggested or exists in the present case, and if it does exist without being discovered it has not been imitated, for there is nothing which by any flight of imagination can be called artistic about either the plaintiffs' or the defendants' representation of a hand making the mark of a cross. It may be also that even the coarsest, or the most commonplace, or the most mechanical reproduction of the commonest object is so far protected on registration that an exact reproduction of it, such as photography, for instance, would produce, would be an infringement of copyright. But in such a case it must surely be nothing short of an exact literal reproduction of the drawing registered that can constitute the infringement, for there seems to me to be in such a case nothing else that is not the common property of all the world ' (t).

Meaning
of
'artistic'. These words, it may be remarked with respect, are eminently sensible, but it seems very doubtful how far 'artistic work' in the present Copyright Act can be taken to imply artistic merit. It will be remembered that 'literary work' does not necessarily imply literary merit, and it would seem likely that 'artistic work' means merely 'work of art' in the popular sense, that is to say a graphic work as opposed to a work of writing or of music. Against this may be set the fact that in the definition of 'architectural works of art'

(t) *Kenrick & Co. v. Lawrence & Co.* (1890), 25 Q.B.D. 99, at pp. 101, 102, Wills J.

the word 'artistic' must mean something more than graphic and imply some degree of artistic merit. The Court, when the matter is discussed, will have no small difficulty in deciding what is artistic and what is not in relation to an 'architectural work of art'. Many of us would say, for instance, that a plain old Georgian house was much more artistic than the queer-shaped erections which are put up in garden cities, but the builders of the latter would not admit this. Some day, perhaps, the Courts will have to decide how far a thing is artistic because it has a queer shape, though the ordinary tribunal is probably one of the worst means that could be desired for settling questions of aesthetics. They may be aided, or hindered, by the additional qualification that the work has to be 'original'.

The word 'photograph' of course includes a photo-^{Photo-}graph of another artistic work, if made with authority (*u*),^{graphs.} but, if unauthorized, it would seem to be incapable of copyright, since it seems unlikely that sufficient skill and labour could have been expended upon such a reproduction as to entitle it to a copyright of its own (*x*). It is possible, however, that a photograph of an arrangement of several artistic works, whether the subjects of copyright or not, might acquire copyright in special circumstances.

The Copyright Act, 1911, does not apply to designs^{Regis-} capable of being registered under the Patents and Designs^{trable} Act, 1907 (*a*), except designs which, though capable of designs.
being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial

(*u*) Compare *Graves' Case* (1869), L.R. 4 Q.B. 715.

(*x*) Compare p. 29 *post*.

(*a*) 7 Edw. VII, c. 29.

process. Whether designs are to be deemed to be so used may be determined by general rules made by the Board of Trade under the Patents and Designs Act, 1907, s. 86 (*b*). A design which is capable of being registered under the Patents and Designs Act, 1907, is any new and original design applicable to any article of manufacture or any substance artificial or natural or partly artificial and partly natural, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined (*c*).

But it does not include 'a design for a sculpture or other thing within the protection of the Sculpture Copyright Act, 1814' (*c*). This last-mentioned Act (*d*) was repealed by the Copyright Act, 1911, and the resulting position is not very clear (*e*). In these circum-

(*b*) Copyright Act, 1911, s. 22, p. 221 *post*.

(*c*) Patents and Designs Act, 1907, ss. 49 (1), 93.

(*d*) 54 Geo. III, c. 56.

(*e*) The Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38 (1), provides that where any subsequent Act repeals and re-enacts, with or without modification, any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted. This has been applied in *Stevens v. General Steam Navigation Co., Ltd.*, [1903] 1 K.B. 890, but there the repealing Act re-enacted a definition to replace the repealed definition. The Copyright Act, 1911, contains no definition of 'work of sculpture' except the provision that it includes casts and models. *Quære* therefore whether s. 38 (1) of the Interpretation Act, 1889, applies here at all, and whether we are not thrown back on the earlier cases, such as *R. v. Stock* (1838), 8 A. & E. 405; *R. v. Merionethshire* (1844),

stances it is worth while to give here the list of the matters which fall within the Sculpture Copyright Act, 1814. It includes 'any new and original sculpture, or model, or copy, or cast, of the human figure, or human figures, or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals, or of any part or parts of any animal combined with the human figure or otherwise, or of any subject being matter of invention in sculpture, or of any alto- or basso-relievo representing any of the matters or things hereinbefore mentioned, or any cast from nature of the human figure, or of any part or parts of the human figure, or of any cast from nature of any animal, or of any such subject containing or representing any of the matters or things hereinbefore mentioned whether separate or combined' (f).

As to other designs, the object of the Act is to exclude from copyright industrial designs, unless they are not intended to be used industrially (g). The provision presumably would not affect designs which formed part of a work which was otherwise the subject of copyright, such as a trade catalogue or a literary work dealing with some industrial process and illustrated by designs (h); but it would, it seems, apply to a design used in the binding of such a work.

6 Q.B. 343; *R. v. Smith* (1873), L.R. 8 Q.B. 146, the effect of which is that if Act A is incorporated by reference in Act B, the repeal of Act A by Act C does not affect it in so far as it is incorporated in Act B.

(f) Sculpture Copyright Act, 1814, s. 1.

(g) See p. 25 *ante*.

(h) See the cases cited, pp. 7, 12 *ante*, and *Walter Macfarlane & Co. v. Oak Foundry Co.* (1883), 10 R. 801, cited p. 24 *post*.

LECTURES

Meaning
of lecture.

‘ Lecture ’ includes ‘ address, speech, and sermon ’ (*i*), and therefore has a very extended meaning, covering most species of oral utterance by one person. The collocation of ‘ address, speech, and sermon ’ is not very artistic ; every sermon is, presumably, both an address and a speech, every address is a speech, and every speech is an address, though every speech is not a sermon and every address is not a sermon. Whether a judge’s judgment is a ‘ lecture ’ is discussed hereafter (*k*).

(*i*) Copyright Act, 1911, s. 35 (1), p. 230 *post*.

(*k*) p. 66 *post*.

CHAPTER III

ORIGINALITY AND IMPROPRIETY

ORIGINALITY

COPYRIGHT only subsists in an 'original' literary, dramatic, musical, or artistic work (*a*). Necessity
of origi-
nality.

A summary of the authorities in which the question of originality has been discussed would be merely a repetition of many of the cases which have been cited in the preceding (*b*), and will be cited in a subsequent (*c*), chapter. In the former will be found definitions and discussions of the works which will be, or have been, admitted to copyright as 'original'; in the latter are set out those works which have been held to be not 'original' because an infringement of 'original' works. Particular attention should be paid to those works which are on the border line of originality, such as editions of works (*d*), trade catalogues (*e*), and other compilations (*f*), and to works which have been held to infringe the copyright subsisting in them (*g*). The result would appear to be that originality does not necessarily connote invention, but may be attained by the expenditure of sufficient skill and labour to take the work out of the category of infringement. Probably the statute does not alter this result (*h*).

In its application to artistic works of reproduction, such as engravings and prints, and in particular to photo- Artistic
works of
reproduc-
tion.

(*a*) Copyright Act, 1911, s. 1 (1), p. 203 *post*.

(*b*) p. 3 *ante*.

(*c*) p. 99 *post*.

(*d*) See p. 5 *ante*.

(*e*) See p. 12 *ante*.

(*f*) See p. 5 *ante*.

(*g*) See p. 101 *post*.

(*h*) In spite of what was said by Lord Halsbury L.C. in *Walter v. Lane*, [1900] A.C. 539, at p. 546.

graphs, the word originality cannot mean more than originality of process, which is practically equivalent, in the case of the less worthy processes of reproduction, to the bona fide expenditure of labour and skill in the making of the reproduction.

IMPROPRIETY

Improper
works in-
capable of
copyright.

There is no provision in the existing statute law which renders a work incapable of copyright on the ground that it is seditious, immoral, or blasphemous, or calculated to deceive the public (*i*) ; but it is apprehended that these principles still apply, inasmuch as under the old law they did not rest on statute but on decisions of the Courts, based on a sense of fitness. It is therefore necessary to examine them more closely. The general principle seems to have been that a work could not be protected by injunction which was such that an action could not be maintained upon it (*j*).

Seditious
works.

Southey's *Wat Tyler* was left without protection by Lord Eldon L.C., on the ground that it was calculated to do injury to the public, apparently by the expression of views which he considered revolutionary (*k*), and in pursuance of his desire to stop what he called elsewhere 'the unhallowed profits of libellous publications' (*l*).

Blas-
phemous
works.

Lord Eldon L.C. refused to restrain the infringement of *Lectures on Physiology, Zoology, and the Natural History of Man*, delivered at the College of Surgeons, with the words, 'Looking at the general tenour of the work, and at many particular parts of it, recollecting

(*i*) See *Wright v. Tallis* (1845), 1 C.B. 893, at p. 907, Tindal C.J.

(*j*) *Southey v. Sherwood* (1817), 2 Mer. 435 ; compare *Cowan v. Milbourn* (1867), L.R. 2 Ex. 230.

(*k*) *Southey v. Sherwood* (1817), 2 Mer. 435.

(*l*) *Walcot v. Walker* (1802), 7 Ves. 1, at p. 2.

that the immortality of the soul is one of the doctrines of the Scriptures, considering that the law does not give protection to those who contradict the Scriptures, and entertaining a doubt, I think a rational doubt, whether this book does not violate that law, I cannot continue the injunction ' (m). Similarly he is said to have just previously refused an injunction to restrain the piracy of Byron's *Cain*, and left the owner of the copyright to his legal remedy, if any. He had had the advantage or disadvantage of having read *Paradise Lost* during the preceding Long Vacation as ' *sollicitae iucunda obliuia uitae* ' (n). Nowadays the attitude of the Courts towards what is called in law blasphemy has changed, and they examine rather the manner than the matter, permitting a reasonable latitude in the discussion of religious topics and the criticism of doctrines accepted by many persons in this country so long as the decencies of controversy are observed (o), and no doubt this attitude would be applied in the case of copyright, if the question arose.

The Memoirs of Harriette Wilson, described by Abbott C.J. as professing to be ' a history of the amours of a courtesan '—containing ' in some parts matter highly indecent, and in others matter of a slanderous nature upon persons named in the work '—was refused protection. The Chief Justice said : ' Upon the plainest principles of the common law, founded as it is, where there are no authorities, upon common sense and justice, this action cannot be maintained. It

Immoral
works.

(m) *Lawrence v. Smith* (1822), Jac. 471.

(n) *Murray v. Benbow* (1822), 4 St. Tr. (N.S.) 1409.

(o) See *R. v. Hetherington* (1840), 4 St. Tr. (N.S.) 563 ; *E. v. Bradlaugh* (1883), 15 Cox C.C. 217 ; *R. v. Ramsay* (1883), *ibid.*, 231. Probably *R. v. Boulter* (1908), 72 J.P. 188, is not to be taken as affecting these liberal principles.

would be a disgrace to the common law could a doubt be entertained upon the subject ; but I think no doubt can be entertained, and I want no authority for pronouncing such a judicial opinion ' (p). Lord Ellenborough C.J. similarly said that he would tell a jury to give no damages if a composition appeared upon the face of it to be a libel so gross as to affect public morals, but refused to regard as such a song called ' Abraham Newland ', which was described by counsel for the defendant as ' a gross and nefarious libel upon the solemn administration of British justice '. The words of the song certainly do not bear out this description, and Lawrence J. pointed out that the same criticism would apply to *The Beggar's Opera* (q). In the case of the 6th, 7th, and 8th cantos of *Don Juan*, Leach V.C. refused to interfere in equity to protect the work, and left the author to his remedy, if any, at law. Lord Byron may or may not have been grateful to his counsel for admitting that ' the work contained much bad taste and many bad jokes ' (r).

The same principle applies, of course, to artistic works as much as to literary works, as where it was sought to restrain the *London Illustrated Standard* from copying seven pictures comprised in a publication called *Le Panorama*, and the action failed as to two of the pictures on the ground of their indecency. It was further held that in such a case there should be no

(p) *Stockdale v. Onwhyn* (1826), 5 B. & C. 173, reported at *nisi prius* 2 C. & P. 163. The same book had been the subject of proceedings in *Poplett v. Stockdale* (1825), 2 C. & P. 198, where the printer was held disentitled to recover from the publisher for printing it, and Best C.J. made as strong remarks as those of Abbott C.J. cited above.

(q) *Hime v. Dale* (1803), 2 Camp. 27 n.

(r) *Lord Byron v. Dugdale* (1823), 1 L.J. (O.S.) Ch. 239.

costs, as the defendants were *in pari delicto* in the matter of impropriety (s).

A book entitled *Evening Devotions, or The Worship of God in Spirit and in Truth, for Every Day in the Year*; ^{Works calculated} *from the German of C. C. Sturm*, which had not in fact been translated from the works of Sturm, a then well-known religious writer, but had been written by one Huish, was held to be incapable of copyright, on the ground that there was a serious design on the part of the owner to impose on the credulity of the purchaser. 'The cases in which a copyright has been held not to subsist where the work is subversive of good order, morality, or religion,' said Tindal C.J., 'do not, indeed, bear directly on the case before us; but they have this analogy with the present inquiry—that they prove that the rule which denies the existence of copyright in these cases, is a rule established for the benefit and protection of the public. And we think the best protection that the law can afford to the public against such a fraud as that laid open by this plea, is, to make the practice of it unprofitable to its author' (t).

Where an illustrated catalogue of trucks and wagons suggested on more than a hundred pages out of 470 that the plaintiff was the patentee of his articles, when in fact he only had foreign patents for them, and some of the

(s) *Baschet v. London Illustrated Standard Co.*, [1900] 1 Ch. 73. Compare *Fores v. Johnes* (1802), 4 Esp. 97. where it was held that *assumpsit* would not lie to recover the value of prints of an obscene or immoral tendency, or libellous prints.

(t) *Wright v. Tallis* (1845), 1 C.B. 893. Such cases, indeed, could also rest on the general principle that a plaintiff must come into equity with clean hands (see *Hayward Bros. v. Lely & Co.* (1887), 56 L.T. 418, at p. 421), applied to a similar application connected with a trade-mark in *Leather Cloth Co., Ltd. v. American Leather Cloth Co., Ltd.* (1863), 4 D. J. & S. 137, affirmed on another ground (1865), 11 H.L.C. 523.

pictures contained an exaggerated representation of the buildings occupied by the plaintiff, it was held that it amounted to 'an attempt to get trade regardless of the way in which it was obtained', and an injunction to restrain infringement was refused (*u*). This seems rather a strong case, as, apart from the false statements as to the patents, the Court was prepared to regard the other misrepresentations as merely puffing or exaggerated advertisements. The plaintiff had in fact patents for the articles, though not in England; and in a previous case it had been held that a catalogue was not incapable of copyright because certain articles were described as patent, though the patent had expired, the Court being moved by the consideration that the patents were in existence when the catalogue was first made, and that it therefore legitimately acquired copyright (*x*).

It would seem to follow necessarily that a work which was itself an infringement could not obtain protection against an unauthorized reproduction, though the reason would perhaps be not so much any deceit practised on the public as the inherent incapacity of an infringing work to possess copyright (*y*).

(*u*) *Slingsby v. Bradford Patent Truck and Trolley Co.*, [1905] W.N. 122.

(*x*) *Hayward Bros. v. Lely & Co.* (1887), 56 L.T. 418. The Court of Session has gone still further, in holding in an action for infringement that averments were irrelevant which alleged that a catalogue stated designs to be registered which in some cases had never been registered and in others had ceased to be registered (*Walter Macfarlane & Co. v. Oak Foundry Co.* (1883), 10 R. 801).

(*y*) See the remarks of Erle C.J. in *Reade v. Conquest* (1862), 11 C.B. (N.S.) 479, at p. 492.

CHAPTER IV

PUBLICATION

PUBLICATION, in relation to any work (*a*), is defined ^{Meaning of publica-} as the issue of copies of the work to the public. It is ^{tion.} stated not to include the performance (*b*) in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art. It is also provided that the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works (*c*). Neither is a work (except for the purpose of infringement) to be deemed to be published or performed in public, nor is a lecture to be deemed to be delivered in public, if published, performed in public, or delivered in public without the consent or acquiescence of the author, his executors, administrators, or assigns (*d*). Acquiescence, presumably, means passive, as opposed to active, consent.

The result of this provision is to restrict the meaning of 'publication' within narrow limits, and consequently to increase very largely the list of unpublished works. Simultaneously, however, the Act has greatly diminished the importance of publication, by creating copyright in unpublished works as well as in published

(*a*) See p. 3 *ante*.

(*b*) For the definition of 'performance', see p. 122 *post*.

(*c*) Copyright Act, 1911, s. 1 (3), p. 204 *post*.

(*d*) Ibid., s. 35 (2), p. 232 *post*.

works, and making the term of copyright run from the making of the work in most cases.

There must be an actual issue of copies of the work to the public, and even this is further limited in the case of works of sculpture and architectural works of art by the proviso that the issue of photographs and engravings of such works is not to be deemed a publication of the works. 'Photograph' includes photolithograph and any work produced by any process analogous to photography (e); 'engravings' include etchings, lithographs, woodcuts, prints, and other similar works, not being photographs as above defined (e). It would appear, therefore, that works of sculpture and architectural works of art can only be published by the issue to the public of drawings or paintings of them, or of models or other copies of them in three dimensions. Why the issue of hand-drawings, water- or oil-colour paintings, and pastels reproducing them should constitute publication, and that of photographs and engravings should not, is somewhat inexplicable. In fact, as regards artistic works in general, the very wide meaning given to 'publication' by some decided cases (f) is now abolished, and, indeed, the Act seems to go to the other extreme.

Publica-
tion of
dramatic
and
musical
works.

As regards dramatic and musical works, the provision that public performance is not publication creates an important change. Previously public representation was necessary to the acquisition of statutory performing right, printing and publication to the acquisition of copyright. This distinction now disappears,

(e) Copyright Act, 1911, s. 35 (1).

(f) *Turner v. Robinson* (1860), 10 Ir.Ch.R. 510; *Blank v. Footman, Pretty & Co.* (1888), 39 Ch.D. 678; but see *Britain v. Hanks Bros. & Co.* (1902), 86 L.T. 765.

and copyright includes performing right. Inasmuch, however, as public performance is not publication, a dramatic or musical work which has been publicly performed, but copies of which have not been issued to the public, is still an unpublished work; and, apparently, copyright in it can only be obtained if the author is a British subject or resident or domiciled within the parts of the King's dominions to which the Copyright Act, 1911, extends (*g*). If, however, copies of it are issued to the public first in such parts of the King's dominions, then it becomes a published work, and the author acquires copyright whoever he may be and wherever he resides or is domiciled.

A private performance clearly would not be a publication, though the Act does not say so (*h*), and the same observation applies to the private delivery of a lecture and the private exhibition of an artistic work. Whether an exhibition, delivery, or performance is private or public is not always easy to decide (*i*), but the distinction has now lost its importance, as in neither case is there publication.

The issue of copies of the work to the public need not, it seems, be an issue for sale or for valuable consideration (*k*); how far a circulation of copies among a limited circle of friends or other persons would constitute

(*g*) See p. 41 *post*; subject, of course, to the provisions as to international copyright.

(*h*) See *Wall v. Taylor* (1883), 11 Q.B.D. 102; *Duck v. Bates* (1884), 13 Q.B.D. 843.

(*i*) See p. 123 *post*, and *Werckmeister v. American Lithographic Co.* (1904), 134 Fed. Rep. 321.

(*k*) *Novello v. Sudlow* (1852), 12 C.B. 177; compare *Jewelers' Mercantile Agency, Ltd. v. Jewelers' Weekly Publishing Co.* (1898), 9 Smith (155 N.Y.) 241, reversing (1895), 84 Hun (91 N.Y.S.C.) 12.

an issue to the public, must depend on the facts of each case (*l*). The test in the case of an issue to a limited circle would seem to be whether the circle is really limited or whether it is one to which, though ostensibly limited, any one can belong by some means or other, so as to obtain copies at will.

It will be noted that, apparently by careless drafting, the words 'the issue' only are used in connexion with the issue of photographs and engravings of works of sculpture and architectural works of art. No doubt the meaning here too is 'the issue to the public'. A loan of photographs in order that engravings might be made from them was held not to amount to a publication of the photographs (*m*).

(*l*) Contrast *Novello v. Sudlow, ubi supra*, with *Kenrick v. Danube Collieries and Minerals Co., Ltd.* (1891), 39 W.R. 473, and the news agency cases in note (*j*), p. 171 *post*.

(*m*) *Mayall v. Higbey* (1862), 6 L.T. 362.

CHAPTER V

ACQUISITION OF COPYRIGHT

PUBLISHED WORKS

COPYRIGHT in a published work subsists if it is first published or published simultaneously (i) in the British Empire, other than the self-governing dominions ; (ii) in a self-governing dominion by which the Copyright Act, 1911, is adopted ; (iii) in a foreign country, to which the Act is extended. The authorities for this statement follow.

Copyright in a published (*a*) work subsists throughout the parts of the King's dominions to which the Copyright Act, 1911, extends (*b*) for the term provided (*c*), if the work was first published within such parts of the King's dominions (*d*). It is to be deemed to be so first published, notwithstanding that it has been published simultaneously in some other place, unless the publication in such parts of the King's dominions is colourable only and is not intended to satisfy the reasonable requirements of the public. Simultaneous publication in two places for this purpose covers publication at an interval of not less than fourteen days or such longer period as may, for the time being, be fixed by Order in Council (*e*).

(*a*) As to publication, see p. 35 *ante*.

(*b*) See p. 1 *ante*.

(*c*) See p. 44 *post*.

(*d*) Copyright Act, 1911, s. 1 (1), p. 203 *post*.

(*e*) Ibid., s. 35 (3), p. 232 *post*. See *Cocks v. Purday* (1848), 5 C.B. 860 ; *Buxton v. James* (1851), 5 De G. & Sm. 80.

It seems clear from these provisions that copyright in a published work can be acquired by an alien friend, who does not reside in the King's dominions to which the Act applies, either at the time of publication or at any other time, as well as by a British subject (*f*). The terms of the provision seem even to embrace a work which is the property of an alien enemy, but an alien enemy could not sue in a British Court to protect his right.

Exclusion
of certain
foreign
works.

There is a special provision, however, that if it appears to the King that a foreign country does not give, or has not undertaken to give, adequate protection to the works of British authors, he may, by Order in Council, direct that the above provisions shall not apply to works published after the date specified in the Order, the authors of which are subjects or citizens of such foreign country and are not resident in the King's dominions (*g*).

It will be noticed that the provision does not apply to such subjects or citizens as are resident in the King's dominions—apparently all his dominions and not merely those to which the Act extends. They, it seems, can go on securing copyright in spite of the misdeeds of their Government.

Such an Order will not affect prejudicially any rights or interests acquired or accrued at the date when it comes into operation, and must provide for their protection (*h*).

International
copyright.

The above provisions as to acquisition of copyright may be extended to foreign works by Order in

(*f*) See the debate on these matters in *Routledge v. Low* (1868), L.R. 3 H.L. 100; and see *Reid v. Maxwell* (1886), 2 T.L.R. 790.

(*g*) Copyright Act, 1911, s. 23. As to residence, see p. 41 *post*.

(*h*) Copyright Act, 1911, s. 32 (1), p. 229 *post*.

Council, subject to the provisions of the Act (*i*) ; and it is, of course, only to works to which such an extension is so made that the general statement at the head of this chapter applies.

UNPUBLISHED WORKS

Copyright in an unpublished work subsists if the author is at the date of its making (i) a British subject, or (ii) resident or domiciled within the British Empire, other than the self-governing dominions, or (iii) resident or domiciled in a self-governing dominion by which the Copyright Act, 1911, is adopted, or (iv) a subject or citizen of a foreign country to which the Act is extended, or (v) resident or domiciled in a foreign country to which the Act is extended. The authorities for this statement follow.

Copyright in an unpublished (*k*) work subsists throughout the parts of the King's dominions to which the Act extends (*l*) for the term provided (*m*) if the author was at the date of the making of the work, or, if such making extended over a considerable period, during any substantial part of such period, a British subject or resident within the parts of the King's dominions to which the Act extends (*n*). 'Resident' for this purpose includes a person who is domiciled (*o*). A body corporate is to be deemed to be so resident, if it has established a place of business within such parts, for the purposes of the first owner-

(i) See p. 186 *post*.

(k) As to publication, see p. 7 *ante*.

(l) See p. 1 *ante*.

(m) See p. 44 *post*.

(n) Copyright Act, 1911, ss. 1 (1), 35 (4), pp. 203, 232 *post*.

(o) Ibid., s. 35 (5), p. 232 *post*.

ship of copyright in mechanical contrivances and photographs (*p*).

Abolition
of com-
mon law
right.

The Act abolishes the common law right analogous to copyright which used to exist in unpublished works (*q*) and substitutes, by the above provision, copyright of a similar kind to that conferred on published works. Consequently such distinctions as there used to be between the incidents of the common law right in unpublished works and copyright in published works have ceased to exist. If, for instance, there was ever any common law right in lectures, which had never been reduced to writing, so as to entitle the lecturer to restrain the publication of them on that ground, and not merely on the ground of breach of confidence or implied contract (*r*), it is now replaced by the rights with regard to lectures conferred by the Act (*s*).

Residence
and domi-
cile.

In order to obtain copyright for an unpublished work, the author need not be a British subject so long as he is resident or domiciled within the parts of the King's dominions to which the Act applies. 'Resident' explains itself. 'Domiciled' is quite distinct from 'resident'. A person may either possess a domicile of origin or a domicile of choice. The former prevails, unless there is clearly shown, in the particular case, a fixed and settled purpose to abandon that domicile for another (*t*). It will be noted that the Act does not require domicile for the purpose of copyright in unpublished works ; mere residence is enough ; but, in case the author is not actually resident at the requisite time,

(*p*) Copyright Act, 1911, ss. 19 (1), 21. (*q*) See p. 169 *post*.

(*r*) See *Abernethy v. Hutchinson* (1825), 1 H. & T. 28 ; *Nicols v. Pitman* (1884), 26 Ch.D. 374 ; *Caird v. Sime* (1887), 12 App. Cas. 326.

(*s*) See p. 136 *post*.

(*t*) See *Winans v. A.-G.*, [1904] A.C. 287 ; *Marchioness of Huntly v. Gaskell*, [1906] A.C. 56.

it will suffice if he is domiciled in the parts of the King's dominions to which the Act applies.

The rather curious provision as to works, the making of which extends over a considerable period, may give rise to difficulty. What is a 'substantial part'? How long, for instance, would Goethe have had to reside in order to acquire copyright in *Faust* before its publication? or Pimen in Pushkin's *Boris Godunov*, if he had wanted a copyright in the chronicles, which he compiled during nearly the whole of a long life?

In the case of unpublished works of considerable age, it will often be difficult to prove that the author satisfied the requirements of the Act during the time of their making or a substantial part of it. Probably the Court would be satisfied with presumptive, and would not require direct, evidence.

These provisions, like those relating to published works, may be extended to foreign countries in manner provided by the Act (u); and it is to such countries only that the general statement above has any application.

(u) See p. 186 *post*.

CHAPTER VI

DURATION OF COPYRIGHT

TERM OF COPYRIGHT

General
state-
ment.

THE term for which copyright subsists is, except so far as otherwise provided, the life of the author and a period of fifty years after his death (*b*). A single uniform term, subject to certain important exceptions stated below, is thus substituted for the variety of terms which existed previously in respect of works which are the subject of copyright. The new term applies to unpublished as well as to published works. Even in cases where a person other than the author is the first owner of copyright by the statute (*c*), the term runs for the life of the author and fifty years after his death.

Works of
joint
author-
ship.

In the case of a work of joint authorship, which means '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' (*d*), copyright subsists during the life of the author who first dies and for the term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer (*e*). This provision is not affected by the fact that some one or more of the joint authors do not satisfy the

(*b*) Copyright Act, 1911, s. 3, p. 207 *post*.

(*c*) See pp. 77, 80 *post*.

(*d*) Copyright Act, 1911, s. 16 (3), p. 216 *post*.

(*e*) Ibid., s. 16 (1), p. 215 *post*.

conditions conferring copyright as laid down by the Act (*f*).

In the case of a literary, dramatic, or musical work, ^{Posthu-} or an engraving, in which copyright subsists at the ^{mous} date of the death of the author, or, in the case of a work ^{works.} of joint authorship, at or immediately before the date of the death of the author who dies last, but which has not been published, nor, in the case of a dramatic or musical work, been performed in public, nor, in the case of a lecture, been delivered in public, before that date, copyright subsists till publication, or performance or delivery in public, whichever first happens, and for a term of fifty years thereafter (*g*).

It will be observed that this provision does not apply to all artistic works, but only to engravings. Photographs are specially provided for elsewhere (*h*). Other posthumous artistic works will be subject to the general provision of the Act and enjoy copyright for fifty years from the death of the author, whether published or not.

Copyright in records, perforated rolls, and other ^{Mechani-} contrivances by means of which sounds may be mechani- ^{cal contri-} cally reproduced subsists for fifty years from the making of the original plate from which the contrivance was directly or indirectly derived (*i*), and 'plate' includes any matrix or other appliance by which records, perforated rolls, or other such contrivances are or are intended to be made (*k*).

Where such a contrivance was made before the commencement of the Act (*l*), copyright, as from the commencement of the Act, subsists for fifty years

(*f*) Copyright Act, 1911, s. 16 (2), p. 215 *post*.

(*g*) Ibid., s. 17 (1), p. 216 *post*.

(*h*) See p. 46 *post*.

(*i*) Ibid., s. 19 (1), p. 217 *post*.

(*k*) Ibid., s. 35 (1), p. 230 *post*.

(*l*) As to this date, see p. 2 *ante*.

from the making of such original plate, as if the Act had been in force at the time of such making, except in the case of a contrivance which would have infringed copyright in some other such contrivance if this provision had been in force at the time of its making (*m*).

Photo-
graphs.

Copyright in photographs, including photo-lithographs or any works produced by any process analogous to photography (*n*), subsists for fifty years from the making of the original negative from which the photograph was directly or indirectly derived (*o*).

Govern-
ment pub-
lications.

Where any work has, before or after the commencement of the Act, been prepared or published by or under the direction or control of the Crown or any Government department, the copyright, subject to any agreement with the author, belongs to the Crown, and continues for fifty years from the date of the first publication of the work. This provision is without prejudice to any rights or privileges of the Crown (*p*).

Inter-
national
copyright.

An Order in Council made for the purpose of international copyright (*q*) may provide that the term of copyright within the parts of the King's dominions to which the Act extends shall not exceed, in the case of works to which the Order applies, that conferred by the law of the country to which the Order relates (*r*).

LIMITATIONS ON TERM OF COPYRIGHT

Repro-
duction
after
notice and
payment
of
royalties.

At any time after the expiration of twenty-five years, or in the case of a work in which copyright subsisted on December 16, 1911, thirty years, from the death of the author of a published work, the work may

(*m*) Copyright Act, 1911, s. 19 (8), p. 221 *post*.

(*n*) Ibid., s. 35 (1), p. 230 *post*.

(*o*) Ibid., s. 21, p. 221 *post*.

(*p*) Ibid., s. 18, p. 217 *post*, and see the chapter on Crown Copyright, p. 65 *post*.

(*q*) See p. 186 *post*.

(*r*) Copyright Act, 1911, s. 29 (1).

be lawfully reproduced for sale, if the person reproducing it proves that he has given notice in writing of his intention, and that he has paid to, or for the benefit of, the owner of the copyright royalties in respect of all copies of the work sold by him calculated at the rate of 10 per cent. on the price at which he publishes the work. The mode in which such notice is to be given and the particulars to be contained in it, and the mode, time, and frequency of the payment of such royalties, are to be prescribed by regulations made by the Board of Trade, in which they may prescribe also, if they think fit, the payment in advance, or the otherwise securing of the payment, of such royalties (*l*).

In the case of a work of joint authorship, copyright runs for fifty years after the death of the author who dies first, or during the life of the author who dies last, whichever period is the longer (*u*), and it is further provided, by a provision which appears to be intended to apply to the present section, that the period during which the powers conferred by it apply, that is to say, from the time when they came into force till the termination of the copyright, is to run from (i) twenty-five or thirty years, as the case may be, from the death of the joint author who dies first or (ii) the death of the joint author who dies last, to the termination of the copyright, whichever period is the shorter (*u*). Works of joint authorship.

Let X be the length of life of the joint author who dies first, and let Y be the length of life of the joint author who dies last, and let Z be the length of copyright.

Case I. Y is greater than X by less than 50 years. Then $Z = X + 50$.

(*l*) Copyright Act, 1911, s. 3, p. 207 *post*.

(*u*) Ibid., s. 16 (1); see p. 73 *post*.

Sub-case A. Y is greater than X by less than 25 years. $X+25$ is greater than Y . $Z-(X+25)$ is less than $Z-Y$. Therefore the section applies for the period $Z-(X+25)$.

Sub-case B. $Y=X+25$.

Here $Z-(X+25)=Z-Y$.

Therefore the section applies for either period, as they are the same.

Sub-case C. Y is greater than X by more than 25 years.

$X+25$ is less than Y .

$Z-Y$ is less than $Z-(X+25)$.

Therefore the section applies for the period $Z-Y$.

Case II. Y is greater than X by 50 years or more.

Then Z equals or is greater than $X+50$ and $Z=Y$.

$Z-Y$ is less than $Z-(X+25)$.

Therefore the section applies for the period $Z-Y$, which in fact is non-existent, since $Z=Y$.

The above cases may be applied to works in which there was copyright on Dec. 16, 1911, by substituting 30 for 25.

Post-
humous
works.

Where a literary, dramatic, or musical work, or an engraving is posthumous (*v*), the date of publication or performance, or delivery in public, is to be treated as the date of the death of the author for the purpose of the above provision (*x*).

Payment
of royal-
ties.

Difficulties may well arise under the above provision as to the payment of royalties in the case of 'collective' works (*y*), where the copyright is not all owned by one person, or in the case of partial assignments or grants of interest, where the assignee becomes owner of the

(*v*) See p. 45 *ante*.

(*x*) Copyright Act, 1911, s. 17 (1). p. 216 *post*.

(*y*) See p. 58 *post*.

copyright for the purpose of the portion assigned or interest granted to him (z), and also in the case of works of joint authorship. These may be in part removed by the Board of Trade regulations, but one would think that they were matters which ought to have been dealt with specifically in the Act.

At any time after the death of the author (or in the case of a work of joint authorship, after the death of the author who dies last (a)) of a literary, dramatic, or musical work which has been published or performed in public, a complaint may be made to the Judicial Committee of the Privy Council that the owner of the copyright has refused to republish or to allow the republication of the work, or to allow the performance of it in public, and that by reason of such refusal the work is withheld from the public, and thereupon the owner of the copyright may be ordered to grant a licence to reproduce the work or perform it in public on such terms and subject to such conditions as the Judicial Committee may think fit (b).

It should be observed that this provision does not apply to artistic works, and if it was intended to apply to lectures, delivery should have been referred to as well as performance, as in other sections where lectures are dealt with (c).

The observations already made as to the difficulties which may arise in certain cases (d) may be taken to be repeated here. It seems remarkable that there should be power to grant a compulsory licence against the owner of a part of a copyright or of an interest in

(z) By s. 5 (3) of the Act.

(a) Copyright Act, s. 16 (1), p. 215 *post*, and see p. 44 *ante*.

(b) *Ibid.*, s. 4.

(c) See p. 137 *post*.

(d) p. 48 *ante*.

a copyright alone, or against the owner of the copyright in part of a 'collective work'. In the case of joint authorship, probably the authors are to be taken to own the copyright in combination (*e*), so that an order could only be made against them in combination and not singly.

(*e*) See p. 73 *post*.

CHAPTER VII

COPYRIGHT IN EXISTING WORKS

SUBSTITUTED RIGHTS

WHERE any person is immediately before the commencement of the Act entitled to any of the rights specified below in any work or to any interest in such a right, he is, as from that date, entitled to the substituted right specified below, or to the same interest in such substituted right, and to no other right or interest. Such substituted right subsists for the term for which it would have subsisted if the Act had been in force when the work was made and the work had been one entitled to copyright thereunder (*a*). General provision.

The provision applies to any person who is so entitled, whether as original owner, or by assignment, devolution, or otherwise.

Where immediately before the commencement of the Act any person was entitled to copyright in a literary or artistic work, or, where such a work was unpublished, to the common law right, if any, to restrain publication or other dealing with the work (*b*), he is entitled to copyright under the Act in the work (*c*). Literary and artistic works.

(*a*) Copyright Act, 1911, s. 24 (1), p. 222 *post*.

(*b*) Copyright in paintings, drawings, and photographs under the old law began when they were made, and not when they were published (Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 1, and see *Tuck & Sons v. Priester* (1887), 19 Q.B.D. 629), and therefore, even before publication, they were protected by copyright and not by common law right.

(*c*) Copyright Act, 1911, s. 24 (1), Sched. I, pp. 222, 234 *post*.

Articles in
periodicals.

In the case of an essay, article, or portion forming part of and first published in a review, magazine, or other periodical or work of a like nature, the above right is subject to the right of publishing the essay, article, or portion in a separate form reverting to the author after the term of twenty-eight years from its first publication, or any such right of separate publication reserved to the author by any contract, express or implied (*d*).

Musical
and dramatic
works.

(1) Where, immediately before the commencement of the Act, any person was entitled to both copyright and performing right in a musical or dramatic work (terms which include, in the case of an unpublished work, the common law right, if any, to restrain publication or other dealing with the work or the public performance thereof respectively), he is entitled to copyright under the Act, subject to the reservation of the right of separate publication in the case of essays, articles, or portions forming part of and first published in a review, magazine, or other periodical or work of a like nature (*e*).

(2) If he was so entitled to copyright, but not to performing right, he becomes entitled to copyright under the Act, except the sole right to perform the work or any substantial part of it in public (*f*).

(3) If he was so entitled to performing right, but not to copyright, he becomes entitled to the sole right to

(*d*) Copyright Act, 1911, s. 24 (1), Sched. I. This right was given to the author by s. 18 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), now repealed, and is preserved by the Act of 1911 as above stated. The provision of that section, that the proprietor of the periodical shall not publish the article in separate form during the twenty-eight years without the consent of the author or his assignees, appears not to be preserved. The Act of 1911 uses the words 'other periodical or work' instead of the words 'other periodical works' of the Act of 1842.

(*e*) Copyright Act, 1911, s. 24 (1), Sched. I, pp. 222, 234 *post*; see *supra*.

(*f*) Copyright Act, 1911, s. 24 (1), Sched. I.

perform the work in public, but to none of the other rights comprised in copyright under the Act (*f*).

These provisions are subject, in the case of musical works, to certain special provisions with regard to mechanical contrivances (*g*).

DURATION OF RIGHTS

The term for which copyright subsists is the life of the author and a period of fifty years after his death (*h*). Term of copy-right.

A work in which copyright subsisted on December 16, 1911, may, at any time after the expiration of thirty years from the death of the author, be reproduced without infringement of copyright after the giving of a notice and the payment of a royalty of 10 per cent. on the published price, as prescribed by Board of Trade regulations (*i*). Reproduction after notice and payment of royalties.

EFFECT OF PRIOR ASSIGNMENT

If the author of any work, in which any of the specified rights (*k*) subsist at the commencement of the Act, or his legal personal representatives has or have, before that date, assigned the right or granted any interest therein for the whole term of the right, then, at the date when, but for the passing of the Act, the right would have expired, the specified substituted right (*l*) will pass to the author of the work or his legal personal representatives, in the absence of express agreement to the contrary, and any such interest created before the Assignment only extends to original term.

(*f*) Copyright Act, 1911, s. 24 (1), Sched. I.

(*g*) See p. 61 *post*.

(*h*) Copyright Act, 1911, s. 3. See p. 44 *ante*.

(*i*) Ibid. This provision has been dealt with, p. 46 *ante*. The period is thirty years in this case, as against twenty-five years in the case of other works.

(*k*) See p. 51 *ante*.

(*l*) See *ibid*.

commencement of the Act and then subsisting will determine, subject to the conditions mentioned below (*m*).

The effect of this provision is to limit the extent of assignments or grants of interest to the duration of the term of copyright conferred by the old law, so that the remainder of the much longer term conferred by the Act of 1911 belongs to the author or his legal personal representatives, subject to the provisions which are set out hereafter.

This effect is prevented if there is an express agreement to the contrary. It does not appear that such an agreement need have been made after the commencement of the Act. An agreement, for instance, to assign or grant an interest in a copyright for the subsisting term or any greater term which might be conferred by statute would satisfy the phrase 'express agreement', whenever it was made.

An author may therefore contract himself out of the benefit of this clause by an express agreement, subject to the provision which nullifies all assignments or grants of interest by authors, who are the first owners of copyright, otherwise than by will, so far as they extend more than twenty-five years after the author's death (*n*).

Assign-
ments and
grants
made be-
tween the
passing
and the
com-
mence-
ment of
the Act.

This last provision applies to assignments and grants made after the passing of the Act, i.e. December 16, 1911, but the present provision applies to assignments and grants made before the commencement of the Act, a very different date. What is the position with regard to assignments and grants made between the passing of the Act and its commencement in cases where the original term of copyright extends more than twenty-

(*m*) Copyright Act, 1911, s. 24 (1), (2), pp. 222, 224 *post*.

(*n*) *Ibid.*, s. 5 (2); see p. 95 *post*.

five years beyond the author's death? Take, for instance, a literary work published in 1905, the author of which died in 1912. Copyright under the old law would last till 1947; under the Act of 1911 it would last till 1962. Suppose that the author assigned the whole of the copyright on December 18, 1911. The assignment, on the one hand, by s. 5 (2) of that Act, would only carry copyright till 1937, and thereupon the copyright would revert to the legal personal representatives of the author, subject to none of the provisos to s. 24 (1). Section 24 (1), on the other hand, states that 'at the date when, but for the passing of this Act, the right would have expired,' i.e. 1947, the balance of the term passes to the author's legal personal representatives, subject to those provisos. But it has already gone to them, subject to no such provisos, in 1937. Is the result that they hold it subject to no provisos for ten years, and then the provisos attach, or do the provisos never attach at all?

Probably the solution is that an assignment or grant made after the passing of the Act, and therefore subject to the limitation imposed by s. 5 (2), is not an assignment or grant 'for the whole term of the right' as contemplated by s. 24 (1), even though it purports to be so, and therefore the provisions of s. 24 (1) do not come into operation.

The person who, immediately before the date at which the right would have expired, but for the passing of the Act, was the owner of such right or interest, is entitled :

Provisions
in favour
of prior
assignees
and
grantees.

(1) On giving the notice mentioned below (o), to an assignment of the right or the grant of a similar interest therein for the remainder of the term of the

(o) See p. 57 *post*.

right for such consideration as, failing agreement, may be determined by arbitration ;

(2) Without any such assignment or grant, to continue to reproduce or perform the work in like manner as theretofore, subject to the payment, if demanded by the author or his legal personal representatives within three years after the date at which the right would have expired but for the passing of the Act, of such royalties to the author or his legal personal representatives as, failing agreement, may be determined by arbitration, except in the case of a ' collective work ', which is the subject of a special provision (*p*).

The prior assignee or grantee of the right or interest may therefore either give the prescribed notice and obtain an assignment or grant covering the remainder of the extended term of copyright on arbitration terms, or he may merely continue to reproduce or perform the work in like manner as theretofore, paying a royalty on arbitration terms, if it be demanded within three years, except in the case of a ' collective work '.

Meaning
of ' in like
manner as
thereto-
fore '.

The words ' in like manner as theretofore ' probably must not be interpreted very strictly as meaning in exactly the same way as that in which the rights under the assignment or grant have been previously exercised ; they more probably mean that the assignee or grantee is entitled to go on exercising such rights as he possessed under the assignment or grant, though not necessarily in precisely the same way as that in which he has in fact previously exercised them. Thus, it would seem, if the assignment or grant gave him power to bring out new and altered editions of a work, he will be entitled to go on doing so, pretty clearly in a case

(*p*) Copyright Act, 1911, s. 24 (1), (2), pp. 222, 224 *post*. As to ' collective ' works, see p. 58 *post*.

where he has previously in fact brought out new and altered editions, and perhaps also where he has not in fact done so but has had power under his assignment or grant to do so. It is more difficult to say whether any special terms provided in the original agreement or grant, on which such new and altered editions were to be brought out, would still apply, or whether the matter is left at large and the parties must agree or have recourse to arbitration under the provision now under discussion for the ascertainment of the terms. One is inclined to think, in view of the scheme of the section, that the latter is the correct view.

The terms of an agreement which were not dependent on the fact that a copyright or an interest in it was or was not vested in any particular person would presumably remain unaffected by the operation of the provisions which have just been discussed.

Notice under the above provision must be given not more than one year nor less than six months before the date at which the right would have expired, if the Act had not been passed, and must be sent by registered post to the author or his legal personal representatives, or, if he or they cannot with reasonable diligence be found, advertised in the *London Gazette* and in two London newspapers (*q*). Manner of giving notice.

If the right would have expired less than six months after the commencement of the Act, it would appear in strictness to be impossible to give notice at all, and the Act ought to have made provision for this. But it would be as well, in such cases, if there is time to do so after the passing of the Act, to give notice, for what it is worth, more than six months before the expiration of the original term.

(*q*) Copyright Act, 1911, s. 24 (1), (2), pp. 222, 224 *post*.

'Collective'
works.

Where the work, with which the above provisions have dealt, is incorporated in a 'collective work' and the owner of the right or interest is the proprietor of that collective work, he is entitled to give the prescribed notice and obtain an assignment or grant on arbitration terms, or to continue to reproduce or perform the work without any such assignment or grant and without any payment (*r*).

The latter and most advantageous course is that which he will naturally adopt. The word 'proprietor' is not defined in the Act, and appears to have been inartistically introduced from the old law, where it was often used as synonymous with 'owner' in regard to copyright. It appears to mean, in the present context, a person who is entitled to deal at will with the copyright in all the portions of the collective work, not necessarily by assignment but by grant or arrangement with the owners of the copyright in such portions (*s*).

'Collective work' is defined as '(i) an encyclopaedia, dictionary, year-book, or similar work; (ii) a newspaper, review, magazine, or similar periodical; and (iii) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated' (*t*).

The two first heads of this definition perhaps need no comment. The last head bears evident signs of conflation. The second half of it includes everything which

(*r*) Copyright Act, 1911, s. 24 (1), p. 223 *post*.

(*s*) Compare Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 18, now repealed; *Trade Auxiliary Co. v. Middlesborough District Tradesmen's Protection Association* (1889), 40 Ch.D. 425; *Cate v. Deron and Exeter Constitutional Newspaper Co.* (1889), *ibid.*, 500; *Liverpool General Brokers' Association, Ltd. v. Commercial Press Telegram Bureaux, Ld.*, [1897] 2 Q.B. 1.

(*t*) Copyright Act, 1911, s. 35 (1).

can possibly fall under the first half, and the first half is therefore unnecessary. It covers any work in which the works or parts of works of different authors are incorporated, whether such works are *eiusdem generis* or not; that is to say, a work combined of one or more literary, dramatic, musical, or artistic works in any permutation or combination, so long as they, or any of them, are by more than one author, is a collective work. It matters not whether the works are distinct or not distinct, or whether they are written contemporaneously or in collaboration or not. Thus works of joint authorship (*u*) are collective works. To take examples, a novel by A with a frontispiece by B is a collective work; a hymn written by Y and provided with a tune by Z is a collective work; so is a play by A provided with a prologue or stage-directions by B or an interpolated song by C; and so is a picture by A provided with a motto by X. In cases, too, where a work of a certain class (*v*) is made to order for valuable consideration or a work is made under a contract of service and apprenticeship, although the person ordering or the employer is the first owner of the copyright, the person who made it is still the author (*x*). Therefore, a book by E with an index by F, who is a paid servant in the employ of the publisher, is a collective work. It is probable that such results as these were not contemplated by the Legislature, but they seem to follow from the definition.

The case where one author's work is subject to copyright and the other's is not is not so clear. It is specifically provided in the case of works of joint authorship that the work of the latter author is to be

(*u*) Defined Copyright Act, 1911, s. 16 (3); see p. 73 *post*.

(*v*) See p. 73 *post*.

(*x*) See p. 80 *post*.

disregarded except for the purpose of the duration of copyright (*y*), but there is no similar provision here, and the natural conclusion is that in the present case it is not to be disregarded. To support the opposite view, it must be contended that 'author' means the author of a copyright work, but there is no definition of 'author' in the Act.

If this view is right, a non-copyright text of Homer edited by A would be a collective work, and A would be entitled to no payment under this section, a remarkable result. There can be no doubt, however, in any case that a text of Homer, edited or provided with an *apparatus criticus* by A, and provided with notes by B, is a collective work, since an edited text of a non-copyright work may be the subject of copyright (*z*). An anthology of non-copyright work, edited by A, would be either a collective work or a work by A alone, according to the opinion held on the question raised above.

In the case of a work in a series of volumes, each of which was written by a single author, it would seem that the work must be regarded as a whole and not by taking each volume separately, and that, therefore, it is a collective work.

Compensation for expenditure incurred before July 26, 1910.

Where any person has, before July 26, 1910, taken any action whereby he has incurred any expenditure or liability in connexion with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or with a view to the reproduction or performance of a work at a time when such reproduction or performance would, but for the passing of the Act, have been lawful, nothing in the above provisions is to diminish or prejudice any rights

(*y*) See p. 73 *post*.

(*z*) See p. 5 *ante*.

or interests arising from or in connexion with such action which 'are' subsisting and valuable at the said date, unless the person, who by virtue of the above provisions becomes entitled to restrain such reproduction or performance, agrees to pay such compensation as, failing agreement, may be determined by arbitration (*a*).

The word 'are' should apparently be 'were', as 'the said date' must mean July 26, 1910. It would seem as though the present tense had been introduced through the subsection having been drafted before that date. The date, one would think, ought to have been fixed later, not long, if at all, before the passing of the Act.

The meaning of the provision is that where expense or liability has been incurred on the faith of a copyright terminating at the date fixed by the old law, the person benefiting by the extension of the term shall compensate the person damnified before he is entitled to enjoy his new advantages.

MECHANICAL CONTRIVANCES

Any person may make, within the parts of the King's dominions to which the Act extends, records, perforated rolls, or other contrivances for the performance of a musical work published before the commencement of the Act. The term 'musical work' for this purpose includes any words so closely associated therewith as to form part of the same work, but not a contrivance by means of which sounds may be mechanically reproduced (*b*). The exercise of this right is subject to the following conditions :

Right to make records and rolls of existing published music.

(*a*) Copyright Act, 1911, s. 24 (1), p. 223 *post*.

(*b*) Ibid. s. 19 (2), (7).

Notice
and pay-
ment of
royalties.

He must have given notice of his intention to make the contrivances in manner prescribed by Board of Trade regulations, and must have paid in the manner so prescribed, to or for the benefit of the owner of the copyright in the work, royalties in respect of all such contrivances sold by him. Such royalties are to be at the rate of $2\frac{1}{2}$ per cent. on the ordinary retail selling price of the contrivance (*b*). No royalties are payable in respect of contrivances sold before July 1, 1913, if contrivances reproducing the same work had been lawfully made or placed on sale within the parts of the King's dominions to which the Act extends before July 1, 1910 (*c*). Subject to the above differences, the provisions as to the assessment and payment of royalties are the same as those enacted in the case of mechanical contrivances for the performance of musical works published after the commencement of the Act (*d*).

Non-effect
of assign-
ments be-
fore De-
cember 16,
1911.

Notwithstanding any assignment made before December 16, 1911, of the copyright in a musical work published before the commencement of the Act, the right conferred by the Act in respect of the making or authorizing the making of such mechanical contrivances belongs to the author or his legal personal representatives and not to the assignee, and the royalties are payable to and for the benefit of the author or his legal personal representatives (*e*).

Expendi-
ture or
liability
already
incurred.

The provisions as to compensation for expenditure or liability incurred before July 26, 1910 (*f*), are not to be construed as authorizing any person who has

(*b*) Copyright Act, 1911, s. 19 (2), (3), (7), pp. 217, 218, 219 *post*.

(*c*) Copyright Act, 1911, s. 19 (7) (*b*), p. 220 *post*.

(*d*) Ibid. See p. 131 *post*, where these provisions are dealt with.

(*e*) Copyright Act, 1911, s. 19 (7) (*c*), p. 220 *post*.

(*f*) See p. 60 *ante*.

made such mechanical contrivances to sell any of them, whether made before or after December 16, 1911, except on the terms and subject to the conditions laid down above (*g*).

Where such a mechanical contrivance was made before the commencement of the Act, copyright, as from the commencement of the Act, subsists therein in like manner and for the like term as if the Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived. The person who, at the commencement of the Act, was the owner of such original plate is the first owner of the copyright (*h*).

Mechanical contrivances existing before the commencement of the Act.

No copyright, however, is conferred on any such contrivance by this provision where the making thereof would have infringed copyright in some other such contrivance, if the provision had been in force at the time of such making (*h*).

Where the work is a work on which copyright is conferred by an Order in Council relating to a foreign country, the copyright so conferred shall not, except to such an extent as may be provided by the Order, include any rights with respect to the making of such mechanical contrivances (*i*).

Foreign works.

CROWN COPYRIGHT

The provisions of the Act as to works prepared or published by or under the direction or control of the Crown or a Government department are expressed to be without prejudice to any rights or privileges of

Saving of Crown rights.

(*g*) Copyright Act, 1911, s. 19 (7) (*d*), p. 220 *post*.

(*h*) Copyright Act, 1911, s. 19 (8), p. 221 *post*. For the definition of 'plate', see *ibid.*, s. 35 (1), p. 230 *post*.

(*i*) *Ibid.*, s. 19 (7) (*e*), p. 220 *post*.

the Crown, and therefore it would seem that the Crown's rights in certain existing works remain unaffected (*k*).

UNIVERSITY AND MEDICAL COPYRIGHT

University copyright. University copyright is specially excepted from the provisions with regard to existing works (*l*); it is therefore unaffected by them, and continues to exist subject to the limitations imposed elsewhere in the Act of 1911 (*m*).

Medical copyright. The sole right to publish the *British Pharmacopoeia* (*n*) is not referred to in the Act of 1911, but inasmuch as the specific statute, under which it exists, is not repealed or affected, it must, apparently, be taken that the general statute does not cut it down, in accordance with the maxim *generalia specialibus non derogant* (*o*).

INTERNATIONAL COPYRIGHT

Modifications may be made by Order in Council. An Order in Council made for the purposes of international copyright (*p*), in applying the provisions of the Act as to existing works, may make such modifications as appear necessary (*q*).

(*k*) Copyright Act, 1911, s. 18. See p. 67 *post*.

(*l*) Copyright Act, 1911, s. 24 (3), p. 224 *post*.

(*m*) See p. 69 *post*.

(*n*) See p. 70 *post*.

(*o*) *Kutner v. Phillips*, [1891] 2 Q.B. 267, at p. 272.

(*p*) See p. 186 *post*.

(*q*) Copyright Act, 1911, s. 29 (1), p. 227 *post*.

CHAPTER VIII

CROWN COPYRIGHT

WHERE a work, whether before or after the com-^{Crown}mencement of the Act, has been prepared or published by^{copyright.} or under the direction of the Crown or any Government department, the copyright, subject to any agreement with the author, belongs to the Crown, and continues for a period of fifty years from the date of the first publication of the work (*a*). This provision is without prejudice to any rights or privileges of the Crown (*a*).

The words of this provision appear to be wide enough to cover the cases of plates or other originals of engravings, photographs, and portraits ordered and made for valuable consideration, and also of works made under a contract of service or apprenticeship (*b*), and consequently it would appear that, in the case of the Crown, the term of copyright in such cases is only fifty years and not the life of the author and fifty years. Possibly, however, it might be argued that the proviso as to Crown rights and privileges would enable the Crown to claim the larger term in such cases, on the ground that it, like a subject, could acquire copyright under the ordinary provisions of the Act, if it preferred it. The Crown's rights in existing works would appear to be unaffected by the Act (*c*), including the right reserved to the Admiralty to publish the Nautical Almanac or

(*a*) Copyright Act, 1911, s. 18, p. 217 *post*.

(*b*) See pp. 77, 80 *post*.

(*c*) See p. 63 *ante*.

other tables to facilitate the discovery of the longitude at sea (*d*).

Permis-
sion to
reproduce
Govern-
ment pub-
lications.

The Treasury issued a Minute on August 31, 1887, stating which species of Government publications the Crown would allow to be reproduced without restriction. These included Reports of Royal Commissions and Parliamentary Committees, papers required by statute to be laid before Parliament, command papers, Acts of Parliament, and official books, such as the King's Regulations for the Army or Navy. Reproductions of these, however, must not be stated to be published by authority, when not published by the Government. The reproduction of literary or quasi-literary works (*e*), or of charts and ordnance maps, is not allowed. No doubt the policy expressed in this Minute will still be followed.

Judges'
judg-
ments.

It is not quite clear whether a judge's judgment, whether written or oral, can be said to be a work prepared or published by or under the direction of the Crown or any Government department. The actual words might cover it, but the intention of the provision does not seem to be directed to such a work.

Perhaps a judge might be regarded as under a contract of service with the Crown. Judges of the High Court in England are paid and their hours of duty are more or less controlled by the Crown, and they are dismissed by the Crown, though only upon an address by both Houses of Parliament. This last fact does not seem to put them in the same category as the dispensary doctor who, being employed by guardians and removable by the Local Government Board for

(*d*) Nautical Almanack Act, 1828 (9 Geo. IV, c. 66), s. 2.

(*e*) As to narrative of a voyage of discovery published by the Crown, see *Nicol v. Stockdale* (1785), 3 Swan. 687.

Ireland (*f*), was held not to be under a contract of service. However, it seems scarcely reasonable to regard judges as being under a contract of service, and perhaps they fall rather within the class described by Buckley L.J. (*g*) as exercising their skill to attain an indicated result, even though they do so at more or less fixed times and in fixed places and for a salary.

The ancient rights which the Crown from time to time asserted, and which included a complete control over printing (*h*), are not a useful subject of discussion at the present day, but they are still of practical importance in connexion with the Authorized Version of the Bible and the Book of Common Prayer (*i*). Bible and
Prayer
Book.

That the Crown had the sole right to publish the Book of Common Prayer was held to have been settled at a early date (*k*).

The sole right with regard to the Bible only extends to the Authorized Version, apparently, and does not cover the versions which that version superseded, versions of the Bible in the original tongues or in other translations in foreign languages or in English, or paraphrases in verse or otherwise (*l*).

Various reasons have been given by the Courts for

(*f*) *Murphy v. Enniscorthy Guardians*, [1908] 2 I.R. 609.

(*g*) In *Simmons v. Heath Laundry Co.*, [1910] 1 K.B. 543, at p. 553, see p. 81 *post*.

(*h*) See 6 Bac. Abr. Prerog. F. 5 (ed. 7, p. 506); *Millar v. Taylor* (1769), 4 Burr. 2303, at p. 2311.

(*i*) Perhaps the King has also the sole right to print Acts of Parliament (see *Basket v. Cambridge University* (1758), 1 W.Bl. 105; *Baskett v. Cunningham* (1762), *ibid.*, 370), but this is now of small importance, as no objection is taken by the Crown to their reproduction by private persons.

(*k*) *Millar v. Taylor* (1769), 4 Burr. 2303, at pp. 2329, 2381; *Stationers' Co. v. Carnan* (1775), 2 W.Bl. 1004.

(*l*) Compare *Millar v. Taylor* (1769), *ubi supra*, at p. 2405.

this exclusive right, some plausible and some not, but the principle seems to be well settled, and, as long as Christianity remains the official religion of the country, the appropriateness of it is so obvious that it is not likely to be successfully contested.

The Crown has from time to time granted out the right of printing these works to the King's Printer (*m*). In 8 Car. I, it seems, a patent was granted to the University of Oxford (*n*). This patent was a continuation of earlier patents, and similar patents were granted to the University of Cambridge (*o*). A grant was also made to the King's Printer in Scotland (now a Board) of the right of printing Bibles and Prayer Books for that country (*p*). A similar grant appears to have been made for Ireland (*q*).

(*m*) *Eyre v. Carnan* (1781), 6 Bac. Abr. Prerog. F. 5 (ed. 7, p. 509); *In re Red Letter New Testament (Authorized Version)* (1900), 17 T.L.R. 1.

(*n*) *Hills v. Oxford University* (1684), 1 Vern. 275.

(*o*) *See Basket v. Cambridge University* (1758), 1 W.Bl. 105.

(*p*) *Oxford and Cambridge Universities v. Richardson* (1802), 6 Ves. 689; *Manners v. Blair* (1828), 3 Bli. (N.S.) 391.

(*q*) *Grierson v. Jackson* (1794), Ridg. L. & S. 304.

CHAPTER IX

UNIVERSITY AND MEDICAL COPYRIGHT

THE Copyright Act, 1911, preserves to the Uni-^{University}versities of Oxford, Cambridge, St. Andrews, Glasgow,^{copyright.} Aberdeen, and Edinburgh, and the Colleges of Winchester, Eton, and Westminster, any copyright which they already possess under the Copyright Act, 1775 (*a*), but provides that the remedies and penalties for infringement of any such copyright are to be under the Act of 1911 and not under the Act of 1775 (*b*).

It will be observed that the power of acquiring any further copyrights under the Act of 1775 is taken away, inasmuch as the Act of 1911 repeals the Act of 1775 altogether (*c*).

In fact the Universities of Oxford and Cambridge alone have acquired any rights, which still subsist, under the Act of 1775. They enjoy the sole liberty of printing and reprinting the books in which they possessed such rights on December 16, 1911 (for so the word 'already' must apparently be interpreted), in perpetuity, except where any of such books have been

(*a*) 15 Geo. III. c. 53. This was not the beginning of University copyright; see *Millar v. Taylor* (1769), 4 Burr. 2303, at pp. 2351, 2388.

(*b*) Copyright Act, 1911, s. 33, p. 229 *post*.

(*c*) Ibid., s. 36, Sched. II. The Act of 1775 was extended to Trinity College, Dublin, by the statute 41 Geo. III. c. 107, which was repealed by s. 1 of the Copyright Act, 1842 (5 & 6 Vict. c. 45), any rights under it being preserved by s. 27 of the same Act; but no such rights were ever acquired.

bequeathed or given to them for any term of years or other limited term. Such exclusive right of printing and reprinting, however, only subsists so long as the books or copies belonging to the Universities are printed only at their own printing presses within the Universities and for their sole benefit and advantage. If they grant or sell, as they have power to do, their exclusive right, or any part thereof, or allow any person or body to print or reprint any of such books, their exclusive right becomes void (*d*), presumably only in respect of the book, the exclusive right in which is sold or granted, though the Act is not at all clear on this point. In case of infringement, the offender can now be proceeded against civilly or for penalties only under the Act of 1911 (*e*).

Medical
copyright.

The Medical Council Act, 1862, (*f*), s. 2, gives the General Council of Medical Education and Registration of the United Kingdom 'the exclusive right of publishing, printing, and selling the *British Pharmacopoeia*, but the Treasury may from time to time fix the price at which copies are to be sold to the public'.

This exclusive right is not specifically preserved by s. 24 (3) of the Copyright Act, 1911, as University copyright is preserved, but, as there is no repeal of the Act under which it subsists, it must be taken to be preserved (*g*).

(*d*) Copyright Act, 1775 (15 Geo. III. c. 53), ss. 1, 3.

(*e*) Copyright Act, 1911, s. 33.

(*f*) 25 & 26 Vict. c. 91.

(*g*) See also p. 64 *ante*.

CHAPTER X

OWNERSHIP AND DEVOLUTION OF COPYRIGHT

OWNERSHIP

THE author of a work is the first owner of the copy-
right therein, except in the cases specified in the pro-
visions set out below (a). The author of an original
literary, dramatic, musical, or artistic work, therefore,
possesses the copyright therein, whoever be the owner
of the work itself, except in the cases hereinafter men-
tioned, and unless and so far as there has been an
assignment in writing (b).

Author of
a work
generally
first owner
of copy-
right.

Thus, for instance, the purchaser of an artistic work,
unless it is an engraving, photograph, or portrait made
for valuable consideration in pursuance of an order (c),
or has been made by some one under a contract of
service or apprenticeship with him (d), does not own
the copyright in it, although he owns the actual artistic
work. If he wishes to do so, he must obtain a written
assignment of the copyright. This is an important
change from the previous law (e). Under it, when a
painting or drawing or negative of a photograph was
sold or disposed of, the person selling or disposing of
it did not retain the copyright unless it was expressly
reserved to him by agreement in writing, signed at or

Owner-
ship of
copyright
in
artistic
works.

(a) Copyright Act, 1911, s. 5 (1), p. 208 *post*.

(b) See pp. 89, 94 *post*.

(c) See p. 77 *post*.

(d) See p. 80 *post*.

(e) Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 1,
now repealed.

before the time of the sale or disposition, by the vendee or assignee (*f*). Now it remains in the vendor, unless he assigns it in writing.

Meaning of 'author'. The term 'author', which is not defined, appears not to include a person who merely suggests the idea of a work, but means the person who actually creates it (*g*). Whether it includes a person who produces it mechanically, as opposed to the person who really invents it, is not so clear. The section regards a person who makes a work under a contract of service or apprenticeship as being the 'author' of the work (*h*), but it does not necessarily follow from this that such a person who merely carries out mechanically something invented by another is the 'author'. On the other hand, a work is no less 'original', as against the world, because it is brought into being by a person who did not originally invent it, so long as such person has not brought it into being himself. But probably it would be held that the author of a work is the person who is really entitled to the credit of its invention, whoever may have carried out its mechanical production (*i*). .

Assignees. An assignment in writing of a copyright by the owner makes the assignee the owner of the copyright to the extent of the assignment (*k*). Where the assignment

(*f*) See *Levi v. Champion & Co., Ltd.* (1887), 3 T.L.R. 286; *Geissendörfer v. Mendelssohn* (1896), 13 T.L.R. 91.

(*g*) See *Nottage v. Jackson* (1883), 11 Q.B.D. 627; *Kenrick & Co. v. Lawrence & Co.* (1899), 25 Q.B.D. 99, at p. 106; *Tate v. Fullbrook*, [1908] 1 K.B. 821, at pp. 825, 826, per Vaughan Williams L.J.

(*h*) See p. 80 *post*.

(*i*) See *Barfield v. Nicholson* (1824), 2 L.J. (O.S.) Ch. 90, at p. 102; also reported 2 S. & S. 1; *Newton v. Cowie* (1827), 4 Bing. 234 (engraving); *Stannard v. Harrison* (1871), 24 L.T. 570; *Kenrick & Co. v. Lawrence & Co.* (1890), *ubi supra*.

(*k*) This seems to follow from the Copyright Act, 1911, s. 5 (2) p. 208 *post*. See p. 89 *post*.

is only partial, the assignee becomes the owner as respects the right in the copyright assigned, and the assignee remains the owner as respects the rights not assigned (*l*).

Where the authorship is joint, i. e. where a work is produced by the collaboration of two or more authors, and the contribution of one author is not distinct from that of the other author or authors, it is not stated by the statute what the exact tenure of the joint authors, who are each first owners of the copyright, is ; but it is specially provided that, in such a case, where some one or more of the joint authors does or do not satisfy the conditions conferring copyright laid down by the Act, the work is to be treated for the purposes of the Act (except as to the term of copyright) as if the other author or authors had been the sole author or authors of it. Where a married woman and her husband are joint authors of a work, the interest of the married woman in it is her separate property (*m*).

The qualification that the contribution of one author must not be distinct from that of the other author or authors means that it must not be distinguished in any way in the work itself, not that it cannot be distinguished by expert examination. Those of the plays included in the collection called by the names of Beaumont and Fletcher, which were written by Beaumont and Fletcher jointly, are a good instance of joint authorship, though an experienced reader can detect approximately which portions are to be attributed to one author and which to the other. The books of the Hexateuch would provide another instance, though

(*l*) Copyright Act, 1911, s. 5 (3), p. 209 *post*.

(*m*) Ibid., s. 16 (2), (3), (4), pp. 215, 216 *post*.

experts can separate J, E, P, and subordinate texts which are conflated in them, if it were not that in their case there was presumably no 'collaboration', since 'collaboration' seems to imply a preconcerted joint design and does not include a suggestion made by A on which B works, or a subsequent alteration or correction of B's work by A (n).

The question of the tenure of the joint authors is not quite easy of solution. Each of them must be regarded as the first owner of the copyright in something, whatever it may be, but *ex hypothesi* the contribution of each of them is not distinguished from that of the others. It has been held that the registered assignees of undivided moieties respectively of a dramatic work were 'tenants in common or part-owners', and that one could not deal with the whole work without the consent of the other (o). This decision does not seem to be applicable to joint authorship under the present statute. The Dramatic Copyright Act, 1833 (p), s. 1, had a specific provision with regard to survivors, which would have enabled a survivor to sue (q), but there is nothing of the sort in the Act of 1911, and equity, at any rate, leans against the existence of joint ownership, which includes the right of survivorship (r). On the other hand, the contributions of the authors being indistinguishable, it seems clear that each of them cannot own the copyright in any particular portion of the work. The position therefore seems to be that the authors

(n) See *Levy v. Rutley* (1871), L.R. 6 C.P. 523 · *Shelley v. Ross* (1871), *ibid.*, 531 n.

(o) *Powell v. Head* (1879), 12 Ch.D. 686, followed in *Lauri v. Renad*, [1892] 3 Ch. 402.

(p) 3 & 4 Will. IV, c. 15.

(q) See *Levy v. Rutley* (1871), L.R. 6 C.P. 523.

(r) *Partriche v. Powlet* (1740), 2 Atk. 54, at p. 55.

together own the copyright in the whole work ; so that one of them cannot deal with any part of it without the others, and that on the death of one of them his legal personal representatives take his place.

The person who owns the original plate (including any matrix or other appliance by which records, perforated rolls, or other contrivances for the acoustic representation of a work are or are intended to be made (s)), from which a record, perforated roll, or other contrivance by means of which sounds may be reproduced, is directly or indirectly derived, at the time when such plate is made, is to be deemed to be the author of such record, perforated roll, or other contrivance (t), and therefore the first owner of the copyright.

The Act does not explain what is to be the result, if appliances by which the record or roll are made do not all belong to the same person. The statement that the author is to be the person who owned the original plate at the time when it was made seems more suitable to a purely Irish statute. It is difficult to see how the plate could have an owner at all till after it was made (u).

Where such record, roll, or contrivance has been made before the commencement of the Act, the person who at such commencement is the owner of the original plate is to be the first owner of the copyright (x).

The person who owns the negative from which a photograph is directly or indirectly derived at the time

(s) Copyright Act, 1911, s. 35 (1).

(t) Ibid., s. 19 (1), p. 217 *post*.

(u) The provision recalls the tale of the traveller in the East who went on to the stage at a scriptural play, and found Adam standing behind the scenes waiting to be created.

(x) Copyright Act, 1911, s. 19 (8), p. 218 *post*.

when the negative is made is to be deemed to be the author of, and therefore the first owner of copyright in, the photograph (*y*), which includes photo-lithograph and any work produced by any process analogous to photography (*z*). This provision is intended to settle the difficulty as to who is the author of a photograph (*a*). It must be read subject to the provision as to photographs made to order for valuable consideration (*b*). The form of the words 'at the time when the negative is made' has already been criticized (*c*). Note that it is not the owner of the plate, either before or after exposure, but of the negative when it is made, who is the first owner of the copyright.

Unpub-
lished
manu-
scripts.

The owner, by a testamentary disposition made by an author, of the manuscript of a work, which has not been published or performed or delivered in public, is *prima facie* the owner of the copyright (*d*). Such ownership can, of course, under this provision, be rebutted. It merely relieves the owner of the manuscript in such cases from having to prove his title to the copyright, if it is not contested. Ownership by testamentary disposition covers the title of an executor, but not that of the administrator of an intestate's estate, and that of a legatee under a will, but not that of a person acquiring the manuscript *ab intestato*. The

(*y*) Copyright Act, 1911, s. 21, p. 221 *post*.

(*z*) *Ibid.*, s. 35 (1).

(*a*) See *Nottage v. Jackson* (1883), 11 Q.B.D. 627; *Wooderson v. Raphael Tuck & Sons*, [1887] W.N. 209; *Melville v. Mirror of Life Co.*, [1895] 2 Ch. 531. The suggestions as to who was the author included the person who operated the camera, the manager who directed him, and the company who employed the manager.

(*b*) p. 77 *post*.

(*c*) p. 75 *ante*.

(*d*) Copyright Act, 1911, s. 17 (2), p. 216 *post*.

bequest, it seems, may be residuary and need not be specific (e).

In the case of an engraving, photograph, or portrait, where the plate or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, then, in the absence of any agreement to the contrary, the person so ordering is the first owner of the copyright (f).

Engravings,
photo-
graphs,
and por-
traits
made to
order.

This proviso covers engravings and photographs, and also, it would appear, portraits produced by any medium whatever, and whether made in two or three dimensions. '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' (g). 'Engraving' includes 'etching, lithograph, woodcut, print, and any other similar work, not being a photograph' (g), and 'photograph' includes 'photo-lithograph and any work produced by any process analogous to photography' (g). An 'agreement to the contrary', which is necessary to prevent the operation of the provision, must, it would seem, be in writing, inasmuch as it will amount, if not to an assignment of the copyright, at least to the grant of an interest therein (h).

The provision will most frequently come into operation with respect to photographs, and its application will usually turn on the question what is 'valuable consideration'. In the ordinary transaction, where a customer visits a photographer and is photographed at his own request for payment, however small, there can be no doubt that the copyright belongs to the

(e) See also the discussion as to the publication of letters, p. 133 *post*.

(f) Copyright Act, 1911, s. 5 (1), p. 208 *post*.

(g) *Ibid.*, s. 35 (1), p. 230 *post*.

(h) See p. 89 *post*.

customer under this provision (i), and this is so whether the payment is actually agreed or there is an implied promise to pay (i).

It also seems reasonably clear, under the provision as it stands, that in the not uncommon case where a photographer, for his own purposes, invites a customer to be photographed *gratis*, the copyright belongs to the photographer, and this will be so, even though the customer subsequently orders and pays for copies for himself, and even though he gets such copies at a lower rate than he would have done if the original invitation that the photograph should be taken had emanated from himself and not from the photographer. In such a case the 'plate or other original' would not have been ordered by the customer, although the subsequent copies were (k). This would be so, *a fortiori*, if the sitter bought no copies, but was merely presented with some complimentary copies (l). Where, however, a photographer invited an actor to come to be photographed in character, and after the sitting asked him to be taken in plain clothes, and he subsequently paid for copies of the plain clothes photograph at a 'reprint' price (i.e. at the price of the copies without any price for the sitting), it was held that as to the plain clothes photograph the sitter had the copyright (m). It is not altogether easy to follow this decision, unless there

(i) *Boucas v. Cooke*, [1903] 2 K. B. 227 (photograph of 'the boy preacher').

(k) Thus *Crooke v. Scots Pictorial Co.* (1905), 13 S.L.T. 132, and *Stackemann v. Paton*, [1906] 1 Ch. 774, appear to be no longer law.

(l) *Ellis v. Horace Marshall & Son* (1895), 64 L.J.Q.B. 757, and see *Boucas v. Cooke*, [1903] 2 K.B. 227, and the comments therein on *Melville v. Mirror of Life Co.*, [1895] 2 Ch. 531. See also *Davis v. Baird* (1903), 37 I.L.T. 50, 518.

(m) *Ellis v. Ogden* (1894), 11 T.L.R. 50.

were special facts which are not properly stated in the report (*n*). Where the copyright is not in the photographer, he can also be restrained from reproduction, apart from copyright, on the ground of breach of confidence (*o*).

The subsection appears to regard ordering a photograph as meaning the same thing as ordering the negative, and in a general sense the two things must be equivalent. If the negative is regarded as ordered, then presumably it must vest in the person ordering, though the statute does not say so. The matter is of small importance during the pendency of the copyright, inasmuch as the photographer and any assignee of the negative would be unable to use it for reproductions, the copyright being in the person ordering, and would moreover be restrained, if it were necessary, on the ground of breach of confidence (*p*). Similar observations will apply to the ownership of plates for engraving, wood-blocks, and other media of reproduction of a like nature (*q*).

(*n*) Note that all these cases were decided on the words in s. 1 of the repealed Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), namely, 'made or executed for or on behalf of any other person for a good and valuable consideration', much wider and vaguer words than those of the present provision, which require the plate or other original to be ordered and to be made for valuable consideration in pursuance of the order. (o) See p. 170 *post*.

(*p*) As to breach of confidence, see p. 170 *post*. The above observations appear to follow the same lines as those made on the repealed law in *Boucas v. Cooke*, [1903] 2 K.B. 227, which disapproved of certain observations of Kekewich J. in *Melville v. Mirror of Life Co.*, [1895] 2 Ch. 531. It may perhaps be observed that an architect employed to do building work at an inclusive percentage is not entitled as against the building owner to the plans which he prepared in the course of his employment (*Gibbon v. Pease*, [1905] 1 K.B. 810).

(*q*) As to the property in such things under the old law, see *Hole v. Bradbury* (1879), 12 Ch.D. 886.

Copyright
where A
orders
from B
and B's
servant
makes the
work.

From a combination of this provision with that which follows (*r*), it may be that if A orders an engraving, photograph, or portrait from B, and B has it made by C under a contract of service or apprenticeship, the first ownership in the copyright vests in A rather than in B, since A has a sort of prior right in time, and on account, so to speak, of his control of the whole operation, to be the first owner of it, but a literal construction of the two provisions would make both A and B first owners, since the words 'in the absence of any agreement to the contrary' in each provision can only be taken to refer to that provision, i. e. as between A and B, and between B and C respectively.

Works
made
under
contracts
of service
or appren-
ticeship.

Where the author is in the employment of some other person under a contract of service or apprenticeship, and the work is made in the course of his employment by that person, such employer is, in the absence of any agreement to the contrary, the first owner of the copyright (*s*).

Meaning
of 'con-
tract of
service'.

Whether a person is or is not under a 'contract of service' must always be more or less a question of fact. 'I confess my inability to lay down any complete or satisfactory definition of the term contract of service' (*t*). 'It is a question of fact to be decided by all the circumstances of the case. The greater the amount of direct control exercised over the person rendering the services by the person contracting for them the stronger the grounds for holding it to be a contract of service; and, similarly, the greater the degree of independence of such control, the greater the

(*r*) *Infra*.

(*s*) Copyright Act, 1911, s. 5 (1). p. 208 *post*.

(*t*) *Simmons v. Heath Laundry Co.*, [1910] 1 K.B. 543, at p. 547, per Cozens-Hardy M.R. This was a case on the Workmen's Compensation Act, 1906 (6 Edw. VII, c. 58), Sched. I., where the term is employed.

probability that the services rendered are of the nature of professional services, and that the contract is not one of service. The place where the services are rendered, i. e. whether at the residence of the person rendering the services or not, will also be an element in deciding the case, but is not in my opinion decisive, nor is the question whether the services are rendered to a person in the way of business' (u). 'It is not, of course, every contract under which services are rendered that can be described as a contract of service. . . . A contract of service is one which necessarily involves the existence of a servant. A servant, said Bramwell L.J. (x), is 'a person subject to the command of his master as to the manner in which he shall do his work'. To distinguish between an independent contractor and a servant, the test is, says Crompton J. (y), 'whether the employer retains the power of controlling the work. Broadly stated, a contract of service does import that there exists in the person serving under the contract an obligation to obey the orders of the person served. A person employed to exercise his skill may or may not be a servant. . . . I do not know whether it is possible to approach more closely to an answer to the question as to what is a contract of service under this Act than to say that in each case the question to be asked is what was the man employed to do ; 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

(u) *Simmons v Heath Laundry Co.*, [1910] 1 K. B. 543, at pp. 549, 550, per Fletcher Moulton J.

(x) *Yewens v. Noakes* (1880), 6 Q.B.D. 530, at p. 532.

(y) *Sadler v. Henlock* (1855), 4 E. & B. 570, at p. 578.

ensure success ? Was his contract a contract of service within the meaning which an ordinary person would give to the words ? Was it a contract under which he would be appropriately described as the servant of the employer ? ' (2).

Judged by these criteria, and particularly by the concluding sentences of the judgment of Buckley L.J., it seems that the ordinary sort of agreement between an author and a publisher, whereby the former agrees to write a book for the latter, either for royalties or for the payment of a lump sum, is not a ' contract of service '. The author is not obeying the publisher's orders in the proper sense of the words, but he is employed to exercise his skill and achieve an indicated result in such manner as in his judgment is most suitable. The publisher indicates the result desired ; he does not control the author's work in the sense that he orders him what he is to do from time to time while the work is in progress.

On the other hand, even in the case of literary work, there are many cases in which there is a contract of service ; for instance, the case of such persons as writers, indexers, compilers, and revisers of various kinds, who are paid by salary or wages (an important element in deciding whether there is a contract of service, though not conclusive) and who work according to the constant directions of superiors. There may even be cases of ' contracts of service ' among persons employed to write in dictionaries or encyclopaedias. Dr. Johnson was not under a contract of service with his publishers for the production of his dictionary, but the various Scotsmen and others, whom he employed to assist him

(2) *Simmons v. Heath Laundry Co.*, [1910] 1 K.B. 543, at pp. 551-3, per Buckley L.J.

and whom he paid out of what he himself received, were no doubt under contracts of service with him.

A doubtful case would be that of a person who scored a musical composition under contract with the composer. Scoring a musical composition for orchestra is sometimes an exercise of skill, which could not be said to be carried out under the orders of a person who was too ignorant or too lazy or too much occupied to do it himself. On the other hand, it is, in many cases, a more or less mechanical re-embodiment of commonplace musical ideas ; and if the score displays no original skill but merely follows slavishly the directions of the composer, the employment may be regarded as merely a contract of service.

The carrying out of the more mechanical parts of the production of artistic works by employees is no doubt a making of them under a contract of service.

The provision may in some cases bear hardly on intelligent employees who have produced original and valuable works during their employment, but they can contract out of it.

The limitation of this provision to works made under a contract of service or apprenticeship, and the absence of any other provision dealing with works made on commission, other than engravings, photographs, and portraits, appears, on the principle *expressio unius est exclusio alterius* (a), to have abolished the effect of those decisions in which the copyright in works made on commission, but not under contract of service, was held to belong to the person giving the commission. Thus a musician, who had written original incidental music

Works
done on
commis-
sion
generally.

(a) This maxim may be 'a valuable servant, but a dangerous master' (*Colquhoun v. Brooks* (1888), 21 Q.B.D. 52, at p. 65, per Lopes L.J.), but in the present case its application seems to be clearly legitimate.

to a play, under a general engagement as musical director which included an obligation to write or adapt such music as was required, was held not to have the copyright in such music, but it was held to belong to his employer (*b*). He can scarcely be described as having been under a 'contract of service' for such a purpose as this. Under the present law he would be regarded as in the same position as the plaintiff who, though employed at a weekly salary, was held entitled to the copyright in the music of a Christmas ballet as against his employer, since it was not composed as part of his employment and there was no written assignment of the copyright to the employer (*c*); or as the author of *Old Joe and Young Joe*, a work which he had produced as the result of a journey paid for by other persons, but which he had not assigned to them (*d*). Where B, acting as agent for A, employs C to make a work under a contract of service or apprenticeship, presumably the first owner of the copyright is A and not B (*e*).

Law-
reporters.

It seems doubtful whether barrister law-reporters can be regarded as under a contract of service, though no doubt ordinary newspaper reporters of legal cases would be. The barrister law-reporter is left to choose cases at his own discretion and report them to the best

(*b*) *Hatton v. Kean* (1859), 7 C.B. (N.S.) 268, followed in the similar case of *Wallerstein v. Herbert* (1867), 16 L.T. 453. Compare also *Hildesheimer & Faulkner v. Dunn & Co.* (1891), 64 L.T. 452. Where a mason's manager was employed to compile a collection of monumental designs for an advertising catalogue, a work of great skill, his employer was held entitled to the copyright (*Grace v. Newman* (1875), L.R. 19 Eq. 623). Not so under the present law, if this employment was not part of his contract of service as manager.

(*c*) *Eaton v. Luke* (1888), 20 Q.B.D. 378.

(*d*) *Shepherd v. Conquest* (1856), 17 C.B. 427.

(*e*) *Stubbs, Ltd. v. Howard* (1845), 11 T.L.R. 507.

of his judgment, for which, no doubt, he is paid a salary, but he is not controlled during the course of his work, though, of course, his productions are subject to selection and correction by his editor (*f*).

It may be that a curate is under a contract of service with his rector or vicar, and that the copy-right in his sermons, for what it is worth, belongs to his employer, and the same may be the case with lecturers in certain circumstances. Curates
and
lecturers.

In any case of doubt a specific agreement as to the copyright should be made in writing (*g*).

Where a work has, whether before or after the commencement of the Act, been prepared or published by or under the direction or control of the Crown or any Government department, the copyright, subject to any agreement with the author, belongs to the Crown (*h*). Govern-
ment pub-
lications.

It was formerly the law that a proprietor of an encyclopaedia, review, or periodical, who had employed any person to compose it or any part of it on the terms that the copyright should belong to the proprietor, and who had paid for the composition, should enjoy the copyright as though he were the actual author, subject to certain limitations of term, and subject to a provision that the right of separate publication reverted to the author after twenty-eight years from publication, and that meanwhile the proprietor should not publish the composition separately without the consent of the actual author or his assigns. Power was also given to the actual author to reserve the right of separate publication to himself (*i*). Articles
in news-
papers
and peri-
odicals.

(*f*) *Sweet v. Benning* (1855), 16 C.B. 459, is therefore no longer law on this point.

(*g*) See p. 89 *post*.

(*h*) Copyright Act, 1911, s. 18, p. 217 *post*. This section is further discussed in the chapter on Crown Copyright, p. 65 *ante*.

(*i*) Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 18, repealed by the Copyright Act, 1911, s. 36, Sched. II. See also p. 52 *ante*.

There is no similar provision in the Copyright Act, 1911, and therefore the author of a portion of a periodical retains the copyright in what he has composed, subject to any assignment or any grant of interest in writing, unless he has composed it under a contract of service or apprenticeship. It is no longer the law, therefore, that a general inference of fact can be drawn to the effect that the copyright belongs to the proprietor of the publication for which the work was done (*k*).

Where an author, who is not working under a contract of service or apprenticeship, and who has not assigned his copyright, has composed a work for a particular periodical, it will not be lawful for the person for whom he has composed it to use it for republication elsewhere, even in another publication which is a colourable reproduction of that for which it was written (*l*).

Author's
right to
restrain
publica-
tion.

The rights of an author, if composing under a contract of service or apprenticeship, are still further protected, but only in the case of an article or other contribution to a newspaper, magazine, or similar periodical, by the provision that, in the absence of any agreement to the contrary, there shall be deemed to be a reservation to the author of a right to restrain the publication of his work otherwise than as part of a newspaper, magazine, or similar periodical (*m*).

This provision is unnecessary in cases where such

(*k*) As it was drawn in *Sweet v. Benning* (1855), 16 C.B. 459, and *Lawrence & Bullen, Ltd. v. Aflalo*, [1904] A.C. 17.

(*l*) Compare *Mayhew v. Maxwell* (1860), 1 J. & H. 312; and *Smith v. Johnson* (1863), 4 Giff. 632, cases on publishing 'in a separate form' under s. 18 of the repealed Copyright Act, 1842, but which contain a principle which is still applicable.

(*m*) Copyright Act, 1911, s. 5 (1), p. 208 *post*.

work was not done under a contract of service or apprenticeship, and most cases where the author would be likely to wish to restrain republication are such, since the author is the first owner of the copyright and has the undoubted right to restrain the publication of his work by any one, to whom he has not assigned the right of publication in writing, whether the work was done for an encyclopaedia or a periodical or otherwise (*n*).

In the case of such work when done under a contract of service or apprenticeship, the result of the provision is apparently to enable the author, in spite of the fact that his employer is the first owner of the copyright, to restrain him or any one else from reproducing the work in any form otherwise than in a newspaper, magazine, or similar periodical. There is nothing in it, however, to prevent the employer, as first owner of the copyright, from restraining publication in a newspaper, magazine, or similar periodical as well as in any other material form or language under the general provisions of the Act. If the provision was intended to have any wider application, the Legislature has failed to express it. It is not very obvious, moreover, why the author in such a case should not be empowered to restrain publication in a newspaper, magazine, or similar periodical other than one belonging to the employer for whom he has done the work. Such publication is precisely that which it is most essential that he should have power to restrain.

An Order in Council made for the purpose of international copyright (*o*), in applying the provisions of the Act as to ownership of copyright, may make such

(*n*) Compare *Bishop of Hereford v. Griffin* (1848), 16 Sim. 190; *Walter v. Howe* (1881), 17 Ch.D. 708; *Johnson v. George Newnes, Ltd.*, [1894] 3 Ch. 663.

(*o*) See p. 186 *post*.

Inter-
national
copyright.

modifications as appear necessary, regard being had to the law of the foreign country to which the Order relates (*p*).

DEVOLUTION

The repealed Copyright Act, 1842 (*q*), s. 25, provided that all copyright should be deemed personal property and should be transmissible by bequest, or in case of intestacy should be subject to the same law of distribution as other personal property, and in Scotland should be deemed to be personal and movable estate. There was a similar provision as to paintings, drawings, and photographs (*r*). No such statutory provision now exists, but no doubt copyright is still to be regarded as personalty. The Copyright Act, 1911, supports this view by its use of the term 'legal personal representatives' of an author (*s*). An agreement to compose a work is, of course, personal, and does not bind the author's executors (*t*).

As to 'joint authors', if the view already expressed is correct (*u*), there is no right of survivorship, and the interest of a deceased joint author passes to his legal personal representatives (*x*).

(*p*) Copyright Act, 1911, s. 29 (1).

(*q*) 5 & 6 Vict. c. 45.

(*r*) Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 3, now repealed.

(*s*) Copyright Act, 1911, ss. 5 (2), 19 (7) (*c*), 24 (2); executors and administrators in s. 35 (2).

(*t*) *Marshall v. Broadhurst* (1831), 1 Tyr. 349.

(*u*) See p. 74 *ante*.

(*x*) A right of survivorship was recognized under the old law in *Levy v. Rutley* (1871), L.R. 6 C.P. 523, and *Marzials v. Gibbons* (1874), L.R. 9 Ch. 518.

CHAPTER XI

ASSIGNMENT OF COPYRIGHT

THE owner of the copyright in any work may assign the right, either wholly or partially, and either generally or subject to limitations to the United Kingdom or any self-governing dominion (i. e. Canada, Australia, New Zealand, South Africa, and Newfoundland (*a*)) or other part of the King's dominions to which the Act extends, and either for the whole or any part of the term of the copyright, and may grant any interest in the right by licence (*b*). Assign-
ments and
grants of
interest.

No such assignment or grant is valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorized agent (*b*).

The question, which has been often discussed, whether a particular act in the law in respect of a copyright amounted to an assignment or was merely a grant of an interest, has lost some of its importance now that registration has been abolished (*c*). It will now only arise, to speak generally, where there has been a subsequent assignment, and it is a question whether that amounts to a complete assignment or whether it is diminished *pro tanto* by a previous act in the law which may or may not have been a partial assignment or a

(*a*) Copyright Act, 1911, s. 35 (1).

(*b*) Ibid., s. 5 (2), p. 208 *post*; and see p. 93 *post*.

(*c*) See, for instance, *In re Jude's Musical Compositions*, [1907] 1 Ch. 651, a case on registration; *Neilson v. Horniman* (1909), 26 T.L.R. 188.

mere licence (*d*) ; or where there is a question whether publishers, to whom the right has been granted, are entitled to assign their right without the author's consent or not. If the right amounts to an assignment, they are ; if it is merely a personal contract between the author and them, they are not (*e*). The principle applies whether the publishers are individuals or a firm, or whether they are a limited company (*f*). Similarly, a publisher's trustee in bankruptcy is not entitled to publish the work, unless there has been an assignment (*g*), but it is otherwise if there has been an assignment (*h*).

Publica-
tion in
altered
form by
assignee.

It has been suggested that the assignee of a copyright has the right to make what alterations he chooses when he publishes the work (*i*). It would certainly seem that the author would have no right to restrain this on the ground of copyright, since he has parted with all his right, but he might have a remedy if the altered work were attributed to him without qualification, and his reputation thereby suffered or were likely

(*d*) *London Printing and Publishing Alliance, Ltd., v. Cox*, [1891] 3 Ch. 291 ; compare *Sweet v. Cater* (1841), 11 Sim. 572 ; *Warne v. Routledge* (1874), L.R. Eq. 497 ; *Heap v. Hartley* (1889), 42 Ch.D. 461, a similar case as to a patent for an invention.

(*e*) *Stevens v. Benning* (1855), 6 D. M. & G. 223 ; *Reade v. Bentley* (1857), 3 K. & J. 271, (1858) 4 K. & J. 656 ; *Hole v. Bradbury* (1879), 12 Ch.D. 886.

(*f*) *Griffith v. Tower Publishing Co. Ltd.*, [1897] 1 Ch. 21.

(*g*) *Lucas v. Moncrieff* (1905), 21 T.L.R. 683. Compare *Gibson v. Carruthers* (1841), 8 M. & W. 321, at p. 343.

(*h*) *In re Grant Richards, Ex parte Warwick Deeping*, [1907] 2 K.B. 33. Here it was held that the author's proof was only to be for the damages caused by the breach of contract to pay his royalties, and not for the amount in full of the royalties, which would have been payable under his assignment of the copyright to the publisher. Compare *In re Curry, Ex parte Lever* (1848), 12 Ir.Eq.R. 382.

(*i*) See *Cox v. Cox* (1853), 11 Hare, 118, at pp. 125, 126.

to suffer. Thus the author of *Archbold*, by which he 'had deservedly acquired great gains in his profession', was held entitled to bring an action against a publisher who had brought out a new edition, edited by another person, without stating that it was so, and recovered £5 damages (*k*). When Mr. (now Sir) Sidney Lee sought an injunction to restrain the publication under his name of an altered form of his *Life of Lord Herbert of Cherbury*, Kekewich J. refused it, holding that the plaintiff's remedy was libel, but that, as it was not a trade libel, an injunction should not be granted (*l*). He said: 'There is no law compelling a man to publish the whole work because he has the copyright in the whole work, nor can he be prevented from publishing extracts from the work; whether it is right for him to publish extracts without saying that they are extracts, whether he can publish the work in a mutilated form without indicating in the text that the work has been mutilated, is a question to my mind of some difficulty, but the question resolves itself into this: Does he thereby injure the author's reputation? What is the author's remedy, his remedy in law? His remedy in law is, I think, undoubtedly libel or nothing' (*m*). If, then, an author wishes to prevent the publication of an altered version of his work, it will be safer for him, when assigning or granting an interest in the copyright, to obtain an undertaking that it will be published in its original form.

On similar principles, if he wishes to ensure that his work will be published, he should obtain an agreement

Refusal to
publish by
assignee.

(*k*) *Archbold v. Sweet* (1832), 5 C. & P. 219.

(*l*) *Lee v. Gibbings* (1892), 67 L.T. 263.

(*m*) *Ibid.*, at pp. 264, 265. See also *Humphreys v. D. C. Thomson & Co., Ltd.* (1908), *Times*, April 29, April 30, May 1, an action on a libel of this kind.

to that effect when assigning the copyright in his work or granting a right to publish it. Otherwise, it seems, there will be no obligation on the assignee or grantee to publish. ' If the copyright had passed, it would have placed it in the absolute power of that firm or their successors to publish or not to publish the book, as they should be minded ' (*n*).

Publica-
tion by
grantee in
another
name.

If the author grants a licence in general terms to another person to print, publish, and sell his work, the latter may exercise his licence by allowing a third person to print, publish, and sell it (*o*).

Equitable
assign-
ments by
agreement
to assign.

A written agreement to assign the copyright of a work, when made, has been held to operate as an assignment of the copyright and to make the person to whom the agreement was given assignee of the copyright (*p*). This appears to be still the law, the only material differences between the repealed Copyright Act, 1842 (*q*), s. 13, and the Act of 1911, s. 5 (2), being that under the former Act it had been held by judicial decision (*r*) that assignments must be in writing, whereas in the present Act this is specifically provided, and that under the present Act there is copyright in unpublished works as well as in published works. The effect of this latter difference will merely be that a publisher can call upon an author to assign the copyright before publication, whereas previously he could not (*rr*).

(*n*) *Hole v. Bradbury* (1879), 12 Ch.D. 886, at p. 895, Fry J.

(*o*) *Booth v. Edward Lloyd, Ltd.* (1910), 26 T.L.R. 549, a case arising out of the use of a hymn tune called 'Commonwealth' by the defendants in their *Election Song Book*.

(*p*) *Ward, Lock & Co., Ltd. v. Long*, [1906] 1 Ch. 550.

(*q*) 5 & 6 Vict. c. 45.

(*r*) See *Leyland v. Stewart* (1876), 4 Ch.D. 419.

(*rr*) But not, of course, before the work is made; see *Platt v. Walter* (1867), 17 L.T. 157.

It would seem, then, that the ordinary authorship agreement, whereby the author covenants to assign the copyright when called upon to do so, operates as an assignment for the purposes of the Act.

A joint author, it would seem, could not assign or grant an interest in a work of joint authorship without the written consent of, or co-execution of the document of assignment or grant by, the other joint author or authors (s). Assignments and grants by joint authors.

An assignment may, by the statute, be complete or partial, or limited in duration or in local extent (t). Partial and limited assignments.

Where there has been such an assignment, the assignee as respects the right assigned, and the assignor as respects the rights not assigned, are to be treated as the owner of the copyright for the purposes of the Act (u).

Notwithstanding any assignment before December 16, 1911, of the copyright in a musical work published before the commencement of the Act, any rights conferred by the Copyright Act, 1911, in respect of the making, or authorizing the making, of contrivances by which the work may be mechanically performed (x) belong to the author or his legal personal representatives and not to the assignee, and the royalties are payable to and for the benefit of the author or his legal personal representatives (y). Assignments of musical works before Dec. 16, 1911.

It will be observed that the above provision is limited

(s) See *Powell v. Head* (1879), 12 Ch.D. 686, and p. 74 *ante*.

(t) As instances, see *Lucas v. Cooke* (1880), 13 Ch.D. 872, where the copyright in a painting was assigned only to the extent of producing engravings of it of a certain size ; and *Holt v. Woods* (1896), 17 N.S.W.L.R.Eq. 36, where an assignment was limited to Australia.

(u) Copyright Act, 1911, s. 5 (3), p. 209 *post*. See further as to the ownership of assignees, p. 72 *ante*.

(x) See p. 61 *ante*.

(y) Copyright Act, 1911, s. 19 (7), p. 219 *post*.

to assignments before December 16, 1911, of works published before the commencement of the Act. It covers assignments made before that date of copyright in works published between that date and the commencement of the Act, but not assignments made between December 16, 1911, and such commencement.

Form of
assign-
ments and
grants.

Assignments and grants of interest must be in writing signed by the owner of the copyright or his duly authorized agent. 'Writing' includes 'printing, lithography, photography, and other modes of representing or reproducing words in a visible form' (z). There is nothing to compel such documents to be witnessed or under seal. Whether a person is a 'duly authorized agent' or not depends on the facts and the general law of agency. It has been held for the purposes of a 'consent in writing of the author' within the repealed Dramatic Copyright Act, 1833 (a), s. 2, that the secretary of a society called the Dramatic Authors' Society was an authorized agent for the purpose of giving consent to a performance of copyright plays, *My Precious Betsy*, *Going to the Derby*, and *A Desperate Game*, on behalf of the plaintiff, who was a member of the society and, as such, must have been taken to have assented to such consent being given by the secretary (b). It would appear that the particular words of an assignment are still immaterial so long as they amount to an assignment. Thus it has been held that an agreement to 'let B have' the copyright amounted to an assignment of a play, *Doing for the Best* (c). And probably it would still be held that a receipt in this form, 'Receipt for copyright of'—then followed

(z) Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 20.

(a) 3 & 4 Will. IV. c. 15.

(b) *Morton v. Copeland* (1855), 16 C.B. 517.

(c) *Lacy v. Toole* (1867), 15 L.T. 512.

a description of the work—‘ £70. Received on account £20,’ signed by the author, amounted to a written assignment of copyright (*d*). But it seems that there would be no doubt now that a pencil memorandum on the manuscript of a song, ‘ Herewith the MS. of your song “ Men ” ’ (*e*), would not be enough to grant any interest in the copyright in the song. *Quaere* how far, in view of the specific statutory provision, the Court is now entitled to infer that there was an assignment or grant in writing duly signed by the author or his authorized agent from circumstances which, in its opinion, can only be explained by the existence of such an assignment (*f*).

Formerly an assignment by entry in the Registry Stamp
was exempt from duty by the Copyright Act, 1842 (*g*), on assign-
ments and
grants.
s. 13. This provision is now repealed, and apparently
any assignment or grant of an interest in copyright
made in any valid form must be stamped as a ‘ con-
veyance on sale ’ (*h*).

Where the author of a work is the first owner of the
copyright, no assignment of or grant of interest in the
copyright, otherwise than by will, made by him after
December 16, 1911, is operative to vest in the assignee or
grantee any rights with respect to the copyright beyond
the expiration of twenty-five years from the death of
the author, and the reversionary interest in the copy-
right expectant on the termination of that period
devolves on the death of the author on his legal personal
Statutory
limitation
on assign-
ments.

(*d*) *Robinson v. Illustrated London News and Sketch, Ltd.* (1907),
Times, April 26.

(*e*) *Edwardes v. Cotton* (1902), 19 T.L.R. 34.

(*f*) *Dennison v. Ashdown* (1897), 13 T.L.R. 226, and compare
Hazlitt v. Templeman (1866), 13 L.T. 593.

(*g*) 5 & 6 Vict. c. 45.

(*h*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 54.

representatives as part of his estate, notwithstanding any agreement to the contrary, and any agreement entered into by him as to the disposition of such reversionary interest is null and void (*i*).

The above provision does not apply to the assignment of copyright in a 'collective work' or a licence to publish a work or part of a work as part of a 'collective work' (*i*).

A 'collective work' means (*i*) an encyclopaedia, dictionary, year-book, or similar work; (*ii*) a newspaper, review, magazine, or similar periodical; (*iii*) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated (*j*); that is to say, apparently, any work in which works or parts of works of different authors, whether literary, dramatic, musical, or artistic, or all or any of them, and whether distinct or not distinct, are included (*k*).

It seems clear, whether the Legislature intended it or not, that the expression as defined includes works of joint authorship (*k*). Therefore, the provision as to such works whereby 'references in this Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, whichever period may be the shorter' (*l*), and which is intended, apparently, to refer to the present provision, can have no application, since assignments of copyright in a collective work and licences to publish a work as part

(*i*) Copyright Act, 1911, s. 5 (2) p. 208 *post*.

(*j*) Copyright Act, 1911, s. 35 (1), p. 230 *post*.

(*k*) See further, p. 58 *ante*.

(*l*) Copyright Act, 1911, s. 16 (1), p. 215 *post*.

of a collective work are excluded from the section altogether.

This provision appears to be inserted in order to provide an author with statutory protection against his own supposed improvidence. It is to be observed that it applies to all works by one author alone, but not to the assignment of copyright in a work by more than one author or to a licence to publish a work or part of a work as part of such a work. It is limited to cases where such one author is the first owner of copyright, and therefore does not affect a person who has acquired copyright by having ordered and given consideration for an engraving, photograph, or portrait, or as the employer of an author making a work under a contract of service or apprenticeship. It does not apply to disposition by will, but it does apply equally to a grant of copyright or of any interest therein for more than twenty-five years after the author's death, and to a grant of the reversion or an interest in the reversion of a copyright after that period of limitation has expired. Why the provision should not be made to apply to a work by two authors, which is not in the nature of an encyclopaedia or periodical or the like, is hard to understand. Two authors can be just as improvident as one, and, as already observed, their work falls within the exception, whether they collaborate in the sense already explained (*m*) or not.

Note that the provision applies to assignments and grants made after the passing, not the commencement of the Act. This raises a difficulty with regard to assignments of existing works made after the passing and before the commencement (*n*).

The provision can probably be circumvented, if it

(*m*) See p. 59 *ante*.

(*n*) See p. 54 *ante*.

is desired, by means of the exception in favour of assignments and grants by will. There is nothing to prevent an author making a testamentary disposition of his copyright or of an interest in it in favour of a publisher, and there are well-known means by which the publisher could be assured that the bequest would not be cancelled or varied, or that, if it were, he would receive compensation of another kind.

CHAPTER XII

INFRINGEMENT OF COPYRIGHT

INFRINGEMENT consists, subject to certain provisions which will be dealt with in their proper place, in the doing by any person, without the consent of the owner of the copyright, of anything, the sole right to do which is conferred on the owner of the copyright (*a*). Innocence does not excuse infringement, but protects the defendant from all remedies except an injunction or interdict (*b*). Direct infringement.

There is also infringement by any person who (1) sells or lets for hire, or by way of trade exposes or offers for sale or hire, (2) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright, (3) by way of trade exhibits in public, (4) imports for sale or hire into any part of the King's dominions to which the Act extends, any work which to his knowledge infringes copyright or would infringe copyright if it had been made within the part of the King's dominions in or into which the sale or hiring, exposure, offering for sale or hire, distribution, exhibition, or importation takes place (*c*). Indirect infringement.

This section sums up, with some variation, the provisions as to indirect infringement in the re-

(*a*) Copyright Act, 1911, s. 2 (1), p. 205 *post*. A combination to infringe copyright may amount to criminal conspiracy (*R. v. Willetts* (1906), 70 J.P. 127).

(*b*) See p. 148 *post*.

(*c*) Copyright Act, 1911, s. 2 (2), p. 206 *post*. See also the Canada Copyright Act, 1875, s. 4, p. 197 *post*.

pealed Acts. It will be observed that knowledge of the infringement is now necessary to constitute indirect infringement. It was not necessary in every case under the old law that there should be such knowledge (*d*). The prohibitions against indirect infringement also, it is to be observed, extend, subject to knowledge, to all works which infringe copyright or would infringe copyright, if made in the part of the King's dominions where the prohibited act is done, and thus the complications of some of the repealed statutes are removed (*e*). It is not essential that there should be any trading. It is enough if there is such a distribution as to affect prejudicially the owner of the copyright (*f*). It has been held that a quotation of an approximate price for a copyright work to an individual at his request is not an 'offering for sale' (*g*), and that producing a sample of a work of sculpture and asking for orders in accordance with it is not an 'exposing for sale' (*h*).

There are also certain provisions as to the detention and forfeiture of imported copies which are infringements (*i*).

Rights
comprised
in copy-
right.

The Copyright Act, 1911, replaces by a single subsection all the enactments as to the rights comprised in copyright in literary, dramatic, musical, and artistic works, which were contained in the numerous statutes repealed by it, with certain variations (*j*). These, and

(*d*) See *Cooper v. Whittingham* (1880), 15 Ch. D. 501 ; *Tuck & Sons v. Priester* (1887), 19 Q.B.D. 629.

(*e*) See *Pitt Pitts v. George & Co.*, [1896] 2 Ch. 866.

(*f*) This is in accordance with *Novello v. Sudlow* (1852), 12 C.B. 177, and *Ager v. Peninsular and Oriental Steam Navigation Co.* (1884), 26 Ch.D. 637.

(*g*) *Wolff v. Wood* (1903), *Times*, October 31.

(*h*) *Britain v. Kennedy* (1902), 19 T.L.R. 122.

(*i*) See p. 153 *post*.

(*j*) Copyright Act, 1911, s. 1 (2), p. 204 *post*.

the acts which amount to direct infringements of them, will be dealt with in order.

RIGHT OF PRODUCTION OR REPRODUCTION IN ANY MATERIAL FORM

The sole right to produce or reproduce or to authorize the production or reproduction of the work or any substantial part thereof in any material form whatsoever (k).

The right of production and reproduction in any material form.

These very wide words are intended to protect the owner's right against infringement in any physical form. Nice questions, however, will still arise as to what constitutes a production or reproduction of a 'substantial part' of the work. 'Substantial' does not necessarily refer to the quantity of the copyright work which is produced or reproduced. The materiality of the portion taken and the way in which it is taken are of more importance than mere quantity in the decision of the question, whether there has been an infringement or not (l). The decision, too, will obviously be affected by the nature of the work alleged to be infringed, whether it is a wholly novel production or something in the nature of a compilation.

Meaning of 'substantial part'.

Where there is a production or a reproduction of a complete work, such as a book (m) or a newspaper article (n), the infringement is generally undoubted, or where large portions of copyright works are taken and reproduced without any sufficient alteration or treatment to justify the plea that sufficient labour and skill has been applied to negative infringement (o). Quantity, how-

LITERARY WORKS. Substantial infringement.

(k) Copyright Act, 1911, s. 1 (2), p. 204 *post*.

(l) Acknowledgment does not excuse infringement (*Bohn v. Bogue* (1846), 10 Jur. 420).

(m) *Routledge v. Low* (1868), L.R. 3 H.L. 100.

(n) *Walter v. Howe* (1881), 17 Ch.D. 708.

(o) *Roworth v. Wilkes* (1807), 1 Camp. 94; *Campbell v. Scott* (1842),

ever, is not by any means the sole element. As Lord Cottenham L.C. said (*p*) : ' When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to. It is useless to refer to any particular cases as to quantity.' These remarks were made in connexion with two books on Private Bill procedure ; but the same principle was applied by the House of Lords to a piracy of some information about circular tours which formed a small, but the most original, portion of a monthly penny time-table (*q*). So it was held to be an infringement to take a small portion of a list of registered bills of sale and deeds of arrangement prepared with skill and a good deal of labour and expense (*r*) ; to copy a shipping list (*s*), and a collection of forms of writs and other instruments (*t*) ; to copy a golf annual containing biographical notes compiled by the plaintiffs from the answers of golf players to questions sent to them (*u*) ; to reproduce practically

11 Sim. 31 ; *Bohn v. Bogue* (1846), 10 Jur. 420 ; *Sweet v. Benning* (1855), 16 C.B. 459. See also *Cary v. Faden* (1799), 5 Ves. 24, and cases, which are not reported, cited in *Cary v. Longman* (1801), 1 East 358.

(*p*) *Bramwell v. Halcomb* (1836), 3 My. & Cr. 737, at p. 738.

(*q*) *Leslie v. J. Young & Son*, [1894] A.C. 335.

(*r*) *Trade Auxiliary Co. v. Middlesborough and British Tradesmen's Protection Association* (1889), 40 Ch.D. 425 ; *Cate v. Devon and Exeter Constitutional Newspaper Co.* (1889), *ibid.* 500 ; *Trade Auxiliary Co., Ltd. v. Irish Trade Protection Agency, Ltd.* (1887), 21 I.L.T.R. 37.

(*s*) *Walford v. Johnston* (1846), 20 D. 1160 ; *Macleay v. Mooly* (1858), 20 D. 1154.

(*t*) *Alexander v. Mackenzie* (1847), 9 D. 748.

(*u*) *James Nisbet & Co., Ltd. v. Golf Agency* (1907), 23 T.L.R. 370.

the whole of a volume of the *General Stud Book* (v); and to reproduce, with some alterations and with the addition of notes, the selection of poetry known as *The Golden Treasury of Songs and Lyrics* (x).

There is more difficulty in such cases as these last, <sup>Compila-
tions.</sup> where the works are not strictly novel, but consist of compilations from common sources or sources open to all, the originality of which arises from labour and skill expended on system and arrangement, works such as calendars, directories, and the like (y). There is nothing to prevent another person from working independently on the sources and producing a substantially identical work, but in such a case the Court would require clear evidence of such independent work. A further complication is introduced by the fact that a subsequent compiler is entitled to utilize a previous work for the purpose of directing him to sources of information, though, having thus discovered such sources, he is bound to exercise honest and independent labour in his use of such sources. Thus it has been said that the compiler of a business directory might not cut out a slip from another similar directory and then, having sent round a canvasser with the slip, and having thus discovered it to be correct, insert the entry in his own directory; but that he might use the directory for the purpose of discovering the names of suitable persons, and then send round a canvasser to

(v) *Weatherby & Sons v. International Horse Agency and Exchange, Ltd.*, [1910] 2 Ch. 297.

(x) *Macmillan v. Suresh Chunder Deb* (1890), Ind.L.R. 17 Cal. 951.

(y) Cases of infringement of rights in calendars were *Matthewson v. Stockdale* (1806), 12 Ves. 270; *Longman v. Winchester* (1809), 16 Ves. 269; in a time-table, *Leslie v. J. Young & Son*, [1894] A.C. 335; in a telegraph code, *Ager v. Peninsular & Oriental Steam Navigation Co.* (1884), 26 Ch.D. 637; in an encyclopædia, *Mawman v. Tegg* (1826), 2 Russ. 385; in a gazetteer, *Lewis v. Fullarton* (1839), 2 Beav. 6.

call on them and so compile particulars about them (z). The distinction seems to be almost too refined for a practical world. In a slightly higher region of literature, the author of *The Reason Why* sought to defend himself from a plea of infringing Dr. Brewer's *Guide to Science*, an explanation of common phenomena in the form of question and answer, by stating that he had only used the doctor's book as a guide to authorities, and that the resemblances were due to their common sources (a). So a defendant, who, in order to win a prize at an Eisteddfod, had eagerly tried to prove that we were all descended from the ancient Britons, was held to be entitled to use the authorities cited by a previous competitor, who had made the same attempt, and not to have infringed, though the ultimate product was not dissimilar to that of the plaintiff (b). But where copyright notes on Milton were published with small additions, there was held to have been an infringement (c). Where, however, one dictionary was compiled, as the defendant admitted, from another to a considerable extent, it was held that the amount of labour expended on what had been taken was, in the circumstances, such as to prevent the taking from being an infringement (d). It seems a little curious that the

(z) *Morris v. Wright* (1870), L.R. 5 Ch. 279. See also *Kelly v. Morris* (1866), L.R. 1 Eq. 697; *Morris v. Ashbee* (1868), L.R. 7 Eq. 34; and *Lamb v. Evans*, [1893] 1 Ch. 218, all cases on directories; and *Hogg v. Scott* (1874), L.R. 18 Eq. 444, at p. 458, Hall V.-C.

(a) *Jarrold v. Houlston* (1857), 3 K. & J. 708.

(b) *Pike v. Nicholas* (1869), L.R. 5 Ch. 251. Compare *Jarrold v. Heywood* (1879), 18 W.R. 279.

(c) *Tonson v. Walker* (1752), 3 Swan. 672. See the similar case of *Moffatt & Paige, Ltd. v. George Gill & Sons, Ltd.* (1902), 86 L.T. 465 (notes to *As You Like It*); *Rooney v. Kelly* (1861), 14 Ir.C.L.R. 158 (a crib to the *Aeneid* with notes).

(d) *Spiers v. Brown* (1858), 6 W.R. 352.

subsequent expenditure of labour on what has been taken should be held to justify the taking. It reminds one of the arguments used by the apologists for Handel's larcenies.

Abridgments, it seems, may or may not be infringe-<sup>Abridg-
ments.</sup>ments according to circumstances, though, *prima facie*, one would suppose that, even if it were assumed to be no theft, if one improved what one took, it would certainly be no less a theft because one spoilt it. Probably the right view is that of Vice-Chancellor Knight Bruce (e), that an abridgment of a copyright work cannot lawfully be published by a person other than the owner unless, as in the case of other takings, such labour and skill is expended on it as to prevent it from being an infringement. Similarly Lord Hardwicke L.C. (f) seems to have confined legitimate abridgments to those which are substantially new books owing to the 'invention, learning, and judgment' of the author. The present provision surely overrules such reasoning as that on which it was held that a publication in the *Grand Magazine of Magazines* of the narrative of *Rasselas*, 'leaving out all the moral and useful reflections,' was not an infringement (g). The Court seemed to think it would be an excellent advertisement for the author. It must also overrule the opinion that 'the act of abridgment is an act of understanding, employed in carrying a large work into a small 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

(e) *Dickens v. Lee* (1844), 8 Jur. 183.

(f) *Gyles v. Wilcox or Wilcocks* (1740), 2 Atk. 141, at p. 143; 3 Atk. 269.

(g) *Dodsley v. Kinnersley* (1761), Amb. 403. As to newspaper summaries, see p. 107 *post*.

of a new and a meritorious work' (*h*). This was the result of a consultation between Lord Chancellor Apsley and Mr. Justice Blackstone, 'who as an author himself had done honour to his country' (*h*), and this view seems to have been accepted in the case of a cheap abridgment of that curious work, *An Apology for the Life of G. A. Bellamy* (*i*). On the other hand, a colourable abridgment of the Term Reports, with an alteration in the order of the cases, was restrained (*k*), and the Court was inclined to adopt the same view in the case of an alleged unfair abridgment of a work on the antiquities of Magna Græcia (*l*).

Competition between original and infringing work.

In all cases of alleged infringement the question whether there is a likelihood of competition between the infringing work and the work infringed is an important factor in deciding whether a fair use has been made of the latter or not (*m*).

Production or reproduction in another material form.

Production or reproduction 'in any material form whatsoever' is an infringement, and therefore the infringement need not be in the same material form as the original. Thus the unauthorized production or reproduction of a literary work in shorthand characters (*n*) or in any unusual type, or of a printed work in manuscript or in typewritten characters (*o*), or by lithography or other process (*p*), would be an infringement.

(*h*) *Anon.* (1774), *Lofft*, 775.

(*i*) *Bell v. Walker* (1785), 1 Bro. C.C. 451.

(*k*) *Butterworth v. Robinson* (1801), 5 Ves. 709.

(*l*) *Wilkins v. Aikin* (1810), 17 Ves. 422.

(*m*) *Weatherby & Sons v. International Horse Agency & Exchange, Ltd.*, [1910] 2 Ch. 297, at p. 305, Parker J.

(*n*) *Nicols v. Pitman* (1884), 26 Ch.D. 374.

(*o*) Compare *Warne & Co. v. Seebohm* (1888), 39 Ch.D. 73.

(*p*) Compare *Novello v. Sudlow* (1852), 12 C.B. 177 (a case on a musical work).

There must, however, be production or reproduction, and consequently, where a publisher has in hand a stock of copies, under an arrangement which permits him to deal with the copyright, and the copyright reverts to the author or his representatives under the provisions with regard to 'existing works' (q), or where he has subsequently assigned the copyright, he can continue to sell such stock after such reverter or assignment without breach of copyright (r). Dealing with existing stock after ceasing to own copy-right.

There is no infringement where there is fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary (s). Fair dealing for purposes of study or criticism.

This exception is couched in very wide terms, and its limits are not easy to define. 'Private study' presumably limits copying to copying for private use. It is clear that 'newspaper summary' would not be held to cover such a case as the abridgment of *Rasselas* in a magazine (t), but the power thus granted seems to be open to much abuse. Neither would the exception of 'criticism' and 'review' cover, it is apprehended, the power to print the whole or a substantial part of a copyright work for the purpose of publishing annotations and commentaries upon it. The right must be limited to 'the fair extract which the law allows for the purpose of comment, criticism, or illustration' (u). But 'it is very difficult to draw the line between that which

(q) See p. 53 *post*.

(r) *Howitt v. Hall* (1862), 6 L.T. 348; *Taylor v. Pillow* (1869), L.R. 7 Eq. 418; *Warne v. Routledge* (1874), L.R. 18 Eq. 497.

(s) Copyright Act, 1911, s. 2 (1), p. 205 *post*.

(t) See p. 105 *ante*.

(u) *Sweet v. Benning* (1855), 16 C.B. 459, at p. 481, per Jervis C.J. Compare *Whittingham v. Wooler* (1817), 2 Swan. 428; *Mawman v. Tegg* (1826), 2 Russ. 385, at p. 393; *Bell v. Whitehead* (1839), 8 L.J. Ca. 141; *Smith v. Chatto* (1874), 31 L.T. 775.

is a fair and legitimate use of an author's work for the purpose of extract, or comment, or illustration, and that which amounts to piracy' (x). As to 'research', this appears to apply to individual research and not to the general advancement of learning by means of research. If this were not so, it would be lawful for a scientific journal to publish the whole of a copyright work with a view to advancing 'research'. In a recent case the *Electrical Engineer* had to pay damages for reproducing portions of a book on electric traction in four issues commencing a fortnight later than that in which a review of the book had appeared (y).

The whole provision, however, is governed by the words 'fair dealing', and no dealing would be held to be fair which unduly injured the owner of the copyright, however laudable it might be in the abstract.

Exception
of certain
collections
for school
use.

It is further provided by the Act that there is no infringement where there is a publication in a collection, mainly composed of non-copyright matter, bona fide intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published literary works, not themselves published for the use of schools, in which copyright subsists; provided that not more than two of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged (z).

This provision, unlike some others, is very strictly limited. It is to be noted that not more than two passages from works by the same author, not merely

(x) *Sweet v. Benning* (1855), 16 C.B. 459, at p. 488, per Cresswell J.

(y) *Harper & Bros. v. Biggs & Son* (1907), *Times*, June 27.

(z) Copyright Act, 1911, s. 2 (1), p. 205 *post*.

from the same work of the same author, are to be published by the same publisher within five years under these conditions.

The infringement of the copyright in printed dramatic works is governed by the same principles as that of the copyright in literary works (a)—indeed, a printed dramatic work would fall under the head of literary work as readily as under that of dramatic work. The production by records and films, which are a species of ‘material form’, is dealt with hereafter (b). The words of the present provision would presumably cover such a performance as that of an ordinary drama by marionettes, which would perhaps not come within the next following provision dealing with performance (c).

DRAMATIC
WORKS.
Infringe-
ment in
general.

A special exception is made for fair dealing with a work for the purpose of private study, research, criticism, review, or newspaper summary (d).

Fair deal-
ing for
purposes
of study
or criti-
cism.

Since copyright in literary, dramatic, and musical works is now unified, no difficulties arise as between the copyright in the words of a song, accompanied recitation, or operatic composition, and these can be more conveniently dealt with under the present head.

MUSICAL
WORKS.

The present provision covers any material reproduction of a musical work, but there are special provisions with regard to the production of musical works by means of records or perforated rolls (e). Copyright in such records, perforated rolls, or other contrivances by means of which sounds may be mechanically reproduced subsists in like manner as if

Mechani-
cal contri-
vances.

(a) See p. 101 *ante*.

(b) p. 130 *post*.

(c) p. 122 *post*.

(d) Copyright Act, 1911, s. 2 (1). See the discussion of this provision in connexion with literary works, p. 107 *ante*.

(e) See p. 130 *post*.

such contrivances were musical works (*f*), subject to certain provisions as to the term of copyright (*g*) and as to ownership (*h*), and any reproduction of such records, rolls, and contrivances is therefore a breach of copyright under the above provision (*i*).

Produc-
tion or
reproduc-
tion in
another
material
form.

It would be an infringement to reproduce a musical work by some other process (*k*) or in some other notation, e.g. in tonic sol-fa, or to turn an ordinary orchestral score into a score of the simplified non-transposing kind advocated by Dr. Weingartner and others.

Arrange-
ments.

Special difficulties arise in the case of musical works owing to the different forms in which music may be published, and it will be a question of fact in each case whether a substantial part has been reproduced. It has been held, for instance, to be a breach of copyright to make dance music out of Auber's copyright opera *Lestocq*, though only parts of various tunes were taken (*l*).

Lord Chief Baron Abinger made some observations in that case which require modification at the present day: 'It is the air or melody which is the invention of the author and which may in such case be the subject of piracy, and you commit a piracy if, by taking not a single bar but several, you incorporate in the new work that in which the whole meritorious part of the invention consists. . . . The original air requires the aid of genius for its construction, but a mere mechanic in music can make the adaptation or

(*f*) Copyright Act, 1911, s. 19 (1), p. 217 *post*.

(*g*) See p. 45 *ante*.

(*h*) See p. 75 *ante*.

(*i*) See also the definition of 'musical work' in the Copyright Act, 1911, s. 19 (2), p. 217 *post*.

(*k*) E.g. by lithography, *Novello v. Sudlow* (1852), 12 C.B. 177.

(*l*) *D'Almaine v. Boosey* (1835), 1 Y. & C. 288.

accompaniment ' (*m*). Even Auber would have resented the notion that his whole merit consisted in the making of tunes, and, from a modern point of view, harmonic and contrapuntal devices and orchestral colour might be an even more serious object of piracy than melody.

It has also been held that a score for voices and pianoforte arranged by one Brissler from Nicolai's *Die Lustigen Weiber von Windsor* was an independent musical work which could be the subject of copyright (*n*). The judgment was accompanied by some rather curious observations by Baron Bramwell on pianoforte arrangements generally. It seems clear that, as against a third party, such an arrangement would entitle its author to sue for infringement of copyright. But, as between the original author and the arranger, such an arrangement would be a breach of copyright. The vocal portions are obviously a mere copy of the original, and even the pianoforte portions would be, it seems, a taking of a 'substantial part' of the original. These observations apply even to pianoforte arrangements of modern music which are often works of the highest knowledge and skill. We need only instance such a piece of work as Von Bülow's arrangement of *Tristan und Isolde*, or Herr Otto Singer's arrangements of Richard Strauss's later music dramas. They also apply to arrangements for other combinations of instruments, such as Wilhelmj's arrangement of the 'Preislied' from *Die Meistersinger* for violin and pianoforte, or arrangements for orchestras of different dimensions to that for which the composition was originally written, or arrangements of orchestral music for military bands. The case, as between composer and

(*m*) *D'Almaine v. Boosey* (1835), 1 Y. & C. 288, at pp. 301, 302.

(*n*) *Wood v. Boosey* (1868), L.R. 3 Q.B. 223.

arranger, would be strengthened against the arranger, if, as is not infrequently the case, the composer wrote his score originally for pianoforte and subsequently scored it, or had it scored by some one else, for orchestra.

It has also been held, as one would have expected, that the production of an orchestral version from a vocal score without authority (the particular case concerned Offenbach's *Vert-Vert*) is an infringement of copyright (o).

Originality of treatment as excusing infringement.

The principle that originality and meritoriousness of treatment applied to copyright matter which has been taken may excuse the taking (p) seems to have a clearer application to musical works than to the other subjects of copyright. No one, for instance, would say that Beethoven's conscious or unconscious use in the first movement of his Third Symphony of the theme of Mozart's overture to *Bastien und Bastienne* could have been a breach of copyright, or the imitation of Agathe's great air in *Der Freischütz* by Wagner in the trio of the 'Einzug' in the second Act of *Tannhäuser*, or the resemblance between the principal theme of Humperdinck's *Königskinder* and a phrase in a romance of Sinding's.

Parody.

The case of a deliberate parody is not so simple, but here again the question must turn on the amount of originality displayed in the treatment. It has never been suggested, for instance, that the brilliant parody of *Tannhäuser* was a breach of copyright (q).

A special exception is made for 'fair dealing with

(o) *Fairlie v. Boosey* (1879), 4 App. Cas. 711.

(p) See p. 101 *ante*.

(q) See the remarks of Channell J. in *Tubb v. Laidler* (1911), *Times*, January 27 (a song 'Coal for the Fire' parodied by 'Milk for the Cat').

any work for the purposes of private study, research, criticism, review, or newspaper summary' (r). This permits the possibility of fairly using specimens of music to illustrate an article or a pamphlet on a composer, but it presumably would not cover the reproduction of portions of an unpublished musical work in the course of an advance article preceding its performance, an instance of which occurred not long ago. It might also not cover a too substantial reproduction of copyright music for the purpose of one of those guides to musical works, which have become so numerous since Wagner's later period.

The law relating to the various species of artistic works has been unified and extended to architectural works of art (s), and the words of the provision which is now under discussion are wide enough to solve most of the problems which have arisen with regard to infringement.

If a copy is made from a copy of an original in such a way as substantially to reproduce the original, there is an infringement of the copyright in the original (t), but it has been held not to be an infringement of the copyright in a reproduction to make another reproduction from the same original (u).

Nice questions may still arise whether a particular alleged reproduction is really a reproduction of the copyright work of art or not. The works of art which are usually copied, with or without authority, are not those which display any very striking points of origin-

(r) Copyright Act, 1911, s. 2 (1). See also p. 107 *ante*.

(s) See p. 21 *ante*.

(t) *Ex parte Beal* (1868), L.R. 3 Q.B. 387, at p. 394; *Hanfstaengl v. H. R. Baines & Co., Ltd.*, [1895] A.C. 20, at p. 30, per Lord Shand.

(u) *De Berenger v. Wheble* (1819), 2 Stark. N.P. 548. Compare *Lucas v. Cooke* (1880), 13 Ch.D. 872.

ality. As was observed by Lord Herschell L.C. in the case of an alleged infringement of a picture called 'Courtship' or 'First Love', 'the idea of a young man courting a young woman at a country stile is of great antiquity' (x). The same might be said of many, perhaps most, other pictures which have attained popularity. It is not, therefore, a proper definition of reproduction to say that it is that which comes so near to the original as to give every person seeing it the idea of the original (y). Kekewich J. suggested that it should be defined as that which comes so near to the original as to suggest that original to the mind of every person seeing it (z). This must not be taken to mean that the whole of the original need be reproduced, but that so much of the original must be reproduced, as to produce on the mind substantially the same impression as the original would produce if it were seen. The question 'must be solved by taking each of the works to be compared as a whole, and determining whether there is not merely a similarity or resemblance in some leading feature or in certain of the details, but whether, keeping in view the idea and general effect created by the original, there is such a degree of similarity as would lead one to say that the alleged infringement is a copy or reproduction of the original or the design—having adopted its essential features and substance' (a). What the essential features are will depend on the nature of the picture. In the case of a portrait, for instance, the background and minor accessories

(x) *Hanfstaengl v. H. R. Baines & Co.*, [1895] A.C. 20, at p. 24.

(y) This was the definition given by Bayley J. in *West v. Francis* (1822), 5 B. & A. 737, at p. 743.

(z) *Hanfstaengl v. W. H. Smith & Sons*, [1905] 1 Ch. 519, at p. 526.

(a) *Hanfstaengl v. H. R. Baines & Co.*, *ubi supra*, at p. 31, per Lord Shand.

might not be essential. In the case of a subject picture, it might well be that the general idea, if sufficiently original to take it out of the category of common property, would be infringed, even though the exact details of the original were not kept. Take, for instance, such a popular subject as a general displaying his domestic proclivities towards a child belonging to the opposing nation during a war. It would be an infringement of this to depict a general displaying similar proclivities in a similar way, even though the faces and dress of the general and the baby were varied, and the furniture of the cottage scene was altered, and the whole rechristened 'Grandfather's Return'. The crudeness and the purpose of the reproduction are immaterial. Thus it was held to be an infringement of a work called 'Nature's Mirror', a draped female looking into a pool, to reproduce it in a magazine as part of a prize competition, though part of the background and the female's wings were omitted, and the whole was of the size of a halfpenny (*b*). It was also held to be an infringement to reproduce 'The Guardian Angel' as an advertisement for pills (*c*), or to make unauthorized use of a poster representing Santa Claus (*d*). The question whether an alleged infringement was substantially a copy of the original was held to have been rightly left to the jury in that form, where the defendant was alleged to have taken an engraving of a celebrated mare, 'Bee's Wing,' and turned it into a woodcut of 'Coronation, Winner of the Derby, 1841' (*e*). Where a butcher's bill-head was

(*b*) *Hanfstaengl v. W. H. Smith & Sons*, [1905] 1 Ch. 519.

(*c*) *Hanfstaengl Art Publishing Co. v. Holloway*, [1893] 2 Q.B. 1.

(*d*) *Green v. Irish Independent Co., Ltd.*, [1899] 1 I.R. 381.

(*e*) *Moore v. Clarke* (1842), 9 M. & W. 692.

copied, it was held to be immaterial that the steer in that copy was facing in the opposite direction (*f*), or that in a copy of a photograph of a lion the tail differed from the tail in the original (*g*). Even if the copy has merits which the original does not possess, it is no less an infringement (*h*).

The instance of the general and the child suggested above is supported by the case of 'Can't you talk?' The engraving represented a collie dog sitting and looking down at a child. The defendants, in a woodcut, substituted a tortoise and two cats for the child, and called the whole 'A Strange Visitor'. It was held that the defendants had taken a substantial part of the engraving and reproduced it in slightly different surroundings (*i*). It has also been held to be an infringement to take the head, bonnet, necktie, and right arm of the Princess of Wales from a copyright photograph and annex them to the remainder of the body of a stout lady for the purpose of advertising a dressholder (*k*). It is, of course, no less an infringement if the reproduction is an enlargement (*l*) or a reduction (*m*) of the original.

There must, however, be production or reproduction,

(*f*) *Whitehead v. Wellington* (1911), 55 Sol.J. 272.

(*g*) *Bolton v. London Exhibitions, Ltd.*, [1898], 14 T.L.R. 550.

(*h*) *Hanfstaengl v. H. R. Baines & Co.*, [1895] A.C. 20, at pp. 26, 27, per Lord Watson.

(*i*) *Brooks v. Religious Tract Society*, [1897] W.N. 25.

(*k*) *London Stereoscopic and Photographic Co., Ltd. v. Kelly* (1888), 5 T.L.R. 169.

(*l*) *Bolton v. Aldin* (1895), 65 L.J.Q.B. 120 (a drawing from a photograph of a tiger).

(*m*) *Gambart v. Ball* (1863), 14 C.B. (N.S.) 306 (the 'Horse Fair' and the 'Light of the World'); *Bradbury v. Hotten* (1872), L.R. 8 Ex. 1 (pictures in *Punch*). Compare also *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109, at p. 131.

and therefore it seems to be still law that, after the purchase of a book containing artistic works lawfully reproduced, the subsequent extraction of such artistic works and separate sale of them would not be an infringement of the copyright in such works (*n*). Similarly a publisher in the possession of copies of artistic works lawfully produced could continue to sell them off, even though the copyright no longer belonged to him.

The above provision covers production or reproduction 'in any material form whatsoever', and so there is no longer any doubt that reproductions in a different material or by a different process are infringements (*o*). Thus it is no longer law that a copy of a picture made on a very large scale and with dioramic effect is no breach of copyright (*p*); and a reproduction of Millais' 'Huguenot' as a pattern for Berlin woolwork (*q*) would now be held to be an infringement. A reproduction by photographs would be, of course, an infringement as hitherto (*r*).

There may be also an infringement of an interest in copyright limited to certain methods of reproduction by a reproduction of the original by such methods (*s*); and there may be an infringement where an arrangement has been made permitting the publication of artistic

(*n*) *Frost & Reed v. Olive Series Publishing Co.* (1908), 24 T.L.R. 649.

(*o*) See *Ex parte Beal* (1868), L.R. 3 Q.B. 387, at p. 394; *Hanfstaengl v. Empire Palace*, [1894] 2 Ch. 1.

(*p*) *Martin v. Wright* (1833), 6 Sim. 297 ('Mr. Martin's grand picture "Belshazzar's Feast"').

(*q*) *Dicks v. Brooks* (1880), 15 Ch.D. 22.

(*r*) *Gambart v. Ball* (1863), 14 C.B. (N.S.) 306; *Graves v. Ashford* (1867), L.R. 2 C.P. 410.

(*s*) *Lucas v. Cooke* (1880), 13 Ch.D. 872; *Tuck v. Canton* (1882), 51 L.J.Q.B. 363.

works by the defendant, and he continues to publish them after the arrangement has determined (*t*).

Blocks
and
plates.

Under the above provision the production of engravings, wood-cuts, etchings, or other similar artistic works from blocks or plates, which one has not the right to use for that purpose, would be an infringement of copyright in the blocks or plates (*u*).

Parody.

A parody, it seems, if not merely a colourable imitation under the guise of a parody, would not be an infringement (*x*).

Evidence
of in-
fringe-
ment.

It has been held not to be necessary for the plaintiff in an action for infringement of the copyright in a picture to produce the original picture ; it was enough if he gave evidence that he had seen it and produced an engraving, which was an exact copy of the original, and from which he stated that the defendants' infringing photograph was taken (*y*).

Excep-
tions.

There are two special exceptions to the provisions as to infringement provided by the Act. Where the author of an artistic work is not the owner of the copyright therein, the use by the author of any mould, cast, sketch, plan, model, or study made by him for the purpose of the work is not an infringement of copyright, provided that he does not thereby repeat or imitate the main design of the work (*z*). This proviso prevents the author, if not the owner of the work, from

Use of
models
and
studies by
author
non-owner
of copy-
right.

(*t*) *Bowlen Bros. v. Amalgamated Pictorials, Ltd.*, [1911] 1 Ch. 386.

(*u*) Discussions of this matter under the repealed law will be found in *Murray v. Heath* (1831), 1 B. & Ad. 804 ; *Cooper v. Stephens*, [1895] 1 Ch. 567 ; *W. Marshall & Co., Ltd. v. A. H. Bull, Ltd.* (1901), 85 L.T. 77 ; *Millar & Lang, Ltd. v. Polak*, [1908] 1 Ch. 433.

(*x*) See *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109, at p. 130, per Lindley L.J.

(*y*) *Lucas v. Williams & Sons*, [1892] 2 Q.B. 113.

(*z*) Copyright Act, 1911, s. 2 (1), p. 205 *post*.

producing replicas with the aid of his studies and sketches, but enables him so to reproduce the details in other forms. This will be specially important in the case of architectural works of art.

The making or publishing of paintings, drawings, engravings, or photographs of a work of sculpture or artistic craftsmanship, if permanently situate in a public place or building, or the making or publishing of paintings, drawings, engravings, or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art, is not an infringement of copyright (*a*).

It is not clear what is meant by a work of 'artistic craftsmanship'. There is no definition of it in the Act, but 'artistic work' is described as including 'works of painting, drawing, sculpture, and artistic craftsmanship, and architectural works of art and engravings and photographs' (*b*). It would seem, then, that works of artistic craftsmanship mean artistic works other than those specially enumerated in the definition of artistic work (*c*). 'Work of sculpture' is not defined in the Act, except in so far as it is expressed to include casts or models (*d*).

It will be observed that no power is given to make or publish reproductions of copyright artistic works other than those mentioned, whether situate in a public place or building or not, and whether public or private property. Such making or publication is an infringement.

The proviso which permits fair dealing for purposes

(*a*) Copyright Act, 1911, s. 2 (1), p. 205 *post*.

(*b*) Ibid., s. 35 (1) p. 230 *post*.

(*c*) See further, p. 22 *ante*.

(*d*) See further, p. 22 *ante*.

Fair dealing for purposes of study or criticism.

of study, criticism, or newspaper summary (e), covers the cases, which have caused some difficulty in the minds of judges, where a reproduction of an artistic work is made by hand for the purpose of private study or amusement (f). The reproduction, however, when made, must not be dealt with for any other purpose than one of those specified in the proviso. Where *Architecture* reproduced illustrations from the plaintiff's book called *The Abbey Church of St. Alban's*, without reference to that book, but for the purpose of severely criticizing the restoration of the Abbey, it was held to have been an unfair use (g).

THE RIGHT OF TRANSLATION

The sole right to produce, reproduce, perform, or publish any translation of the work or any substantial part thereof or to authorize any of such acts (h).

LITERARY AND DRAMATIC WORKS.

This provision settles the question of infringement by translation, on which various opinions have existed. The Indian Courts, it appears, have held that a publication in Urdu of a copyright English book (i), or in Persian of a copyright Urdu book (k), is not an infringement (i). This certainly seems a remarkable application of the doctrine that a literary theft is no theft if labour is expended upon the stolen article, yet it seems to be supported in an old case (l) by Lord Parker L.C., who

(e) Copyright Act, 1911, s. 2 (1). See p. 107 *ante*.

(f) See *Gambart v. Ball* (1863), 14 C.B. (N.S.) 318; *Dicks v. Brooks* (1880), 15 Ch.D. 22.

(g) *Neale v. Harmer* (1897), 13 T.L.R. 209.

(h) Copyright Act, 1911, s. 1 (2), p. 204 *post*.

(i) *Macmillan v. Shamsul Ulama M. Zaka* (1895), Ind.L.R. 19 Bom. 557.

(k) *Munshi Shaik Abdurruhman v. Mirza Mahomed Shirazi* (1890), Ind.L.R. 14 Bom. 586.

(l) *Burnett v. Chetwood* (1720), 2 Mer. 440 n.

suggested that 'the translator may be said to be the author, inasmuch as some skill in language is requisite thereto, and not barely a mechanic art'. In that instance, however, he granted an injunction to restrain the publication of an English translation of a copyright Latin book, *Archaeologia Sacra*, on the ground that it 'contained strange notions, intended by the author to be concealed from the vulgar in the Latin language'. It has also been held, *obiter*, that if Baedeker had translated Murray into German and some one else had retranslated it into English, the English translation would be a breach of copyright (*m*). But the direct question as to a foreign translation of an English copyright work seems not to have been decided in England.

Now, however, under the Act, there is no doubt that a translation, or the performance or publication of a translation, of a copyright work or any substantial part of it is an infringement, whatever the language may be, living or dead, natural or artificial, even Esperanto. But of course it will not prevent translation as between the British Empire and foreign countries to which the Act is not extended, though it will prevent the importation, sale, letting, distribution, and exhibition of such translations.

The same principles will, of course, apply to unauthorized translations of the words of a song, accompanied recitation, or operatic composition, whether these be regarded as a literary work or as part of a musical work. MUSICAL
WORKS.

(*m*) *Murray v. Bogue* (1852), 1 Drew. 353.

RIGHT OF PERFORMANCE

The sole right to perform or to authorize the performance of the work or any substantial part thereof in public (n).

Definition
of 'per-
form-
ance'.

A 'performance' is defined as 'any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument' (o). 'Perform' is not defined, but its definition follows from that of 'performance'.

LITERARY
WORKS.

This provision may have some application to literary works, so far as reading or recitation in public is concerned.

Public
recitation
of an ex-
tract by
one
person.

It is specially limited, however, in this respect by a provision that the reading or recitation in public by one person of any reasonable extract from any published work is no infringement of copyright (p). A piece for recitation falls within the definition of 'dramatic work' (q), but this provision covers literary works also. It is not very happily drafted. 'Any published work' means, of course, any published work in which copyright still subsists. 'By one person' presumably means by one person in contradistinction to a dramatic or quasi-dramatic performance by two or more persons, which is forbidden by the general provision as to performance. The present provision can scarcely be taken to refer to musical works, and therefore it would presumably be an infringement to recite with the music a reasonable extract from a recitation set

(n) Copyright Act, 1911, s. 1 (2), p. 204 *post*.

(o) Ibid., s. 35 (1), p. 230 *post*.

(p) Ibid., s. 2 (1), p. 205 *post*. The provision agrees with the observation made *obiter* by Stirling J. in *Hanfstaengl v. Empire Palace*, [1894] 3 Ch. 109, at p. 116.

(q) Copyright Act, 1911, s. 35 (1).

to music, such as Richard Strauss's *Das Schloss am Meer* or *Enoch Arden*, at any rate as far as the music is concerned. It is not easy to say what a 'reasonable extract' is. Is the standard of reasonableness the length of the extract as compared with the length of the work, or the capacity of the performer, or the feelings of the audience? The first of these is probably the best criterion, coupled with any special surrounding circumstances.

An infringing performance must be public, and this apparently means that the public must be admitted, either with or without payment (*r*). Whether a performance before one of the societies which are so often formed nowadays for the production of plays would be a public performance is doubtful. Probably it would be where the society was formed merely *ad hoc*, as in the case of the production of Maeterlinck's *Monna Vanna*; perhaps it would not be where the society was one of a permanent character, like the Incorporated Stage Society. The question must be one of fact in each case. 'Some domestic or quasi-domestic entertainments may not come within the Act; suppose that a club of persons united for the purposes of good fellowship gives a dramatic entertainment to its members; I do not say that the entertainment will necessarily fall within the prohibition of the statute' (*s*).

DRAMATIC
WORKS.

Meaning
of 'per-
form in
public'.

(*r*) See *Duck v. Bates* (1884), 13 Q.B.D. 843, at p. 848, a case, however, which turned on the meaning of 'place of public entertainment' in the repealed Dramatic Copyright Act, 1833 (3 & 4 Will. IV, c. 15), s. 2. See also *Glenville v. Selig Polyscope Co.* (1911), 27 T.L.R. 554, where it was held that a show-room for pictures was not a 'place of public entertainment'.

(*s*) *Duck v. Bates* (1884), *ubi supra*, at p. 850; but remember the *curat* in note (*r*). In the same case, in a dissenting judgment, Fry L.J. gave a much wider interpretation to the words of the statute.

Meaning
of 'sub-
stantial
part'.

A performance, in order to infringe, must be of the whole or of a substantial part. It has been held under the old law that where there has been no infringement of the verbal substance of a dramatic work, a similarity of accessories, such as scenic effects, make-up, or 'business', is not an infringement (*t*). But this judgment proceeded on the basis that the repealed Dramatic Copyright Acts contemplated as the subject of copyright something which could be printed and published. Now the definition of 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' (*u*). It seems, therefore, that under the Act of 1911 it would be an infringement to copy scenic effects, make-up, or 'business', which are fixed in writing or otherwise, if such constituted a choreographic work or entertainment in dumb show, even though they were in combination with a 'dramatic work' in the ordinary sense of the word (*x*).

Whether there has been an infringement or not is no doubt largely a question of fact, depending on the nature of the matter taken and the manner of its taking, rather than on the mere quantity of it (*y*). It was held, for instance, that the taking of two scenes from an English adaptation of a French play, founded on

(*t*) *Tate v. Fullbrook*, [1908] 1 K.B. 821, which must be taken as overruling certain dicta of Brett J. and Lindley J. in *Chatterton v. Cave* (1875), L.R. 10 C.P. 572; but see *Nethersole v. Bell* (1903), *Times*, July 4, 31. The principle of the former case was applied in *Bishop v. Viriana & Co.* (1909), *Times*, January 15, which concerned an imitation of a 'Gollywog' dance.

(*u*) Copyright Act, 1911, s. 35 (1), p. 230 *post*.

(*x*) See p. 14 *ante*.

(*y*) See p. 101 *ante*.

Sue's *Le Juif Errant*, was not an infringement (z). On the other hand, it was held that the use by a defendant of some of the plaintiff's words in an English version of Weber's *Oberon* was an infringement (a), and the same was held where portions of the play *Trilby* had been taken (b).

Sometimes there may be considerable similarities between two pieces, which are purely accidental, and then there will be, of course, no infringement (c). Such similarities will usually arise when both have been drawn from a common source, which was legitimately open to the authors of both. In such cases, however there is an *onus* cast on the defendant to show his originality, as the presumption is against him (d).

Where a licence to perform has been given and has determined or been withdrawn, it is, of course, a breach of copyright to continue to perform it, as was held in

Accidental
similarities.

Infringe-
ment after
termina-
tion of
licence.

(z) *Chatterton v. Cave* (1878), 3 App. Cas. 483.

(a) *Planché v. Braham* (1837), 4 Bing. (N.C.) 17. It will be remembered that the plaintiff wrote in English the original libretto of the opera which was set by Weber.

(b) *Tree v. Bowkett* (1891), 74 L.T. 77.

(c) *Reichardt v. Sapte*, [1893] 2 Q.B. 308.

(d) There was an interesting instance of this in *Scholz v. Amasis Ltd.* (1909), *Times*, May 19, where both plaintiff and defendant had used a novel by Ebers, and there were similarities in their work, but it was held on appeal that there had been no infringement. Compare also *Schlesinger v. Bedford* (1890), 63 L.T. 762, and *Beere v. Ellis* (1889), 5 T.L.R. 330, both of which were cases of plays adapted from the same novel. The numerous cases on the dramatic versions of *East Lynne* will also be remembered, and the part played in them by that eminent character Police-constable Bullock (see, for instance, *Hardacre v. Corelli & Co.* (1911), *Times*, March 10). In *Robt v. Palace Theatre, Ltd.* (1911), 28 T.L.R. 69, it was held that there was no infringement because both plays were drawn from 'the common stock of dramatic ideas'.

the case of a play called *The New Lady Bantock, or Fanny and the Servant Problem* ' (e).

Public
recitation
of an ex-
tract by
one per-
son.

There is a special exception of ' reading or recitation in public by one person of any reasonable extract from any published work ', which has been already discussed (f). The limitation to ' one person ' is meant to exclude the dramatic element which would be introduced by a performance by two or more actors.

Liability
for per-
mitting
place of
entertain-
ment to
be used.

Not only the person responsible for the performance is guilty of infringement, but also any person who for his private profit permits a theatre or other place of entertainment to be used for the performance in public of a work without the consent of the owner of the copyright. But this latter person is not liable, if he was not aware and had no reasonable ground for suspecting that the performance would be an infringement of copyright (g). There are also provisions for the summary recovery of penalties against persons who cause such performances (h).

MUSICAL
WORKS.
Meaning
of ' per-
formance
in public '.

The observations already made as to the performance of dramatic works (i) apply in the main to the performance of musical works. As to what constitutes a performance of a musical work, it has been said that it ' must be such according to the ordinary acceptance of ' that term. ' Singing for one's own gratification without intending thereby to represent anything, or

(e) *Jerome v. Lingard* (1911), *Times*, November 25.

(f) See p. 122 ante.

(g) Copyright Act, 1911, s. 2 (3), p. 206 post. The onus of proving innocence would seem to be now on the person using it as a defence. Under the repealed Copyright (Musical Compositions) Act, 1888 (51 & 52 Vict. c. 17), s. 3, the plaintiff had to prove the defendant's guilt (*Moul v. Coronet Theatre, Ltd.* (1903), *Times*, February 4. See also *Cole v. Gear* (1888), 4 T.L.R. 246).

(h) See p. 157 post.

(i) See p. 123 ante.

to amuse any one else, would not, it seems, be either a representation or a performance according to the ordinary meaning of those terms, nor would the fact of some other person being in the room at the time of such singing make it so ; but where to give effect to a song it is necessary that the singing should be made to represent something, or where it is performed for the amusement of other persons, then probably it would be a representation or performance. To some extent whether it is such or not must in each case be a question of fact' (*k*). These words give a very wide interpretation to the meaning of performance, and they must now be read subject to the statutory definition of performance as 'any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument', and to the fact that under the present Act the performance has to be in public. The musical work *Will o' the Wisp*, with regard to which the action arose in the case just cited, was in fact performed at a public concert in one case, where there was a charge for admission, and in the other at a school, where nothing was charged for admission but there was a compulsory tea which cost eightpence (*l*).

The remarks already made as to infringement of a musical work by reproduction in a material form (*m*) apply, *mutatis mutandis*, to infringement by performance. It would be an infringement of a work written for one instrument or combination of instruments to perform it on another instrument or combination of instruments, or to play a vocal piece on an instrument

Infringe-
ment by
perform-
ance in
general.

(*k*) *Wall v. Taylor* (1883), 11 Q.B.D. 102, at p. 106, per Brett M.R.

(*l*) See *Wall v. Taylor* (1882), 9 Q.B.D. 727.

(*m*) See p. 109 *ante*.

or instruments. It would be, *pro tanto*, as much a breach of copyright to play 'Land of Hope and Glory' on a xylophone at a music hall as to perform it with a vocalist and a first-class orchestra, though, no doubt, the damage to the composer's pocket and reputation would not be so great.

There may be infringement although only a part of a work is performed, subject to the provision that the part must be substantial, and the question of substantiality is one of fact in each case. It was held to be an infringement to use the words of a few songs out of Planché's *Oberon*, such songs including the celebrated scena, 'Ocean, thou mighty monster' (*n*). The same observation applies to part of a melody (*o*).

Liability
for per-
mitting
place of
entertain-
ment to
be used.

A person who for his private profit permits a theatre or other place of entertainment to be used for an unauthorized performance of a copyright work is liable for infringement, subject to proof of innocence, as in the case of dramatic works (*p*).

RIGHT OF DRAMATIZATION AND NOVELIZATION

The sole right, in the case of a novel or other non-dramatic work, or of an artistic work, to convert it into a dramatic work, by way of performance in public or otherwise ; and, in the case of a dramatic work, to convert it into a novel or other non-dramatic work ; or to authorize any of such acts (q).

Dramati-
zation.

LITERARY
WORKS.

It is now at last expressly provided that the conversion of a novel or other non-dramatic work, such, for instance, as a poem, into a dramatic work is a breach of the copyright in the work so converted ; and

(*n*) *Planché v. Braham* (1837), 4 Bing. (N.C.) 17.

(*o*) *D'Almaine v. Boosey* (1835), 1 Y. & C. 288 (p) See p. 126 *ante*.

(*q*) Copyright Act, 1911, s. 1 (2), p. 204 *post*.

an answer is thus provided to the complicated problems which have been presented to the Courts on this subject (*r*). It will be observed that the conversion need not necessarily be performed in order to cause a breach of copyright; the mere making of the conversion in book form or otherwise would be sufficient. 'Otherwise', however, can scarcely be interpreted as including performance in private, in view of the express mention of performance in public.

A non-dramatic musical work is occasionally converted into a dramatic work, as, for instance, when Rimsky-Korsakov's symphonic poem 'Sheherazade' was turned into music accompanying a ballet, and when Berlioz's 'Damnation de Faust' was made into an opera. This is prohibited both by the present special provision and by the general provisions of the Act. MUSICAL
WORKS.

The provision also applies specifically to artistic works, and therefore meets the case of the conversion of such works into *tableaux vivants* or cinematograph productions, both of which are included in the definition of dramatic work (*s*). ARTISTIC
WORKS.

There appears to have been no English authority hitherto on the question whether a novel made out of a play infringes the copyright in the play, and the matter is now set at rest. It has become of some importance in recent years owing to the curious taste Noveliza-
tion.

(*r*) See, for instance, *Reade v. Lacy* (1861), 1 J. & H. 524; *Reade v. Conquest* (1861), 9 C.B. (N.S.) 755; *Reade v. Conquest* (1862), 11 C.B. (N.S.) 479; *Tinsley v. Lacy* (1863), 1 H. & M. 747; *Schlesinger v. Bedford* (1870), 63 L.T. 762; *Toole v. Young* (1874), L.R. 9 Q.B. 523; *Warne & Co. v. Seeborn* (1888), 39 Ch.D. 73.

(*s*) Copyright Act, 1911, s. 35 (1), p. 230 *post*. This was previously not an infringement of copyright; see *Hanfstaengl v. Empire Palace*, [1894] 2 Ch. 1.

of some modern playgoers who, after seeing their *Sign of the Cross* on the stage, wish to chew it all over again in the form of a novel. The playwright will now have the exclusive benefit arising from this habit.

Conver-
sion into
other
non-
dramatic
works.

Dramatic musical works have sometimes been converted into non-dramatic musical works, the reason generally being their non-success on the stage; for example, Rubinstein's sacred operas. This is prohibited both by the present provision and by the general provisions of the Act.

RIGHT OF MAKING MECHANICAL CONTRIVANCES

The sole right, in the case of a literary, dramatic, or musical work, to make or to authorize the making of any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed (t).

LITERARY
WORKS.

This provision may apply to a literary work in such a case, for instance, as the reproduction of copyright literary work on a cinematograph film by way of explanation of a picture. The matter of lectures is dealt with hereafter (u).

For the purpose of the making of mechanical contrivances, it is specially provided that words so closely associated with a musical work as to form part of it are to be deemed to be included in the term 'musical work' (x), and they must be taken, therefore, to be dealt with below in connexion with musical works (y).

DRAMATIC
WORKS.

The special provisions as to the making of contrivances for reproducing sounds (z) do not apply to dramatic works but to musical works only, and there-

(t) Copyright Act, 1911, s. 1 (2), p. 204 *post*.

(u) p. 137 *post*.

(y) p. 131 *post*.

(x) Copyright Act, 1911, s. 19 (2).

(z) See p. 131 *post*.

fore the reproduction of a dramatic work by such means must be arranged with the author in the same way as any other reproduction of a copyright work. It is now specifically provided that the making or the authorization of the making of a cinematograph film of a copyright work is an infringement of copyright. This gets rid of the difficulty which arose under the repealed Dramatic Copyright Act, 1833 (*a*), s. 2, where it was held that the manufacturers of cinematograph films of a dramatic work called *The Humming Birds, or Twice Nightly*, had not infringed, on the ground that they had not 'caused' the work 'to be represented' (*b*).

The provision remedies the state of the law which had been declared to exist, and whereby the making of a perforated roll of music or a phonographic record for performance by a mechanical instrument was held not to be an infringement of copyright in the music (*c*). MUSICAL
WORKS.

As the result of the cases just cited, however, and for certain other reasons, the Legislature has thought fit to insert most elaborate special clauses with regard to the making of such mechanical contrivances (*d*). These provisions are substantially varied in their application to musical works published before the commencement of the Act (*e*). Special
provi-
sions.

Any person may make within the parts of the King's

(*a*) 3 & 4 Will. IV. c. 15.

(*b*) *Karno v. Pathé Frères, Ltd.* (1909), 100 L.T. 260. But see the remarks made *obiter* by Channell J. in *Glenville v. Selig Polyscope Co.* (1911), 27 T.L.R. 554.

(*c*) *Boosey v. Whight*, [1900] 1 Ch. 122; *Newmark v. National Phonograph Co., Ltd.* (1907), 23 T.L.R. 439; compare *Mabe v. Connor*, [1910] 1 K.B. 515. An attempt to prevent these results on the ground of a common law right has failed (*Monckton v. Gramophone Co., Ltd.*, [1912] W.N. 32).

(*d*) Copyright Act, 1911, s. 19 (2)-(8), pp. 217-221 *post*.

(*e*) See p. 61 *ante*.

Condi-
tions for
making
mechani-
cal contri-
vances.

dominions to which the Act extends records, perforated rolls, or other contrivances for mechanically performing a musical work, if he proves (1) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner of the copyright in the work; (2) that he has given notice of his intention and paid certain royalties in manner prescribed by Board of Trade regulations (*f*). Consent is to be deemed to have been given, if inquiries so prescribed have been made and the owner of the copyright fails to reply to them within the time so prescribed (*g*).

For this purpose, a musical work is deemed to include any words so closely associated with it as to form part of the same work, but not to include a contrivance for the mechanical reproduction of sounds (*f*).

Alterations and omissions.

No alterations or omissions from the work are to be made unless contrivances with such alterations or omissions have been previously made by, or with the consent (*h*) or acquiescence of, the owner of the copyright, or unless they are reasonably necessary for the adaptation (*i*).

The opportunity which these last words gives for the alteration and curtailment of fine music for the purpose of getting it on to a mechanical contrivance will be obvious. But the subsection also seems to put some check for the future on the practice of over-decorating simple music for the purpose of pleasing the less intelligent type of auditor.

Royalties. The rate of royalty (*k*) is to be $2\frac{1}{2}$ per cent. on the

(*f*) Copyright Act, 1911, s. 19 (2), p. 217 *post*.

(*g*) Ibid., s. 19 (5), p. 219 *post*.

(*h*) See *supra*.

(*i*) Copyright Act, 1911, s. 19 (2), p. 217 *post*.

(*k*) The rate of royalties differs, and there are other provisions relating to the payment of them, in the case of musical works published before the commencement of the Act; see p. 62 *ante*.

ordinary retail selling price, calculated as prescribed by Board of Trade regulations, in the case of contrivances sold within two years after the commencement of the Act, and 5 per cent. on contrivances sold thereafter, with a minimum of a halfpenny for each contrivance or for each work, where more than one are reproduced on one contrivance. Each fraction of a farthing is to be reckoned as one farthing. The Board of Trade may hold a public inquiry and decrease or increase such rate, subject to confirmation by Parliament, at any time after seven years from the commencement of the Act. No further revision may be made till fourteen years after such revision (*l*).

Where a contrivance reproduces works of different persons, the royalties are to be apportioned by arbitration, in default of agreement (*m*).

RIGHT OF PUBLICATION

The sole right, if a work is unpublished, to publish it or to authorize its publication (*n*).

Common law rights similar to copyright in unpublished works are now abolished (*o*), and unpublished works have now copyright under the Act in the same way as published works. Abolition of common law rights.

The publication of unpublished letters, either during the writer's lifetime or posthumously, has presented difficulties, most of which appear to be removed by the Act. The author of the letters, if alive, is the owner of the copyright (*p*), whoever may be the actual LITERARY WORKS.
Letters.

(*l*) Copyright Act, 1911, s. 19 (3), p. 218 *post*.

(*m*) *Ibid.*, s. 19 (4), p. 219 *post*.

(*n*) Copyright Act, 1911, s. 1 (2), p. 204 *post*.

(*o*) See p. 169 *post*.

(*p*) See such cases as *Pope v. Curl* (1741), 2 Atk. 342; *Macmillan & Co. v. Dent*, [1907] 1 Ch. 107; *Philip v. Pennell*, [1907] 2 Ch. 577.

possessor of the manuscripts, and consequently their publication without his consent is a breach of copyright. In the face of this statutory provision it is not quite clear whether certain rights of publication, which the recipient has been said to have in certain circumstances, still exist. The Court on one occasion (*r*) refused to continue an injunction against the publication of certain letters on the ground that the publication was due to the defendant's desire to vindicate himself from certain aspersions made on him by the plaintiffs. But it is to be noted that the judge seemed to have unsound views on the question whether letters were literary works and the subject of copyright, and that Lord Eldon L.C. subsequently did not apply the principle in a similar case (*s*). It has, nevertheless, been approved in more recent judgments (*t*). The Act, however, does not affect, it is apprehended, the production of unpublished letters in evidence for the purposes of public justice (*u*).

Presump-
tion from
testa-
mentary
ownership
of de-
ceased
author's
unpub-
lished
manu-
script.

If an author be dead there is a special provision with regard to the presumption arising from the ownership of his manuscript. It is provided that the ownership of an author's manuscript after his death, where such ownership has been acquired by a testamentary disposition made by the author, and the manuscript is of a work which has not been published or performed in public or delivered in public, shall be *prima facie* proof of the copyright being with the owner of the manuscript (*x*).

(*r*) *Lord Perceval v. Phipps* (1813), 2 V. & B. 19.

(*s*) *Gee v. Pritchard* (1818), 2 Swan. 402.

(*t*) *Earl of Lytton v. Derey* (1884), 54 L.J.Ch. 293 ; *Labouchere v. Hess* (1897), 77 L.T. 559.

(*u*) *Gee v. Pritchard*, *ubi supra*, at p. 427 ; *Hopkinson v. Lord Burghley* (1867), L.R. 2 Ch. 447.

(*x*) Copyright Act, 1911, s. 17 (2), p. 216 *post*.

It will be observed that the ownership of the manuscript, to which the provision applies, is confined to ownership by testamentary disposition made by the author. It practically amounts to a provision that a bequest of a manuscript is equivalent to a bequest of the copyright in its contents, unless such presumed bequest of copyright is rebutted by evidence. It would be rebutted, no doubt, by a specific bequest to another person of the particular copyright or of all the testator's copyrights ; how far it would be rebutted by other bequests, not dealing specifically with copyright, must depend on the circumstances of the case, but it is easy to see that difficulties may arise.

It is not clear why the expression 'the copyright being with the owner of the manuscript' is used. If it means, as apparently it does, 'the owner of the manuscript being the owner of the copyright,' it would have been better to say so.

It should be noted also that the provision does not apply to all works which are unpublished, in the sense in which the word is used elsewhere in the Act ; if a work has been performed or delivered in public it is outside the operation of the provision.

Public performance of a dramatic work is not publi- DRAMATIC
WORKS.
cation, and therefore a dramatic work, whether it has been performed in public or not, remains unpublished till copies of it are issued to the public (*y*) ; but if it has been performed in public, it is not within the provision as to the presumption arising from the ownership of the manuscript under the author's will (*z*).

The observations already made with regard to MUSICAL
WORKS.
unpublished literary works (*a*) should be read here.

(*y*) See p. 36 *ante*.

(*z*) See p. 134 *ante*.

(*a*) See p. 133 *ante*.

As the distinction between copyright and performing right has now disappeared, the old questions as to the effect of publication in material form on performing right no longer arise (*b*). The presumption from the ownership of a deceased author's manuscript extends to a manuscript of a musical work as well as to that of a literary or dramatic work (*c*).

ARTISTIC
WORKS.

Copyright under the Act has taken the place of the copyright which existed in paintings, drawings, and photographs, whether published or unpublished, and the common law right protecting other unpublished artistic works (*d*). In the provision with regard to a deceased author's manuscript (*e*), 'manuscript' is not defined. In common parlance it would not cover such a thing as a hand-made drawing in any medium, even in pen and ink, but the etymological meaning of the word would probably include them. And what of a case where there was a drawing with a manuscript inscription on it ?

LECTURES

Definition
of
'lecture'.

This peculiar form of work requires separate treatment. A lecture is described as including address, speech, and sermon (*f*), and therefore it includes a political address, but it is not stated in the Act whether it is to be regarded as, and to have the

(*b*) See *Chappell v. Boosey* (1882), 21 Ch.D. 232, a case on a song called 'The Bellringer'.

(*c*) See p. 134 *ante*.

(*d*) See the repealed Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 1; *Prince Albert v. Strange* (1849), 1 Mac. & G. 25; *Turner v. Robinson* (1860), 10 Ir.Ch.R. 510; *Mansell v. Valley Printing Co.*, [1908] 2 Ch. 441; *Bowden Bros. v. Amalgamated Pictorials, Ltd.*, [1911] 1 Ch. 386.

(*e*) See p. 134 *ante*.

(*f*) Copyright Act, 1911, s. 35 (1), p. 230 *post*.

protection afforded to, a literary, dramatic, musical, or artistic work. But it seems that it must be taken to have general protection as being one or other of such works.

Where it has not been published, therefore, and in the case of a lecture delivery in public does not constitute publication (*g*), the author has the sole right of publication (*h*). Publication in breach of his rights might also be restrainable as a breach of confidence or implied contract (*i*). The author has also the sole right to produce or reproduce the lecture or any substantial part thereof in any material form whatsoever, or to produce, reproduce, perform, or publish any translation of it whatsoever, or to deliver or authorize the delivery of it or of any substantial part of it in public (*k*)—delivery including delivery by means of any mechanical instrument—or to authorize any of such acts (*l*). The other rights attaching to literary, dramatic, musical, or artistic works could hardly apply to a lecture.

Copyright in lectures, like copyright in other works, is subject to the exemption of fair dealing with the work for the purposes of private study, research, criticism, review, or newspaper summary (*m*), and the reading or recitation in public by one person of any reasonable extract from it, if published (*n*).

(*g*) Copyright Act, 1911, s. 1 (3), p. 204 *post*; compare *Caird v. Sime* (1887), 12 App. Cas. 326.

(*h*) In substitution for the old common law right. See *Nicols v. Pitman* (1884), 26 Ch.D. 374; *Caird v. Sime*, *ubi supra*; and p. 169 *post*.

(*i*) See *Abernethy v. Hutchinson* (1825), 1 H. & T. 28, and p. 170 *post*.

(*k*) Copyright Act, 1911, s. 1 (2), p. 204 *post*.

(*l*) *Ibid.*, s. 35 (1), p. 230 *post*.

(*m*) *Ibid.*, s. 2 (1), p. 205 *post*. See p. 107 *ante*.

(*n*) *Ibid.* See p. 172 *ante*.

Copyright
in lectures.

Excep-
tions to
copyright
in lec-
tures.

News-
paper
reports.

There is also this further exception, that a newspaper is entitled to report a lecture delivered in public, a term which does not include delivery in public without the consent or acquiescence of the author or his legal personal representatives or assigns (*o*), unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer (*p*). This provision does not affect the power of fair dealing for the purpose of newspaper summary (*p*). There may be some difficulty in knowing what is the main entrance of the building in which the lecture is given, where the building forms part of a college or large collection of buildings. The provision as to public worship must presumably only apply to the actual room or hall in which the lecture is being delivered, though it is not very happily expressed. 'Public worship' is a very wide phrase which is not defined. It certainly seems not to be confined to Christian worship, but to extend to the worship of any object, however indefinite. Shinto or Positivist rites, or services conducted by Ethical Societies, would apparently fall within it (*q*).

Where the reporting of a lecture is so prohibited, it cannot be reported or reproduced in a newspaper or elsewhere without breach of copyright, and therefore clearly a person who reported it could not now acquire

(*o*) Copyright Act, 1911, s. 35 (2), p. 232 *post*.

(*p*) Ibid., s. 2 (1), p. 205 *post*.

(*q*) Reference may perhaps be made to *Rossi v. Edinburgh Corporation*, [1905] A.C. 21, a case on a by-law prohibiting the sale of ice-cream on 'Sunday or on any other day set apart for public worship by lawful authority'.

copyright in his report (*r*). If the reporting is not so prohibited, no one is entitled to report it except in a newspaper, and a person who reported it by any other medium would acquire no copyright. Would the newspaper acquire copyright? The delivery of a lecture is not a publication (*s*), and, though the publication by a newspaper, if not prohibited, is declared not to be an infringement of copyright, it would seem that such a publication is not a publication or 'issue of copies of the work to the public' (*t*) for all purposes, although it may be said to have taken place with the acquiescence of the author (*u*). If that be so, then the author retains his copyright. Is one newspaper entitled to copy the report from another newspaper, although it did not report the lecture directly itself? It would seem that the privilege of reporting is confined to those newspapers which send representatives to the lecture and find that no prohibition is posted up, and that publication is limited to them. But all these questions are very far from being free from doubt.

It seems unlikely that the provisions of the Act were intended to extend to the judgments delivered orally by judges, but the word 'speech', though not, perhaps, the words 'address' or 'sermon', except in peculiar cases, would seem to cover them. In the House of Lords, it is well known, the judgments of the learned Lords are, technically, speeches advising the House, and not judgments. If they are 'lectures', the copyright would seem to be in the judge, unless it is in

(*r*) It was not so under the earlier law; see *Walter v. Lane*, [1900] A.C. 539.

(*s*) Copyright Act, 1911, s. 1 (3).

(*t*) Ibid.

(*u*) Ibid. s. 35 (2).

the Crown (*x*), and we have the extraordinary result that they could not be reported elsewhere than in a newspaper without breach of copyright, and that the judge by posting up prohibitions could prevent their being reported at all.

Where a judge's judgment is a written judgment, it seems clear that it is a literary work, at any rate for the purposes of copyright, and the copyright is either in the judge or in the Crown (*y*).

Counsel's
speeches
and wit-
nesses'
evidence.

The observations made as to oral judgments seem to apply, *a fortiori*, to the speeches of counsel. The evidence of witnesses cannot be regarded in the same way, though sometimes both questions and answers degenerate into speeches.

News-
paper
reports of
political
speeches.

Copyright in political speeches is further limited, apparently by an afterthought, by the provision that it should not be an infringement of copyright in an address of a political nature delivered at a public meeting to publish a report thereof in a newspaper (*z*). A person delivering such a speech, therefore, cannot, by notice, prevent its being reported by a newspaper as in the case of other species of lectures. There is no definition of 'an address of a political nature'. The term can scarcely be confined to party politics (though one cannot help fancying that the Legislature had party politics mainly, if not solely, in its mind), or even home politics. It would cover anarchistic and seditious (*a*)

(*x*) See p. 66 *ante*.

(*y*) p. 66 *ante*. It has been held by the Supreme Court of the United States that, under their law, neither the judge nor the State has copyright in judgments (*Wheaton v. Peters* (1834), 8 Peters, 591; *Banks v. Manchester* (1888), 21 Davis, 244).

(*z*) Copyright Act, 1911, s. 20.

(*a*) These, however, would not be protected in any case, on general principles; see p. 30 *ante*.

speeches, and even, it is to be feared, some sermons. It would also cover a speech made, say, by a German about German politics, or a lecture on the political views of Plato, Aristotle, or Hobbes. 'Political', indeed, must be taken to mean everything concerning the government or legislation of this country or any other, or any part of either, whether national or municipal (*b*), but it would presumably not include speeches made in the course of judicial or other legal proceedings.

It will be observed that nothing in this provision or in the Act appears to touch the question of the reporting of proceedings in either House of Parliament.

With regard to the limitation that the speech must be delivered at a public meeting in order to fall within the exception, what has been said already (*c*) as to the meaning of 'public' with regard to performances should be considered here. In the Public Meeting Act, 1908 (*d*), which deals with disorderly conduct at 'lawful public meetings', no definition of 'public meeting' is attempted. It would naturally mean a meeting to which the public is admitted without discrimination either with or without payment. *Quaere* how far a political meeting to which persons are only admitted by tickets distributed as far as possible to the political partisans of the speaker or speakers would be a public meeting. If the representatives of the news-

(*b*) Politics was defined by Lord Hardwicke, L.C., in *Earl of Chesterfield v. Janssen* (1750), 2 Ves. Sen. 125, at p. 156, as 'Everything that concerns the government of the country'. The word 'political' cannot be limited in the way in which 'political' has been limited with reference to offences under the Extradition Act, 1870 (33 & 34 Vict. c. 52), s. 3 (1); see *In re Castioni*, [1891] 1 Q.B. 149; *In re Meunier*, [1894] 2 Q.B. 415; *In re Arton*, [1896] 1 Q.B. 108.

(*c*) p. 123 *ante*.

(*d*) 8 Edw. VII, c. 66.

paper press were freely admitted to it, it would probably be a public meeting for the purpose of the present provision.

It may be noted that in the Law of Libel Amendment Act, 1888 (e), 'public meeting' is defined as 'any meeting bona fide and lawfully held for a lawful purpose, and for the furtherance and discussion of any matter of public concern, whether the admission thereto be general or restricted'. It has been held that a service at a Congregational chapel was not within this definition, although the sermon delivered at it, in respect of which the proceedings were taken, had been advertised beforehand (f).

(e) 51 & 52 Vict. c. 64, s. 4.

(f) *Chaloner v. Lansdown & Sons* (1894), 10 T.L.R. 290.

CHAPTER XIII

REMEDIES

CIVIL REMEDIES

Literary, Dramatic, Musical, and Artistic Works

WHERE copyright in any work has been infringed, the owner of the copyright is entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise as may be conferred by law for the infringement of a right, subject to the exceptions hereinafter mentioned (a). Proceed-
ings for
infringe-
ment.

Thus he may have an action for damages as an alternative, or in addition, to an account and payment of the profits derived from the infringement, in respect of any species of infringement, whether by production or reproduction, sale, hire, importation for sale or hire, or otherwise (b). The damages will be estimated as in any other case of infringement of a right, or they may be merely the amount of the net proceeds of the copies sold or otherwise obtained from the infringement (c).

He is also entitled to an injunction (in Scotland an Injunction. interdict) to restrain any species of infringement, and the fact that the infringement is minute is no

(a) Copyright Act, 1911, s. 6 (1), p. 209 *post*. For the exceptions, see pp. 144, 148 *post*.

(b) See p. 99 *ante*.

(c) Compare *Delfe v. Delamotte* (1857), 3 K. & J. 581; *Muddock v. Blackwood*, [1898] 1 Ch. 58.

reason why an injunction should be refused (*d*). This, however, is limited in cases where the construction of a building or other structure, which infringes or which, if completed, would infringe the copyright in some other work, has been commenced. In such a case the owner of the copyright is not entitled to obtain an injunction or interdict to restrain the construction of such building or structure or to order its demolition, but is left to his other remedies (*e*). The limitation presumably applies also where the building or structure has been in fact completed, though the subsection is unskilfully drawn and does not say so.

Remedy
for and
against
the Crown.

The Crown's remedy for infringement would be a Latin information (*ee*). If a copyright were infringed by the Crown or a Government department, a petition of right would not lie in respect thereof, but an action would have to be brought against the officer who was in fact responsible for the infringement (*f*).

Proceed-
ings for
recovery
and
damages
for con-
version of
infringing
copies.

The owner of the copyright may also take proceedings, either in the same action, it seems, or independently, for the recovery of possession, or for damages for the conversion, of any infringing copies of any work in which copyright subsists or of any substantial part thereof, and of all plates used or intended to be used for the production of such infringing copies, such copies and plates being deemed to be the property of the owner of the copyright (*g*).

(*d*) See *Cooper v. Whittingham* (1880), 15 Ch.D. 501; *Butterworth v. Kelly* (1888), 4 T.L.R. 430.

(*e*) Copyright Act, 1911, s. 9 (1), p. 210 *post*.

(*ee*) See Robertson, *Civil Proceedings by and against the Crown*, 170 *et seq*.

(*f*) See *Feather v. R.* (1865), 6 B. & S. 257, a case of infringement of a patent, Robertson, *op. cit.*, 352, and other cases there cited.

(*g*) Copyright Act, 1911, s. 7, p. 210 *post*. Compare *Hole v.*

'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, perforated rolls, or other contrivances for the acoustic representation of the work are or are intended to be made (*h*).

The provision, however, that the infringing copy is deemed to be the property of the owner of the copyright does not apply to the case of a building or structure as described above (*i*).

Where a copy only in part infringes, an order will be made for the delivery up of the infringing part, if separable; otherwise, it seems, an order will be made for the delivery up of the whole (*j*).

If the Crown or a Government department has infringed, probably a petition of right would lie for the recovery of the copy or plate, as being a specific chattel, but perhaps not for damages for their conversion (*k*). The Crown's remedy would be an information of *devenerunt* (*l*).

In the case of joint authorship, the proceedings must, it would seem, be taken by the authors jointly or by the survivor or survivors and the legal personal representatives of any deceased author (*m*).

Parties to proceedings.
Joint authors.

Bradbury (1879), 12 Ch.D. 886; *Warne & Co. v. Secbohm* (1888), 39 Ch.D. 73, at p. 83; *Huddock v. Blackwood*, [1898] 1 Ch. 58.

(*h*) Copyright Act, 1911, s. 35 (1).

(*i*) p. 144 *ante*. Copyright Act, 1911, s. 9 (2), p. 211 *post*.

(*j*) *Boosey & Co. v. Whight & Co.* (No. 2) (1899), 81 L.T. 265.

(*k*) See Robertson, *Civil Proceedings by and against the Crown*, 335.

(*l*) See *ibid.*, 175.

(*m*) See p. 74 *ante*, and compare *Stercus v. Wildy* (1850), 19 L.J. Ch. 190; *Trade Auxiliary Co. v. Middlesborough and District Tradesmen's Protection Association* (1888), 40 Ch.D. 425; *Cate v. Devon and Exeter Constitutional Newspaper Co.*, (1889), *ibid.*,

Agent. Where a copyright is acquired by some one merely as an agent for some one else, the principal can sue for its infringement (*n*).

Assignee. Whether an assignee can sue in respect of an infringement of copyright will depend on the general law regarding actions by assignees. Where the infringement has occurred before assignment, the assignee could not, it seems, sue without joining the assignor, even though he had taken a specific assignment of the right of action in respect of the infringement (*o*). If there is not a complete and bona fide assignment, the assignor must be joined (*p*).

Legal personal representatives. A right of action for an infringement which occurred before an owner's death would, it seems, pass to his legal personal representatives along with the copyright, as being an action in respect of a substantial damage to his property (*q*); and if the estate of a deceased person had benefited by his infringement of a copyright, an action, it seems, would lie against his legal personal representatives (*r*), at any rate in so far as profits could be shown to have been obtained by the deceased through his infringement and to form part of his estate (*s*).

Trustee in bankruptcy. So the right of action in respect of an infringement of a copyright before the owner's bankruptcy would, it seems, pass to his trustee in bankruptcy (*t*).

500. *Quære* whether *Lauri v. Renad*, [1892] 3 Ch. 402, can be good law.

(*n*) See *Stedall v. Houghton* (1901), 18 T.L.R. 126.

(*o*) See *May v. Lane* (1894), 64 L.J.Ch.B. 236; *Dawson v. Great Northern & City Railway Co.*, [1905] 1 K.B. 260.

(*p*) *Landeker v. Louis Wolff & Co., Ltd.* (1907), 52 Sol.J. 45.

(*q*) *Rose v. Buckett*, [1901] 2 K.B. 449.

(*r*) *Phillips v. Homfray* (1883), 24 Ch.D. 439.

(*s*) *In re Duncan, Terry v. Sweeting*, [1899] 1 Ch. 387.

(*t*) *Rose v. Buckett, ubi supra*.

Where two or more persons join in infringing a copy-^{Joint in-}right, they will be liable as joint *tortfeasors*. Printers^{fringers.} who knew that they were printing an infringement, and knew the purpose for which it was intended, were held to be jointly liable in damages to the persons whose copyright was infringed (u).

In any action for infringement of copyright in any^{Presump-}work, the work is presumed to be a work in which copy-^{tions as to}right subsists and the plaintiff is presumed to be the^{copyright.} owner of the copyright, unless the defendant puts in issue the existence of the copyright or the title of the plaintiff, as the case may be. Where any such question is in issue then (i) if a name purporting to be that of the author of the work is printed or otherwise indicated on the work in the usual manner, the person whose name is so printed or indicated is presumed to be the author of the work, but such presumption may be rebutted by proof to the contrary; (ii) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or that by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated is presumed to be the owner of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein (x).

The presumption under the second head is specifically limited to proceedings for infringement, but inas-

(u) *Lamb v. Evans*, [1895] W.N. 156. Contrast *Kelly's Directories, Ltd. v. Garin*, [1902] 1 Ch. 631, where, on the facts, printers were held not liable. In *Duck v. Mayeu*, [1892] 2 Q.B. 511, a covenant not to sue one of two joint infringers of the performing right in a play was held not to release the other from liability.

(x) Copyright Act, 1911, s. 6 (3), p. 209 *post*.

much as the whole subsection only applies to actions for infringement, the object of this specific limitation is not apparent, unless some distinction is supposed to be drawn between 'action' and 'proceedings'.

'The usual manner' is a vague expression which must be interpreted reasonably. 'The name by which he is commonly known' presumably means the name by which he is commonly known as an author, not that by which he is commonly known by his family or friends. 'Proprietor' is not defined anywhere in the text, as it should have been. It is discussed elsewhere (*y*).

Defence of
innocent
infringe-
ment.

Where proceedings are taken in respect of the infringement of copyright in any work, if the defendant alleges in his defence that he was not aware of the existence of the copyright in the work, which he is alleged to have infringed, and proves that at the date of the infringement he was not aware, and had no reasonable ground for suspecting, that copyright subsisted in the work, the plaintiff is only entitled to an injunction or interdict in respect of the infringement and to no other remedy (*z*).

By this provision a defendant's allegation and successful proof of the fact that he did not know and had no reasonable ground for suspecting that a work was subject to copyright relieves him from the payment of damages and the repayment of profits, but leaves him still liable to an injunction or interdict. He is also perhaps exempt from an order for the delivery up of the infringing copies and plates, if 'proceedings . . . in respect of the infringement of copyright' under this

(*y*) p. 58 *ante*.

(*z*) Copyright Act, 1911, s. 8, p. 210 *post*. Compare *Scott v. Stanford* (1867), L.R. 3 Eq. 718.

section are taken, as seems natural, to include 'proceedings for the recovery of the possession' of infringing copies and plates 'or in respect of the conversion thereof' under s. 7 of the Act. The words certainly seem wide enough to include them.

This new provision confers an increased protection on the innocent infringer, as will appear from a comparison of the law as interpreted in the cases before the passing of the present Act (*a*).

The provision must also be read subject to the earlier provision that in cases of what has been called indirect infringement, namely by sale, letting, importation (*b*), distribution, or exhibition, the absence of knowledge that there is infringement appears, from the words of that provision, to be a defence to all remedies against the infringer. It seems doubtful whether the Legislature can have intended to deprive the owner of the copyright of his remedy by injunction or interdict in such a case, but that seems to be the result of the two sections when read together.

An action in respect of infringement of copyright cannot be commenced after the expiration of three years after the infringement (*c*). The commencement of an action is the issue of the writ or other process.

Limita-
tion of
actions.

In the case of infringement by production or reproduction, the three years would run from the act of production or reproduction of any particular copy,

(*a*) See *Lee v. Simpson* (1847), 3 C.B. 871 (dramatic work); *Norello v. Sudlow* (1852), 12 C.B. 177 (musical work); *West v. Francis* (1822), 5 B. & A. 737; *Gambart v. Sumner* (1859), 5 H. & N. 5; *Hanfstaengl v. H. R. Baines & Co.*, [1895] A.C. 20, at p. 29, per Lord Ashbourne; *Green v. Irish Independent Co., Ltd.*, [1899] 1 I.R. 386; *Mansell v. Valley Printing Co.*, [1908] 2 Ch. 441 (artistic works).

(*b*) See p. 99 *ante*.

(*c*) Copyright Act, 1911, s. 10, p. 211 *post*.

but after the expiration of such three years there seems to be no reason why an action should not be brought in respect of some subsequent infringement by sale, letting, distribution, exhibition, or importation of such copy, whether by the original infringer or by some other person. As explained above (*d*), presumably the words 'action in respect of infringement of copyright' include proceedings for the recovery of the possession of infringing copies or plates or in respect of the conversion thereof.

The Public Authorities Protection Act, 1893 (*e*), s. 1, would apply to proceedings in respect of infringement of copyright, if the person sued had committed the infringement in pursuance or execution or intended execution of any Act of Parliament or of any public duty or authority, and, so, amongst other things, cut down the period of three years under the Act to one of six months (*f*).

Costs.

The costs of all parties in any proceedings in respect of the infringement of copyright (including, apparently, proceedings for the recovery or in respect of the conversion of infringing copies and plates (*g*)) are in the absolute discretion of the Court (*h*).

This provision gives the Court full discretion in all cases (*i*). The discretion must, of course, be exercised judicially, and generally in accordance with the ordinary

(*d*) p. 148 *ante*.

(*e*) 56 & 57 Vict. c. 61.

(*f*) See *Kent County Council v. Folkestone Corporation*, [1905] 1 K.B. 620.

(*g*) See p. 148 *ante*.

(*h*) Copyright Act, 1911, s. 6 (2), p. 209 *post*.

(*i*) In *Cooper v. Whittingham* (1880), 15 Ch.D. 501, it was held that the Court had no discretion to refuse a plaintiff costs, where he had brought an action to enforce his legal right of copyright and there had been no misconduct on his part; and this is in accordance with the ordinary principle.

authorities as to costs (*j*). It has been held that where an action for infringement fails on the ground of the indecency of the work, and the indecency has been repeated in the infringing copies, it ought to be dismissed without costs (*k*).

Paintings, Drawings, and Photographs

Penalties are specially provided against any person who does any of the following acts : Penalties
for fraud.

(1) Fraudulently signs or otherwise affixes, or causes to be signed or affixed, to or upon any painting, drawing, photograph, or negative, any name, initials, or monogram ;

(2) Fraudulently sells, publishes, exhibits, or disposes of, or offers for sale, exhibition, or distribution, any such work having thereon the name, initials, or monogram of a person who did not execute or make the work ;

(3) Fraudulently utters, disposes of or puts off, or causes to be uttered or disposed of, any copy or colourable imitation of any such work, whether subject to copyright or not, as having been made or executed by the author of the original work from which the copy or imitation has been taken ;

(4) During the life of the author of any such work, without his consent, makes or knowingly sells or publishes or offers for sale any such work or any copies of such work or of any part thereof as and for the unaltered work of the author, where the author has sold or otherwise parted with the possession of the

(*j*) See R.S.C., Ord. 65, r. 1, and authorities thereon in the *Annual Practice*, 1912, vol. i, pp. 1117 *et seq.*

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

work and some other person has afterwards made an alteration therein (*l*).

The above provisions only apply where the person whose name, initials, or monogram is so fraudulently signed or affixed, or to whom such spurious or altered work is so fraudulently or falsely ascribed, has been living at or within twenty years next before the date of the offence (*l*).

The offender, on conviction, forfeits to the person aggrieved a sum not exceeding £10, or not exceeding double the full price, if any, at which all such copies, imitations, or altered works have been sold or offered for sale, and in addition all such copies, imitations, or altered works are to be forfeited to the person, or the assigns or legal representatives of the person, whose name, initials, or monogram has been so fraudulently signed or affixed, or to whom such spurious or altered work has been so fraudulently or falsely ascribed (*m*). Such penalties and forfeitures may be recovered by the person entitled, in England or Ireland, by action against the offender, and, in Scotland, by action in the Court of Session (*n*).

These provisions have recently been discussed in Court in the first reported case upon them (*o*). It was held that an offence under the fourth head need not be fraudulent, since the word fraudulently is omitted there, but that it must be committed with knowledge. The Court's attention, however, does not appear to have been called to the fact that the words 'fraudu-

(*l*) Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 7, p. 193 *post*.

(*m*) *Ibid*.

(*n*) *Ibid.*, s. 8, p. 195 *post*, as amended by the Copyright Act, 1911, s. 36, Sched. II, pp. 232, 235 *post*.

(*o*) *Carlton Illustrators v. Coleman & Co., Ltd.*, [1911] 1 K.B. 771.

lently or falsely ' are used twice in the latter part of the section as applying to this offence. It was further held that the alteration must be material, and that it would be so, if it affected the reputation of the author as an artist. Consequently the £10 penalty was awarded to one Garth Jones, who had made a drawing for the defendants as an advertisement for ' Wincarnis ' meat wine. The drawing represented a woman and was entitled ' Caution '. The defendants had had it altered without the plaintiff's consent, and had published it as a poster in its altered form with the plaintiff's signature. The action was originally brought by the firm of which the plaintiff was a member, but this was clearly wrong, as the author alone could sue, and therefore he was subsequently joined as plaintiff. In addition to the penalty an injunction would have been granted, had not the defendants given an undertaking in lieu of it.

Apart from these provisions, it appears that to put a spurious name of a painter on a picture, and to obtain money thereby, would be a cheat at common law, though it would not be forgery (*p*).

CUSTOMS PROCEEDINGS

If the owner of the copyright desires that copies made out of the United Kingdom of any work in which copyright subsists, which, if made in the United Kingdom, would infringe copyright, should not be imported into the United Kingdom, he must give notice in writing by himself or his agent to the Commissioners of Customs and Excise, and thereupon such copies shall not be so imported, and, if so imported, they shall be forfeited and

Prohibi-
tion of
importa-
tion.

(*p*) *R. v. Closs* (1858), D. & B. 460 (a case where a dealer falsely put the name of J. Linnell on a copy of a picture by that artist, and sold it as an original).

may be destroyed or otherwise disposed of as the Commissioners may direct (*q*). Before detaining any such copies or taking any further proceedings with a view to the forfeiture thereof, the Commissioners may require the regulations hereinafter mentioned to be complied with, and may satisfy themselves in accordance with such regulations that the copies are such as are prohibited from importation by the above provision (*r*).

Customs
regula-
tions.

The Commissioners of Customs and Excise may make regulations, either general or special, and referring to all works, or to different classes of works, respecting the detention and forfeiture of such copies and the conditions, if any, to be fulfilled before such detention and forfeiture, and may, by such regulations, determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of the above provision, and the mode of verification of such evidence.

Such regulations may provide for the informant reimbursing the Commissioners all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention, and may provide for notices given under ss. 42 and 44 of the Customs Consolidation Act, 1876 (*s*), and s. 1 of the Revenue Act, 1889 (*t*), being

(*q*) Copyright Act, 1911, s. 14 (1), p. 212 *post*, applying the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 42, as amended by s. 36, Sched. II of the Copyright Act, 1911, and by Order in Council under the Finance Act, 1908 (8 Edw. VII, c. 16), s. 4.

(*r*) Copyright Act, 1911, s. 14 (2), p. 213 *post*.

(*s*) 39 & 40 Vict. c. 36. Section 42, so far as it related to books, and s. 44 are repealed by the Copyright Act, 1911, s. 36, Sched. II. See a discussion of the former section in *Imperial Book Co., Ltd. v. Adam & Charles Black* (1905), 21 T.L.R. 540.

(*t*) 52 & 53 Vict. c. 42. Section 1, so far as it related to books, is repealed by the Copyright Act, 1911, s. 36, Sched. II.

treated as notices given under the Copyright Act, 1911, s. 14 (*u*).

The above provisions have effect as if they were part of the Customs Consolidation Act, 1876 (*x*), but the Isle of Man is not to be treated as part of the United Kingdom for this purpose (*y*). They also, with the necessary modifications, apply to the importation into a British possession to which the Act extends of copies of works made out of that possession (*z*).

Extent of
above
provi-
sions.

SUMMARY REMEDIES

Literary, Dramatic, Musical, and Artistic Works

The following provisions only extend to the United Kingdom (*a*):

Extent of
provisions.

If any person knowingly—

(1) makes for sale or hire any infringing copy of a work in which copyright subsists;

Convic-
tions for
dealing
with in-
fringing
copies.

(2) sells or lets for hire, or by way of trade exposes or offers for sale or hire, any infringing copy of any such work;

(3) distributes infringing copies of any such work either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright;

(4) by way of trade exhibits in public any infringing copy of any such work;

(5) imports for sale or hire into the United Kingdom any infringing copy of any such work;

(*u*) Copyright Act, 1911, s. 14 (3), (4), (5), p. 213 *post*.

(*x*) As to proceedings taken by the Commissioners under that Act, see Robertson, *Civil Proceedings by and against the Crown*, 70.

(*y*) It is so treated for other Customs purposes (Customs Consolidation Act, 1876, s. 277).

(*z*) Copyright Act, 1911, s. 14 (6), (7). pp. 213, 214 *post*. See also the Canada Copyright Act, 1875, s. 4, p. 197 *post*.

(*a*) Copyright Act, 1911, s. 13, p. 212 *post*.

he is guilty of an offence under the Act and liable on summary conviction to a fine not exceeding forty shillings for every copy dealt with in contravention of the above provisions, but not exceeding fifty pounds in respect of the same transaction; or, in the case of a second or subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months (*b*). Knowledge is essential to the offence.

Proceedings under these provisions are additional to any civil proceedings which may be taken in respect of infringement of copyright with regard to the same transactions (*c*).

The meaning of the words 'exposes or offers for sale' has already been discussed (*d*).

It will be observed that the provisions include making for sale or hire, but do not include any other production or reproduction or any performance or delivery or publication of a work. There is a special provision as to causing a performance for private profit (*e*).

The penalty is payable in respect of each copy dealt with, and it does not matter that it is not dealt with singly, but in batches with others (*f*). As the penalty is now fixed at 40s. per copy, with a maximum of £50, the difficulty which used to be felt as to awarding a fraction of a farthing in the case of a large number of infringing copies no longer arises (*g*).

(*b*) Copyright Act, 1911, s. 11 (1), p. 211 *post*.

(*c*) See p. 142 *ante*.

(*d*) p. 100 *ante*.

(*e*) See p. 157 *post*.

(*f*) Compare, under the old law, *Ex parte Beal* (1868), L.R. 3 Q.B. 387; *Ellis v. Horace Marshall & Son* (1895), 64 L.J.Q.B. 757; *Baschet v. London Illustrated Standard Co.*, [1900] 1 Ch. 73.

(*g*) See *Green v. Irish Independent Co.*, [1899] 1 I.R. 392; *Hildesheimer v. W. & F. Faulkner, Ltd.*, [1901] 2 Ch. 552; *Nicholls v. Parker* (1902), 18 T.L.R. 459.

Any person who knowingly does any of the prohibited acts will be liable, whether he be principal, agent, or servant (*h*).

The above provisions do not apply to a case of infringement where the construction of a building or other structure, which infringes or which, if completed, would infringe the copyright in some other work, has been commenced (*i*).

If any person (1) knowingly makes or has in his possession any plate for the purpose of making infringing copies of any work in which copyright subsists, or (2) knowingly and for his private profit causes any such work to be performed in public without the consent of the owner of the copyright, he is guilty of an offence under the Act, and is liable on summary conviction to a fine not exceeding fifty pounds, or, in the case of a second or subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months (*k*).

Offences
with
respect to
plates and
perform-
ances.

'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, perforated rolls, or other contrivances for the acoustic representation of the work are or are intended to be made (*l*).

In the case of both classes of offences specified in this provision knowledge is essential, and in the second the offence must be, in addition, committed for the private profit of the offender. To cause a work to be

(*h*) Compare *Parsons v. Chapman* (1831), 5 C. & P. 33; *Lamb v. Evans*, [1895] W.N. 156; *Baschet v. London Illustrated Standard Co.*, [1900] 1 Ch. 73.

(*i*) Copyright Act, 1911, s. 9 (2), p. 211 *post*.

(*k*) *Ibid.*, s. 11 (2), p. 211 *post*.

(*l*) *Ibid.*, s. 35 (1).

performed in public, therefore, for charitable or public purposes would not be an offence, but it would seem that, if private profit was aimed at, the fact that loss and not profit resulted would be no defence, though it would probably mitigate the penalty (*m*).

The consent of the owner may, apparently, be given and proved in any way. There is no need for a consent in writing or in any particular form.

The subsection refers only to the causing of a performance, and not to the performance, of a work. The performance in public by a person himself can hardly be said to be a causing of the performance of it. It would seem, however, that if a singer obtained one or more instrumentalists to accompany him when performing in public, he would cause the performance of the instrumental portion of the work, and therefore be liable in respect of it, though he could not be said to have caused his own performance; but, perhaps, if a singer took a hall or theatre and made arrangements for his own performance there, it would be a causing of the performance.

There have been several decisions on the words 'cause to be represented' and 'cause to be printed' in the repealed Acts, which have still some value. It has been held that a person who let a room to an offender, supplied benches and lights, and sold or caused to be sold tickets of admission, whereby the infringer was enabled to give performances of dramatic pieces called *The Ship on Fire* and *The Gambler's Wife*, was not guilty. The Court said that no one could be considered an offender who did not actually take part in the representation, by himself or his agent (*n*). Previously

(*m*) Compare *Novello v. Sudlow* (1852), 12 C.B. 177.

(*n*) *Russell v. Briant* (1849), 8 C.B. 836.

it had been held that a person, who was seen once or twice at rehearsals of *Richard the Third*, engaged one of the actors to perform, and gave him a cheque in payment, was rightly convicted (o); and, similarly, that an acting manager who paid and dismissed one of the performers had committed the offence, and that it was immaterial whether he did it as an agent for others or not (p).

On the contrary, by a decision which seems scarcely consistent with those which have been cited, the proprietor of a theatre was held to be not guilty, where he had arranged with another person to provide the company, select the pieces, manage the representation, and control exclusively the persons employed in the theatre, he himself providing the printing and advertising, the *personnel* in front of the stage, the band, and the persons to take the money at the doors, and taking half the gross receipts for the use of the theatre (q). The case was distinguished subsequently on the ground that the defendant had had no control over the performance, and it was held that the proprietor of a theatre who let his theatre to a performer for £30 for one night, the fee including company, which comprised his own son, band, lights, and accessories, was guilty of causing the representation of *Spring-heel'd Jack*, *the Flying Highwayman*, or *The Mysteries of the Old Red Grange* (r). It is submitted that the control of the performance is not the real criterion, and that a person might very well 'cause' a performance if he took

(o) *R. v. Glossop* (1821), 4 B. & A. 616.

(p) *Parsons v. Chapman* (1831), 5 C. & P. 33.

(q) *Lyon v. Knowles* (1863), 3 B. & S. 556; affirmed (1864), 5 B. & S. 751.

(r) *Marsh v. Conquest* (1864), 17 C.B. (N.S.) 418.

measures to bring it about, even though he never had any more to do with it, except taking his private profit, after he had arranged for it. This view appears to have been taken by the Court, which held that a proprietor of a music hall, who engaged a singer to sing what songs he liked without control, and who in fact sang a copyright song called 'We are Going to Reform Some Day', was liable to a penalty, the singer being regarded as his agent with authority to sing the song (s). But, on the other hand, where a proprietor of a music hall, his general manager, and the performers concerned were all sued for penalties, it was held that, while the other defendants were liable for penalties, the general manager was not liable, on the ground that he was merely the mouthpiece of the proprietor (t). It could scarcely be said, in most cases, that a manager caused a work to be performed 'for his private profit' under the present provision.

With regard to all these authorities, moreover, it must be remembered that they arose from quasi-criminal (u) proceedings by the owner of copyright for penalties, and that the Court would probably require stricter proof of liability under the purely criminal provisions with which we now have to deal.

On the words 'cause to be printed', it has been held that printers who innocently printed a portion of a book, the remainder of which, containing infringing matter, was printed by some one else, but whose name appeared as printers of the whole, were not liable (x).

(s) *Monaghan v. Taylor* (1886), 2 T.L.R. 685.

(t) *French v. Day* (1893), 9 T.L.R. 548. In *Roberts v. Bignell* (1887), 3 T.L.R. 552, the proprietor, the accompanying pianist, and the singer were all sued for penalties.

(u) See *Ex parte Graves, In re Prince* (1868), L.R. 3 Ch. 642.

(x) *Kelly's Directories, Ltd. v. Gavin*, [1902] 1 Ch. 631.