THE LAW

RELATING TO

Works of Literature and Art:

EMBRACING THE

LAW OF COPYRIGHT,

THE

LAW RELATING TO NEWSPAPERS,

THE

LAW RELATING TO CONTRACTS BETWEEN AUTHORS, PUBLISHERS, PRINTERS, &c.,

AND THE

LAW OF LIBEL.

WITH THE STATUTES RELATING THERETO,
FORMS OF AGREEMENTS BETWEEN AUTHORS, PUBLISHERS, &c.,
AND
FORMS OF PLEADINGS.

By JOHN SHORTT, LL.B.,

OF THE MIDDLE TEMPLE, ESQ., BARRISTER-AT-LAW.;

Joint Editor of "The Law of Railway Companies," and "The County Courts Acts, Rules and Orders."

"Ut monitus caveas, ne forte negoti
Incutiat tibi quid sanctarum inscitia legum"—HORACE.

LONDON:
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Gift of
Equitable Life Assur. Soc.

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PREFACE.

About four years ago it was proposed to the author that he should collect in one book the various branches of law relating to works of literature and art, with a view of supplying not only the legal profession with such a work, but also those engaged in literary and artistic pursuits, whether as authors, editors, or, publishers, with a complete statement of the law bearing on the subjects of their important labours. The work then begun has from time to time occupied the author's attention ever since, and the present volume is the result of labours which other business has frequently and for long periods interrupted.

It was originally not the intention of the author to deal with the subject of Copyright in Designs; but, in order that the book might contain a complete treatise on the law of copyright, a supplementary chapter has been added (pp. 602—628), in which this department of law is fully treated.

Special attention has been paid to the collection, in the appendix, of a number of precedents in pleading, the utility of which can hardly fail to be appreciated, more particularly by junior members of the profession; and the index has been compiled with a view of furnishing, to a considerable extent, an analysis of the entire work.

3, Essex Court, Temple,
July 18, 1871.

TO

SIR ROUNDELL PALMER, Q.C., M.P.,

IN SINCERE ADMIRATION

OF

DISTINGUISHED ATTAINMENTS COMBINED WITH LOFTY CHARACTER,

THIS WORK

IS

(WITH PERMISSION)

DEDICATED BY

THE AUTHOR.

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ADDENDA ET CORRIGENDA.

PAGE 8, line 5, after 17 Geo. 3, c. 57, *add* "sculpture, models, and casts (54 Geo. 3, c. 56)."

PAGE 65, line 26, *for* "Act" *read* "Acts."

PAGE 84, after line 12, *insert*:

New edition with notes.

The Scotch Court of Session has held in the recent case of *Black* v. *Murray* (9 Scotch Sess. Cas. 341, 3rd Series), that a person may, by publishing a reprint of a work of which the copyright has expired, with notes and illustrations from other works, create a new copyright which will be protected from piracy; and that it is a piratical use of such copyright work to borrow from it any considerable number of those illustrations.

It was contended on behalf of the defenders in this case (an action for infringing the pursuers' copyright in the works of Sir Walter Scott by publishing what purported to be a reprint of the original edition of the "Minstrelsy of the Scottish Border") that the copyright claimed by the pursuers was a copyright of an edition of a work, not of the original text, the copyright in which had admittedly long since expired; that the pursuers' claim to copyright was chiefly based on notes contributed to their alleged copyright edition; that to make notes the subject of copyright, they must in a reasonable sense form a "book," and must constitute the value of the new edition; that that was not the case with the pursuers' edition, the notes added by their edition being 200 in all, many of them unimportant, and not extending to 25 small pages; that only 40 were taken by the defenders, 10 of them being found in editions not copyright; and finally, that it was open to the defenders to quote even from copyright books for the purpose of illustration; but the Court of Session, affirming the interlocutor of the Lord Ordinary, held the defenders liable for piracy.

Some valuable observations were made by the court, in this case, on the question—what constitutes a new edition of a book? "Questions of great nicety and difficulty," said the Lord President, "may arise as to how far a new edition of a work is a proper subject of copyright at all; but that must always depend upon circumstances. A new edition of a book may be a mere reprint of an old edition, and plainly that would not entitle the author to a new term of copyright running from the date of the new edition. On the other hand, a new edition of a book may be so enlarged and improved as to constitute in reality a new work, and that just as clearly will entitle the author to a copyright running from the date of the new edition. Take for example, in illustration of that, a new edition of a scientific work which is published twenty or thirty years after the date of the first edition. The progress of science in the interval necessarily leads to the new edition being a very different book from the old. That old edition will probably, in the course of these twenty or thirty years, have become comparatively worthless, while the new edition, particularly if it is the production of the original author himself, will be as valuable at the later period as the original edition of the book was at the time when it was published. But there are many cases between these two extremes; and the difficulty will be to lay down any general rule as to what amount of addition or alteration or new matter will entitle a second or a new edition of a book to the privilege of copyright, or whether the copyright extends to the book as amended or improved, or is confined only to the additions or improvements themselves, as distinguished from the rest of the book. I think in the present case that we shall not find that we are in reality much troubled with such difficulties."

"It is not necessary," observed Lord Ardmillan, "that a work shall be entirely a new work in order to be the subject of copyright. A new edition is not necessarily a subject of copyright, but it may be so. There must be some originality in it; it may be in new thought or in new illustration, or in new explanatory and illustrative annotation, or even, in some peculiar instances, in simply new arrangement. If, in any of these respects, there is independent mental effort, then in the result of that mental effort, there may be copyright."

Lord Kinloch said: "I think it clear that it will not create copyright in a new edition of a work, of which the copyright has expired, merely to make a few emendations of the text, or to add a few unimportant notes. To create a copyright by alterations of the text, these must be extensive and substantial, practically making a new book. With regard to notes, in like manner, they must exhibit an addition to the work which is not superficial or colourable, but imparts to the book a true and real value, over and above that belonging to the text. This value may, perhaps, be rightly expressed by saying that the book will procure purchasers in the market on special account of these notes. When notes to this extent and of this value are added, I cannot doubt that they attach to the edition the privilege of copyright. The principle of the law of copyright directly applies. There is involved in such annotation, and often in a very eminent degree, an exercise of intellect and an application of learning, which place the annotator in the position and character of author, in the most proper sense of the word. The skill and labour of such an annotator have often been procured at a price which cries shame on the miserable dole which formed to the author of the text his only remuneration. In every view, the addition of such notes as I have figured, puts the stamp of copyright on the edition to which they are attached. It will still, of course, remain open to publish the text, which, *ex hypothesi*, is the same as in the original edition; but to take and publish the notes will be a clear infringement of copyright."

Notes need not be original.

It is not necessary that the notes should be original: if skill and labour are bestowed in their selection and application, the annotator is entitled to copyright in them.

"Of the 200 notes," said the Lord President, in the case just referred to, "the defenders' counsel tells us further that 15 only consist of original matter and are the composition of Mr. Lockhart himself, while the remaining 185 are quotations from other books and authors. Now this seems to be considered also to be a sort of disparagement of the value of the notes, in which I cannot at all agree. It seems to me that notes of this kind are almost chiefly valuable in bringing together, and in combination, the thoughts of the same author in different places, or the thoughts of other authors or of critics bearing upon the point that is under consideration; and nothing could better illustrate it than a number of the notes which we see in these very volumes, and which are exceedingly interesting and valuable as matter of literary and critical taste and judgment. The quotations are in many places most apposite, and highly illustrative of the text, and exceedingly interesting to the reader; and certainly the selection and application of such quotations from other books may exercise as high literary faculties as the composition of original matter. They may be the result both of skill and of labour and of great literary taste; and, therefore, I think the circumstance that the notes consist to a great extent of quotations is anything but a disparagement of their value." So Lord Kinloch: "It was, perhaps, thought that to repeat quotations from well-known authors was not piracy. If so, I think a great mistake was committed. In the adaptation of the quotation to the ballad which it illustrates—the literary research which discovered it—the critical skill which applied it—there was, I think, an act of authorship performed of which no one was entitled to take the benefit for his own publication, and thereby to save the labour, the learning, and the expenditure, necessary even for this part of the annotation."

PAGE 117, marginal note, *for* "authorship of" *read* "copyright in."

PAGE 118, before line 3, *add*:—It has recently been decided that joint authorship in a dramatic composition is not constituted by one person's altering the work of another without his consent, even though an entirely new scene should thereby be added: (*Levy* v.

Joint authorship.

Rutley, L. T. June 3, 1871, p. 85; Weekly Notes, June 3, 1871, p. 122; Notes of Cases, June 9, 1871, p. 127.) The Court of Common Pleas considered that joint authorship consisted in the co-operation of two or more authors in a common design, and that where there was no joint concert as to the general design and arrangement of the play, the person at whose request it was written, and who, besides making several alterations of an unimportant character, had introduced one entirely new scene, was not, as joint author, entitled, after the death of the writer, to sue for penalties for the unauthorised performance of the piece, although the deceased writer had given him a receipt for a sum of money on account, expressed to be for his "share as joint author:" (*Ibid.*) The court said that, to hold otherwise would give a copyright to many lives instead of to one life, as the statute contemplated; and if the contributor of an alteration or scene were held to be a co-author, the consequence would be that as many authors as had written a scene or made an alteration in a dramatic piece might each of them bring an action for penalties.

PAGE 127, before the last line, *insert*:

Canadian copyright.

An Act respecting copyrights in Canada was passed in 1868 (31 Vict. c. 54, being the first session of the first Parliament of Canada) by the Senate and House of Commons of Canada, and assented to by Her Majesty.

Publication in Canada necessary.

The most important provision of this Act is contained in the 9th section, which enacts that to entitle any literary production or engraving, which is the work of a person resident in Great Britain or Ireland, to the protection of the Act, the work must be "printed and published in Canada," and must contain, in addition to a notice of having been entered according to Act of Parliament of Canada, and immediately after it, "the name and place of abode or business in Canada of the printer and publisher thereof."

Who may have copyright in Canada.

The persons who may possess copyright, and the works in which it may be enjoyed, are dealt with by the 3rd section. It provides that "any person resident in Canada, or any person being a British subject, and resident in Great Britain or Ireland, who is the author of any book, map, chart, or musical composition, or of any original painting, drawing, statuary, sculpture, or photograph, or who invents, designs, etches, engraves, or causes to be engraved, etched, or made from his own design, any print or engraving, and the legal representatives of such persons shall have the sole right and liberty of printing, reprinting, publishing, reproducing, and vending such literary, scientific, or artistical works or compositions, in whole or in part, and of allowing translations to be made of such literary works from one language into other languages, for the term of 28 years from the time of recording the title thereof in the manner hereinafter directed; but no immoral or licentious, treasonable or seditious, book, or any other such literary, scientific, or artistical work, or composition, shall be the subject of such registration or copyright."

Renewal of term.

If at the expiration of the terms of 28 years the author or any of them (if originally more than one) is still living and residing in Canada or Great Britain, or, if dead, has left a widow, child, or children living, the term is to be continued for 14 years more to such author, widow, child, or children; but the title of the work secured must be, within a year after the expiration of the first term, recorded, and the same regulations must be observed as in the case of original copyrights: (sect. 4.)

Publication of record of renewal.

In all cases of renewal of copyright under the Act, the author or proprietor must, within two months from the date of the renewal, cause a copy of the record of it to be published once in the *Canada Gazette*: (sect. 5.)

No copyright in any scene or object.

Nothing contained in the Act is to prejudice the right of any person to represent any scene or object, notwithstanding that there may be copyright in some other representation of such scene or object: (sect. 14.)

Copyright of work made to order, &c.

Whenever the work has been executed by the author for another person, or has been sold to another person for due consideration, the author is not to be entitled to obtain or retain

the proprietorship of the copyright, which is by the said transaction virtually transferred to the purchaser, who may avail himself of the privilege, unless such privilege is specially reserved by the author or artist in a deed duly executed: (sect. 15.)

Requisites to copyright. The requisites to copyright are: (1) Recording title; (2) Deposit of copies; (3) Insertion of notice of copyright in the work; and (4) In the case of works of British subjects residing in Great Britain or Ireland, publication in Canada, and insertion in the work, immediately after the ordinary notice of copyright, of the name and place of abode or business in Canada of the printer and publisher of it.

Register of copyrights. The Minister of Agriculture is to cause to be kept in his office a book called the "Register of copyrights," in which proprietors of literary, scientific, and artistic works may have them registered: (Sect. 1.) He may also, from time to time, subject to the approval of the Governor in Council, make rules, regulations, and forms for the purposes of the Act; such regulations and forms being circulated in print for the use of the public, are to be deemed correct for the purposes of the Act; and all documents executed according to the same and accepted by him, are to be held valid so far as relates to all official proceedings under the Act: (sect. 2.)

Deposit of copies. No person is to be entitled to the benefit of the Act, unless he has deposited in the office of the Minister of Agriculture two copies of the book, map, chart, musical composition, photograph, print, cut, or engraving, and in case of paintings, drawings, statuary, and sculptures, unless he has furnished a written description of such works of art, and the Minister of Agriculture is forthwith to cause the same to be recorded in the book kept for the purpose, and in manner prescribed, for which record a payment of one dollar is to be made, and the like sum for every copy given to the person claiming the right, or his representatives, the sums so paid to be paid over to the Receiver-General, to form part of the Consolidated Revenue of Canada: (sect. 6.) The Minister of Agriculture is to cause one of the two copies to be deposited in the Library of the Parliament of Canada: (sect. 7.)

Notice of copyright to appear in work. Nor is any person to be entitled to the benefit of the Act unless he gives information of the copyright being secured, by causing to be inserted in the several copies of every edition published during the term secured, on the title-page, or the page immediately following, if it be a book, or if a map, chart, musical composition, print, cut, engraving, or photograph, by causing it to be impressed on the face thereof, or if a volume of maps, charts, music, or engravings, upon the title or frontispiece, the following words: "Entered according to Act of the Parliament of Canada, in the year , by A. B., in the office of the Minister of Agriculture:" (sect. 8.)

In the case of paintings, drawings, statuary, and sculpture, the signature of the artist is to be deemed a sufficient notice of proprietorship: (*Ib.*)

Temporary registration to secure copyright. A literary work intended to be published in pamphlet or book form, but which is first published in separate articles in a newspaper or periodical, may be the subject of registration within the Act, whilst so preliminarily published, provided the title of the MS. and a short analysis of the work are deposited in the office of the Minister of Agriculture, the registration fee be duly paid, and every separate article so published, be preceded by the words "Registered in accordance with the Copyright Act of 1868;" but the work, when published in book or pamphlet form, is to be subject, besides, to the other requirements of the Act: (sect. 13.)

Penalty for infringement of copyright in books; It is piracy for any other person, after the recording of the title of any book according to the Act, within the term or terms therein limited, to print, publish, or import, or cause to be printed, published, or imported, any copy or translation of such book, without the consent of the person legally entitled to the copyright first had and obtained by deed duly executed, or knowing the same to be so printed or imported, to publish, sell, or expose to sale, or cause to be published, sold, or exposed to sale, any copy of such book without such consent in writing. The offender is to forfeit every copy of the book to the person legally entitled to the

copyright, and two dollars for every copy found in his possession, either printed or printing, published, imported, or exposed to sale, contrary to the intent of the Act; one moiety of the penalty to be to the use of Her Majesty, the other to the legal owner of the copyright, to be recovered in any court of competent jurisdiction: (sect. 13.)

In painting, drawing, or sculpture;

Whoever, within the term limited, and after the recording of any painting, drawing, statuary, or sculpture, reproduces in any manner, or causes to be reproduced, made, or sold, in whole or part, copies of those works of art without the consent of the proprietor or proprietors, is to forfeit the plate or plates on which such reproduction has been made, and also every sheet thereof so copied, printed, or photographed, to the proprietor of the copyright, and also two dollars for every sheet of the same reproduction so published or exposed to sale, contrary to the intent of the Act, the penalty to be divisible and recoverable as in the case of piracy of books: (sect. 11.)

In prints, maps, charts, musical compositions, or photographs.

If any person, within the time limited, and after the recording of any print, cut or engraving, map, chart, musical composition, or photograph, according to the provisions of the Act, engraves, etches, or works, sells or copies, or causes to be engraved, etched, or copied, made or sold, either in the whole, or by varying, adding to, or diminishing the main design, with intent to evade the law, or prints or imports for sale, or causes to be printed or imported for sale, any such map, chart, &c., or any parts thereof, without the consent of the proprietor of the copyright, first obtained as aforesaid, or knowing the same to be so printed or imported without such consent, publishes, sells or exposes to sale, or in any manner disposes of any such map, chart, &c., without such consent, he is to forfeit the plate or plates on which such map, chart, &c., has been copied, and also every sheet thereof, so copied or printed, to the proprietor of the copyright, and also two dollars for every sheet of such map, musical composition, &c., found in his possession, printed or published or exposed to sale, contrary to the true intent and meaning of the Act; the penalty to be divisible and recoverable as in the preceding cases: (sect. 12.)

Damages for infringement of copyright.

If any person prints or publishes any MS. whatever in Canada, or, the same having been printed or published elsewhere, offers it or causes it to be offered for sale in Canada, without the consent of the author or legal proprietor first obtained, such author or proprietor being resident in Canada, or being a British subject resident in Great Britain or Ireland, such person is to be liable to the author or proprietor for all damages occasioned by such injury, to be recovered in any court of competent jurisdiction: (sect. 16.)

Penalty for falsely pretending to have copyright.

If any person prints, publishes, or reproduces any book, map, chart, musical composition, print, cut, or engraving, or other work of art, or photograph, and, not having legally acquired the copyright thereof, inserts therein, or impresses thereon, that it has been entered according to the Act, or words to that effect, he is to incur a penalty not exceeding 60 dollars, to be divisible and recoverable as in preceding cases: (sect. 17.)

Limitation of actions.

All proceedings for the recovery of penalties under the Act must be commenced within two years from the cause of action arising: (sect. 18.)

Repeal of former Acts.

The Act repeals former Copyright Acts, saving in respect of unexpired terms thereunder: (sects. 19, 20.)

PAGE 165, before line 19, *add:* But a receipt for money on account, given by the writer of a play to the person for whom he writes it on commission, does not amount to an assignment: (*Levy* v. *Rutley*, L. T. June 3, 1871, p. 85; Weekly Notes, June 3, 1871, p. 122; Notes of Cases, June 9, 1871, p. 127).

PAGE 265, second marginal note, *for* "stamped" *read* "stamp."

PAGE 267, lines 23, 24, *for* "property" *read* "penalty."

PAGE 323, line 15, *for* "Charles" *read* "James."

PAGE 353, line 18, *for* "and" *read* "or."

PAGE 379, note (*d*), *for* "Clements" *read* "Clement."

PAGE 412, note (*j*), line 1, *for* "Herle" *read* "Keble."

PAGE 413, note (*a*), line 8, *for* "Stewart" *read* "Stuart."

PAGE 428, line 7, *for* "Dixon" *read* "Dickson."

PAGE 465, line 6, *for* "came" *read* "come."

PAGE 488, marginal note, and lines 18, 25, and 42, *for* "Creevy" *read* "Creevey."

PAGE 506, before line 40, *add:* In the case of *Reg.* v. *Stanger* (L. Rep. 6 Q. B. 352; 40 L. J. 96, Q. B.) affidavits stating that a copy of the newspaper in which the libel appeared had been purchased from a salesman in the office of the newspaper, and that by a footnote to the newspaper the defendant was stated to be the printer and publisher of it, and that deponent believed him to be so, were held not to disclose legal evidence of publication entitling to a rule for a criminal information. In the same case the court doubted whether recourse could be had to the affidavits of the defendant used in showing cause against the rule *nisi*, in order to supply the defects in those for the prosecution.

PAGE 508, note (*a*), *for* "Rex" *read* "Reg."

PAGE 515, note (*b*), *for* "Reg." *read* "Rex."

THE LAW

RELATING TO

Works of Literature and Art.

PART I.—LAW OF COPYRIGHT.

CHAPTER I.

LITERARY PROPERTY.

THE foundation of Literary property is the same as that of all other property. "La propriété," says Bentham,(*a*) "n'est qu'une base d'attente; l'attente de retirer certains avantages de la chose qu'on dit posséder en conséquence des rapports où l'on est déjà placé vis-à-vis d'elle;" and this expectation of advantages to be derived is altogether the work of law. In the right of property are two elements involved, first, the power of using indefinitely the subject of the right, or of applying it to uses or purposes which are not positively and exactly circumscribed; and, secondly, a power of excluding others from using the same subject.(*b*) These are the advantages which the possessor of literary as well as other property enjoys, and which the law of the land secures to him. The sole right of originally giving to the world the results of his mental labours, and the power to hinder the infringement by others of his property therein, are guaranteed to every British subject by law, so far as law can accomplish that object; for the mental experiences of all of us have so much in common, the thoughts of most men resemble each other to so large an extent, that to determine and guard specific property in ideas merely—ideas which have not embodied themselves in a material form—is a task which no law makers

(*a*) "Traités de Legislation," par Dumont, p. 95.
(*b*) Austin Jur. iii. 19.

not pretending to omniscience could undertake to perform. Hence our law takes no cognisance of any claims to the ownership of ideas which have not found a material clothing, and refuses to preserve the most original of men from the annoyance of having published abroad, either by writing or by word of mouth, his most original ideas, which have been communicated to another in the course of conversation. The original ideas of a man on any subject, though they exist not out of relation to his mind, in one sense really belong as entirely to him as if they were reduced by him to writing, and hence it might be thought that he ought to be enabled to assert an equal claim to them in the one case as in the other. But the practical impossibility referred to, of dealing by means of legal proof with the former case, has rendered necessary the distinction which the law makes between the two. The intangible and incorporeal products of his mind, so long as they remain in that condition, are beyond the protection of law; when reduced into any material form, which can be produced in a court of justice, or be identified by proofs of a satisfactory kind, the author's right to them (called copyright) becomes enforceable by law.(*a*) And that right is twofold: first, he has a right to them, and a property in them whilst the materials embodying them remain unpublished in his possession; and, secondly, after they are published he has a statutory exclusive property in them limited in point of duration.(*b*) This obvious division of the subject will be followed in dealing with the copyright belonging to individuals, and we shall treat separately of the property in unpublished works, or copyright before publication, and in published works, or copyright after publication. Before doing so, however, it will be advisable to determine the answers to two other questions, namely: first, in what works this right of property exists? and secondly, what class of persons are entitled to claim and enjoy the right? With these we shall now proceed to deal in order.

(*a*) "It is a well-known and established maxim (which, I apprehend, holds as true now as it did 2000 years ago) 'that nothing can be the *object* of property which has not a *corporeal* substance':" (Yates, J., in *Millar* v. *Taylor*, 4 Burr. 2361.)

(*b*) "Copyright is not of a simple but a complex nature, involving two conditions, one of publication and the other of exclusion. An author claims the right of multiplying the copies of his work, and of thus securing to himself present reputation and distant fame; and he also claims the advantage of excluding by statute law, other persons from multiplying copies of the same work:" (*Arguendo* in *Prince Albert* v. *Strange*, 2 De G. & Sm. 674.)

CHAPTER II.

IN WHAT WORKS COPYRIGHT EXISTS.

Enumeration of works.

COPYRIGHT may exist with regard to every original composition or work of literature, science, or art, which is innocent in its nature, including every volume, part or division of a volume, map, chart, or plan separately published (5 & 6 Vict. c. 45, s. 2), lectures (5 & 6 Will. 4, c. 65), engravings (8 Geo. 2, c. 13; 7 Geo. 3, c. 38; 17 Geo. 3, c. 57), lithographs (15 & 16 Vict. c. 12, s. 14), paintings, drawings, and photographs (25 & 26 Vict. c. 68).

Work must be innocent.

If the work be not innocent in its nature, there is no right of property in it which the law will enforce or protect. In what respect, then, may a work not be innocent? The test of the innocence of a work, where the Court of Chancery is asked to interfere, laid down by Lord Eldon in the case of *Southey* v. *Sherwood*,(*a*) is the possibility of making it the foundation of a successful action at law. "If this publication is an innocent one," said his lordship, "I apprehend that I am authorised by decided cases to say that, whether the author did or did not intend to make a profit by its publication, he has a right to an injunction to prevent any other person from publishing it. If, on the other hand, this is not an innocent publication, in such a sense as that an action would not lie in case of its having been published by the author and subsequently pirated, I apprehend that this Court will not grant an injunction." And the same judge observes, "If the doctrine of Lord Chief Justice Eyre(*b*) is right, and I think it is, that publications may be of such a nature that the author can maintain no action at law, it is not the business of this court, even upon the submission in the answer [as to one edition of the book in question which the defendants acknowledged that they had pirated] to decree either an injunction or an account of the profits of works of such a nature that the author can maintain no action at law for the invasion of that which he calls his property, but which the policy of the law will not permit him to consider his property."(*c*) And again, "This court interferes by injunction; but not in cases where an action cannot be maintained."(*d*)

Now it is a fundamental principle of our common law that no action can be maintained on any contract, express or implied, parol or under seal, which is in direct violation of

(*a*) 2 Meriv. 437.
(*b*) See next page.
(*c*) *Southey* v. *Sherwood* (*ubi supra*).
(*d*) *Laurence* v. *Smith* (Jac. 472).

PART I. CHAPTER II.

law—whether statutory or unwritten—which is of an immoral tendency or contrary to sound policy.(*a*)

When a contract is said to be void and incapable of being enforced as "opposed to sound or public policy," this is in accordance with the principle of law that "no subject can lawfully do that which has a tendency to be injurious to the public or against the public good—which may be termed, as it sometimes has been, the policy of the law, or 'public policy' in relation to the administration of the law."(*b*) The legal maxim on the subject is, *Nihil quod est inconveniens est licitum*.(*c*)

A work, then, may lack the character of innocence by being opposed to any law, either unwritten or statutory, by being of an immoral tendency (a test, as applied, of a very comprehensive character) or by being contrary to what is called sound or public policy. If it offends against innocence in any of these respects no action at law would lie to enforce any alleged right with reference to it, and, as a consequence, no court of equity would interfere to hinder any infringement of such alleged right.

The opinion of Lord Chief Justice Eyre, already referred to(*d*) by Lord Eldon, was expressed by him on the trial of an action brought by Dr. Priestley against a hundred to recover damages sustained by him in consequence of the riotous proceedings of a mob at Birmingham. Amongst other property alleged to have been destroyed, and for the loss of which he claimed compensation, were certain unpublished MSS. It was alleged, by way of defence, on behalf of the hundred, that the plaintiff was in the habit of publishing works injurious to the government of the State, but no evidence was produced in support of that allegation. The Lord Chief Justice observed that if such evidence had been produced, he should have held it was fit to be received as against the claim made by the plaintiff.(*e*)

In *Walcot* v. *Walker*,(*f*) it was held that a court of equity would not act, either by giving an injunction or an account, even upon a submission in the defendant's answer, in the case of an unauthorised publication of a literary work of such a nature that an action at law could not be maintained in respect of it. "It is no answer," said Lord Eldon, "that the defendants are as criminal. It is the duty of the court to know whether an action at law would lie; for if not, the

(*a*) Broom's Com. p. 354, 3rd edit.
(*b*) Per Lord Truro in *Egerton* v. *Brownlow* (4 H. L. Cas. 196).
(*c*) Co. Litt. 66*a*. (*d*) *Ante*, p. 3. (*e*) Cited 2 Meriv. 437.
(*f*) 7 Ves. 1.

court ought not to give an account of the unhallowed profits of libellous publications. At present I am in total ignorance of the nature of this work, and whether the plaintiff can have a property in it or not. . . . Before I uphold any injunction I will see these publications and determine upon the nature of them, whether there is question enough to send to law as to the property in those copies; for, if not, I will not act upon the submission in the answer. If, upon inspection, the work appears innocent, I will act upon that submission; if criminal, I will not act at all; and if doubtful, I will send that question to law."

Where the work is of a criminal character the Court of Chancery, not being a court of criminal jurisdiction, simply refuses to interfere in any way. It punishes the author of a criminal, libellous, or immoral production no otherwise than by denying him any assistance in the assertion of a right of property in his work, or in the attempt to hinder the piracy of it. Courts of equity stand quite neutral. "The Court does not interfere in the way of injunction to punish or to prevent injuries done to the character of individuals; but it leaves the party to his remedy at law."(*a*) One Lord Chancellor (Macclesfield), indeed, seems to have taken a different and much more lofty view of the province of courts of equity in dealing with books of the character above mentioned, being of opinion "that the Court of Chancery had a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality;"(*b*) and his lordship granted an injunction to restrain the publication of a translation of two Latin works ("Archæologia Philosophica" and "De Statu Mortuorum et Resurgentium") written by Dr. Burnett, on the sole ground that "inasmuch as the book contained to his (the Chancellor's) knowledge (he having read it in his study) strange notions intended by the author to be concealed from the vulgar in the Latin language—in which language it could not do much hurt, the learned being better able to judge of it—it was proper to grant an injunction to the printing and publishing it in English." And Lord Ellenborough, in dealing with the case of a libellous picture

(*a*) Per Lord Eldon (*Southey* v. *Sherwood*, 2 Meriv. 438); see also the opinion of Lord Langdale, M.R., in *Clark* v. *Freeman* (11 Beav. 117, 119), but as to the decision in the latter case, see the remarks of Lord Cairns in *Maxwell* v. *Hogg* (L. Rep. 2 Ch. App. 310; 16 L. T. N. S. 130; 36 L. J. 433, Ch.), and of Malins, V.C. in *Springhead Spinning Company* v. *Riley* (L. Rep. 6 Eq. 561; 19 L. T. N. S. 64; 37 L. J. 889, Ch).

(*b*) *Burnett* v. *Chetwood*, cited from a manuscript volume of cases, in a note, by the learned reporter to *Southey* v. *Sherwood* (*ubi supra*).

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said, that "upon an application to the Lord Chancellor, he would have granted an injunction against its exhibition."(a) These opinions with regard to the extent of the jurisdiction of courts of equity in dealing with non-innocent publications have, as the cases already cited show, been long since abandoned, and courts of equity now simply refuse to interfere in the matter at all. Lord Eldon, in *Lawrence* v. *Smith*,(b) in express words repudiates the jurisdiction asserted by Lord Macclesfield. In the judgment pronounced by him in that case, he says: "As this Court has no jurisdiction in matters of crime,(c) it has been said that if the injunction be refused it has the effect of increasing the number of copies. The answer to that is, I have nothing to do with it as a crime. The question relates only to a civil right of property. If the one party has that right, the other must not invade it; if he has not that right the Court cannot give him the consequences that belong to it." There are other means of punishing the authors of criminal and libellous works, which will be treated of in a subsequent portion of this work.(d)

In *Southey* v. *Sherwood* (e) a motion was made on the part of the poet Southey to restrain the defendants from printing or publishing a poem called "Wat Tyler," which had been composed by the plaintiff about twenty-three years previously, and had lain unpublished during the whole of that period in the hands of the bookseller to whom Southey had first sent it for his perusal and consideration as to the advisability of

(a) *Du Bost* v. *Beresford* (2 Camp. 511). Referring to this dictum of Lord Ellenborough, the editor of Howell's State Trials says (vol. xx. p. 799): "I have been informed by very high authority, that the promulgation of this doctrine relating to the Lord Chancellor's injunction excited great astonishment in the minds of all the practitioners in the Courts of Equity, and I had apprehended that this must have happened; since, I believe there is not to be found in the books any decision or any dictum, posterior to the days of the Star Chamber, from which such doctrine can be deduced, either directly, or by inference, or analogy; unless, indeed, we are to except the proceedings of Lord Ellenborough's predecessor Scroggs, and his associates, in the case of Henry Care, in which case 'Ordinatum est quòd liber intitulat' The Weekly Packet of Advice from Rome, or the History of Popery, non ulterius imprimatur vel publicetur per aliquam personam quamcunque.'" The learned editor does not appear to have known of the decision of Lord Macclesfield in *Burnett* v. *Chetwood*, above cited.

(b) Jac. 471. *Vide post*, pp. 7, 8.

(c) If a publication, which is criminal, tends also to the destruction or deterioration of property, the Court of Chancery has, according to the decision of Malins, V.C., in *The Springhead Spinning Company* v. *Riley* (L. Rep. 6 Eq. 551; 19 L. T. N. S. 64; 37 L. J. 889, Ch.), jurisdiction to restrain the publication by injunction.

(d.) See the chapters on "Libel," *post*.

(e) 2 Meriv. 435.

publishing it. On the part of the defendant it was contended that the poem in question, from its libellous tendency, was of such a nature that there could be no copyright in it; and the case of *Dr. Priestley* and that of *Walcot* v. *Walker* were referred to. Lord Eldon, in refusing the injunction, stated that he remained of the same opinion as that which he entertained in deciding the case of *Walcot* v. *Walker*. "It is very true," he proceeded, "that in some cases it may operate so as to multiply copies of mischievous publications by the refusal of the Court to interfere by restraining them; but to this my answer is, that, sitting here as a judge upon a mere question of property, I have nothing to do with the nature of the property, nor with the conduct of the parties, except as relates to their civil interests; and if the publication be mischievous, either on the part of the author or of the bookseller, it is not my business to interfere with it." (*a*)

One of the most important cases decided on this subject came before Lord Eldon in 1822. In *Lawrence* v. *Smith*, (*b*) the Lord Chancellor dissolved an injunction which had been obtained upon an *ex parte* motion, to hinder the publication of a pirated edition of certain "Lectures on Physiology,

(*a*) An American writer (Curtis) on Copyright urges some weighty objections to the doctrine laid down by Lord Eldon in the above case. In the case of *Dr. Priestley* the owner of the manuscript was seeking damages for the destruction of what might have been the source of pecuniary profit, and the case goes only to this, that a work existing in manuscript may be of such a character that the author cannot make lawful profits by its publication; and in this sense it may be said that there can be no property in such a work. But this cannot justify the very different doctrine that the author of an unpublished manuscript of a character not innocent or doubtful cannot have the interposition of a court of equity to restrain its publication by a person who is about to publish it against his will. There is a wide difference between seeking protection for a published work of a non-innocent character and the mere assertion of a right to possess and control, to publish or not to publish one's own manuscript. There are two kinds or degrees of property in a literary work, one consisting in the right to take the profits of a book when published, the other in the right to the exclusive possession and control of a manuscript, or the right to publish or withhold from publication altogether. In no case has it been considered that the author's right depends on his intention to publish and to make a profit; but the cases proceed upon the ground of a *right of property*, by which seems to be intended a right to the possession and control of the manuscript, and to publish or to withhold it from publication; and this holds equally in the case of a non-innocent and an innocent work. When, therefore, an author has not published, or does not intend to publish a work existing in manuscript, but, on the contrary, desires and intends to withhold it from publication, the question as to its innocence does not arise, because that question affects only so much of his right of property as consists in the right to take the *profits* of the publication.

(*b*) Jac. 471.

Zoology, and the Natural History of Man," which had been delivered by the plaintiff at the College of Surgeons, and afterwards published by him. In support of the motion to dissolve the injunction, it was urged that the nature and general tendency of the work were such, that it could not be the subject of copyright, as it contained several passages hostile to natural and revealed religion, impugning the doctrines of the immateriality and immortality of the soul. And on this ground Lord Eldon refused to continue the injunction, and left the plaintiff to bring his action at law, if he considered that he had any chance of succeeding there. "Looking," said his lordship, "at the general tenor of the work, and at many particular parts of it, recollecting that the immortality of the soul is one of the doctrines of the Scriptures, considering that the law does not give protection to those who contradict the Scriptures, and entertaining a doubt—I think a rational doubt—whether this book does not violate that law, I cannot continue the injunction. The plaintiff may bring an action, and when that is decided he may apply again." As to the injunction originally granted, *ex parte*, Lord Eldon said, "I take it for granted that when the motion for the injunction was made, it was opened as quite of course; nothing probably was said as to the general nature of the work, or of any part of it; for we must look *not only at the general tenor, but at the different parts;* and the question is to be decided, not merely by seeing what is said of materialism, of the immortality of the soul, and of the Scriptures, but by looking at the different parts and inquiring whether there be *any* which deny, or which appear to deny, the truth of Scripture, or which raises a fair question for a court of law to determine whether they do or do not deny it."

Two later instances of the application of the same doctrine are mentioned in Mr. Jacob's note to the case last cited. In *Murray* v. *Benbow* (February, 1822), the Lord Chancellor (Eldon) refused an injunction to restrain the defendant from publishing a pirated edition of Lord Byron's poem "Cain," on the ground of a doubt whether the poem was not intended to bring into discredit that portion of Scripture history to which it relates. And in 1823 Vice-Chancellor Sir John Leach, on similar principles, dissolved an injunction which had been obtained to restrain the publication of a pirated edition of a portion of the poem of "Don Juan." In this case, however, the Vice-Chancellor ordered that the defendant should keep an account.(*a*)

(*a*) See also *Hime* v. *Dale*, referred to 2 Camp. 27.

A doubt has been expressed(*a*) whether the doctrines laid down in these cases would be strictly adhered to in the present day; but, notwithstanding the more enlarged and tolerant views which are now generally entertained on subjects of a religious as well as of a political nature, there seems to be no disposition on the part of our courts of common law to relax the strict rules of former times as to contracts of an irreligious nature.(*b*) And so long as the test of the propriety of equitable interposition continues to be the ability of the author to sustain an action at law, it should seem that in all respects the author's title to relief against the infringement of his copyright, either at law or in equity, is still dependent on his work being *innocent* in the sense already described. In *Stockdale* v. *Onwhyn*,(*c*) the Court of King's Bench, in 1826, held that no action could be brought for the infringement of an asserted copyright in a book entitled "Memoirs of Harriett Wilson," the book on examination appearing to be the history of the life and amours of a courtesan, and containing anecdotes either libelling or ridiculing the various persons with whom she professed to have had communication. Holroyd, J., succinctly states the principle on which the courts proceed in dealing with works of this character: (*d*) "The ground of this action, if any, must be that the defendant has worked an injury to the plaintiff's exclusive right of publishing the book in question; now it is criminal in him to publish such

(*a*) Phillips on Copyright, p. 25.

(*b*) In the recent case of *Cowan* v. *Milbourn* (L. Rep. 2 Ex. 230; 16 L. T. N. S. 290; 36 L. J. 124, Ex.), where an action had been brought for breach of a contract to let rooms to the plaintiff, the defendant set up as a defence, that after contracting to let the rooms he discovered that the plaintiff intended to use them for the purpose of delivering lectures of an irreligious, blasphemous, and illegal character—lectures maintaining, amongst other things, that the character of Christ is defective and His teaching misleading, and that the Bible is no more inspired than any other book. The Court of Exchequer held the defence to be a sufficient one, that the publication of such doctrines was blasphemy, and that therefore the purpose for which the plaintiff intended to use the room was illegal, and the contract one which could not be enforced at law. The remarks of Bramwell, B., in giving his judgment, are deserving of attention. "It is strange," he says, "that there should be so much difficulty in making it understood that a thing may be unlawful, in the sense that the law will not aid it, and yet that the law will not immediately punish it. If that only were unlawful to which a penalty is attached, the consequence would be that, inasmuch as no penalty is provided by the law for prostitution, a contract having prostitution for its object would be valid in a court of law."

(*c*) 5 B. & C. 173; 7 D. & R. 625; 2 C. & P. 163.

(*d*) 7 D. & R. 629; see also *Poplett* v. *Stockdale* (Ry. & M. 337).

a book: then he has no right to publish it, and having no right, he has sustained no injury, and has no ground of action."

Publication in another's name with intent to deceive.

The analogy of the cases, where it has been held that no copyright exists in a work subversive of good order, morality, or religion, has been extended (*a*) to the case of an author publishing a book in the name of another, with a deliberate design to deceive the public, by inducing them to believe that the work is the original work of the author named, and thereby to obtain from the purchaser a greater price than he would otherwise pay. "The publisher," said Tindal, C.J., with reference to such a case, "seeks to obtain money under false pretences; and as not only the original act of publishing the work, but the sale of copies to each individual purchaser falls within the reach of the same objection, we think the plaintiff cannot be considered as having a valid and subsisting copyright in the work, the sale of which produces such consequences, or that he is capable of maintaining an action in respect of its infringement." The book in which the plaintiff claimed copyright in this case was entitled "Evening Devotions, or the Worship of God in Spirit and in Truth, for Every Day in the Year; from the German of C. C. Sturm." The defendant set up as a defence that several of the works of Sturm had been translated into English, and were much valued, and that plaintiff knowing that, and intending to defraud and deceive the public, caused the book in question to be written, and had falsely, fraudulently, and deceitfully published the same to the public, as and for a translation of an original work written in German by C. C. Sturm. On demurrer it was held that the facts stated in the defendant's plea were sufficient to negative the existence of a valid copyright in the plaintiff, and consequently to preclude him from maintaining any action for piracy. "The cases," said the Chief Justice, "in which a copyright has been held not to subsist, where the work is subversive of good order, morality, or religion, do not, indeed, bear directly on the case before us; but they have this analogy with the present inquiry, that they prove that the rule which denies the existence of copyright in those cases, is a rule established for the benefit and protection of the public. And we think the best protection that the law can afford to the public against such a fraud as that laid open by this plea, is to make the practice of it unprofitable to its author?"

The case is different, however, where the misrepresenta-

(*a*) *Wright* v. *Tallis* (1 C. B. Rep. 893).

tion as to authorship is harmless and innocent, as in the case of many books of instruction and amusement (*e.g.* Walpole's "Castle of Otranto") which have been published as translations, although in reality original works, or which have been published under an assumed instead of a true name, as has been done in the case of many books of voyages, travels, biography, works of fiction or romance, and even of science and instruction.(*a*) "There is not found in any one of those cases any serious design on the part of the author to deceive the purchaser, or to make gain and profit from him by the false representation; the purchaser, for anything that appears to the contrary, would have purchased at the same prices if he had known that the name of the author was an assumed and not a genuine name; or had known that the work was original and not translated."

immoral pictures, drawings, and photographs

The same principle of law which applies to writings of a libellous, immoral, or irreligious kind would, of course, apply equally to pictures, drawings, and photographs of a similar character. Pictures and drawings may be libellous as well as writings, and the same may be said of photographs, which are a species of pictures. And it is to be observed that the term libel includes, besides libels defamatory of individuals, such writings as are of a blasphemous, treasonable, seditious, or immoral kind, the publication of any of which is now a misdemeanor, and subjects the person by whom it was composed, written, printed, or published, to fine and imprisonment.(*b*) There cannot, of course, be copyright in pictures, drawings, or photographs which are libellous in any of the senses above mentioned. And the same doctrine is applicable to obscene pictures, prints, drawings, or other representations, the public selling or exposing for public sale or to public view of these being punishable with fine or imprisonment, or both, with hard labour at the discretion of the court.(*c*) It was long since determined (*d*) that an action would not lie to recover the value of prints of an obscene, immoral, or libellous tendency. And Lord Ellenborough, in *Du Bost* v. *Beresford*,(*e*) held that if a picture destroyed by the defendant was a libel upon the individuals introduced into it, the owner of the picture was at most entitled to recover only the value of the canvas and paint which formed its component parts.

Letters.

Of innocent productions there is also a species of copyright on the part of the writer in the private letters which

(*a*) 1 C. B. Rep. 906.
(*b*) 4 Steph. Black. 345.
(*c*) 14 & 15 Vict. c. 100, s. 29; see also 20 & 21 Vict. c. 83.
(*d*) *Fores* v. *Johnes* (4 Esp. 97).
(*e*) 2 Camp. 511.

one person sends to another. The earliest assertion of this doctrine in our law books is to be found in the judgment of Lord Hardwicke in *Pope* v. *Curl*,(a) in which case his lordship refused to dissolve an injunction which Pope had obtained to restrain the defendant from publishing a collection of letters written by the poet. "The first question," said Lord Hardwicke, "is whether letters are within the grounds and intention of the statute made in the 8th year of Queen Anne, c. 19, intitled, 'An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies.' I think it would be extremely mischievous to make a distinction between a book of letters which comes out into the world, either by permission of the writer, or the receiver of them, and any other learned work. . . . . Another objection has been made by the defendant's counsel, that where a man writes a letter it is in the nature of a gift to the receiver. But I am of opinion that it is only a special property in the receiver; possibly the property of the paper may belong to him, but this does not give a licence to any person whatsoever to publish them to the world, for at most the receiver has only a joint property with the writer." And to the objection insisted on by the defendant's counsel that this was a sort of work which did not come within the meaning of the Act of Parliament, because it contained only letters on familiar subjects, and inquiries after the health of friends, and therefore could not properly be called a learned work, his lordship replied: "It is certain that no works have done more service to mankind than those which have appeared in this shape, upon familiar subjects, and which, perhaps, were never intended to be published, and it is this makes them so valuable; for I must confess, for my own part, that letters which are very elaborately written, and originally intended for the press, are generally the most insignificant, and very little worth any person's reading."(b) The injunction was continued by the Lord Chancellor only as to those letters in the book which were written *by* Pope, and not as to those which were written *to* him.

In *Thompson* v. *Stanhope*(c) (a case respecting the letters written by Lord Chesterfield to his son) Lord Apsley, C., took the same view of the law as that expressed in the preceding case by Lord Hardwicke. In the later case of *Percival* v. *Phipps*(d) Sir Thomas Plumer, V.C., adhering to the same

(a) 2 Atk. 342.
(b) *Ib.* 343. See *Eyre* v. *Higbee* (22 How. Pr. 200).
(c) Amb. 737.
(d) 2 V. & B. 19.

doctrine, observed: "An injunction restraining the publication of private letters must stand upon this foundation: that letters, whether of a private nature or upon general subjects, may be considered as the subject of literary property; and it is difficult to conceive in the abstract that they may not be so. . . . . The question then arose, whether letters having that character of literary composition, the transmission of them to the person to whom they were addressed deprived the author of his power over them as his composition, so far as to authorise a publication without his consent; and it has been decided that by sending a letter the writer does not give the receiver the power of publishing it; that, whether he is to be considered as a joint proprietor or not, letters have the character of literary composition stamped upon them, so that they are within the spirit of the Act of Parliament protecting literary property; and a violation of the right in that instance is attended with the same consequences as in the case of an unpublished manuscript of an original composition of any other description." An important qualification of the right of property in private letters was stated by the Vice-Chancellor in this case. "Though the form of familiar letters might not prevent their approaching the character of a literary work, every private letter upon any subject to any person is not to be described as a literary work, to be protected upon the principle of copyright. The ordinary use of correspondence by letters is to carry on the intercourse of life between persons at a distance from each other, in the prosecution of commercial or other business; which it would be very extraordinary to describe as a literary work in which the writers have a copyright."

Lord Eldon followed the preceding decisions in *Gee* v. *Pritchard*,(*a*) though expressing his doubts relative to the jurisdiction assumed by the Court of Chancery over the publication of letters,(*b*) and hinting his determination to give effect to those doubts should the question ever be

(*a*) 2 Swans. 402. See *Brandreth* v. *Lance* (8 Paige's Rep. 24.)

(*b*) "My predecessors," said his lordship, "did not inquire whether the intention of the writer was or was not directed to publication. The difficulty which I have felt in all these cases is this: If I had written a letter on the subject of an individual for whom both the person to whom I wrote and myself had a common regard, and the question arose for the first time, I should have found it difficult to satisfy my mind that there is a property in the letter; but it is my duty to submit my judgment to the authority of those who have gone before me; and it will not be easy to remove the weight of the decisions of Lord Hardwicke and Lord Apsley."

brought on appeal before the House of Lords. An injunction was granted to the plaintiff in this case to restrain the publication of private letters written by her to the defendant.

In *Cadell* v. *Stewart*,(*a*) the Scotch Court of Session restrained the publication of letters written by the poet Burns to Clarinda. The interdict was granted after the death of Burns on the application of the publishers of his works, concurred in by the brother of the poet and the curator of his children. The report of the case says, "There was little difference of opinion upon the bench. The ground upon which the court seemed to pronounce the decision was, that the communication in letters is always made under the implied confidence that they shall not be published without the consent of the writer, and that the representatives of Burns had a sufficient interest for the vindication of his literary character to restrain this publication."

In a bill filed by the executor and residuary legatee of Lady Tyrawly, the Irish Court of Chancery restrained a connection of her ladyship, who resided in her house, from publishing after her death a collection of letters addressed to her.(*b*)

There seems to be no distinction with reference to the writer's title to restrain the publication of letters written to another, between merely private letters not intended as literary compositions, and those which are written with a view to their literary character, although Sir T. Plumer, in *Percival* v. *Phipps*, appears to consider such a distinction material. Notwithstanding the doubts expressed by Lord Eldon(*c*) as to the existence of what Lord Hardwicke(*d*) called a "joint property" in a letter in the writer and receiver, the Court of Chancery has restrained the publication of letters on the sole ground of the property (of whatever nature it be) which the writer has in the letters written by him. Whether the right to control the act of publication and to decide whether there shall be any publication at all be correctly termed a right of property or no, it is on the ground of this right that equity interferes to aid the writer of letters. And, if so, there can be no valid distinction between the writer's property in private and familar letters and those of a more elaborate and literary character. Indeed it would be completely impossible to draw a line of distinction between the two; and were the case otherwise it is difficult to resist the conclusion that "if

(*a*) 13 Fac. Dec. 375, June 1, 1804.
(*b*) *Earl of Granard* v. *Dunkin* (1 Ball & B. 207).
(*c*) *Gee* v. *Pritchard* (*ante*, p. 13). (*d*) *Pope* v. *Curl* (2 Atk. 342).

the mere sending of letters to third persons is not to be deemed, in cases of literary composition, a total abandonment of the right of property therein by the sender, *à fortiori* the act of sending them cannot be presumed to be an abandonment thereof in cases where the very nature of the letters imports, as matter of business or friendship, or advice, or family or personal confidence, the implied or necessary intention and duty of privacy and secrecy."(*a*)

Limitations of property in letters.

The decided cases, however, have placed certain restrictions on the title of the writer of private letters to insist on his special property in them, and to hinder their publication by others. The writer may by his own acts disentitle himself to prevent the publication of his letters to another person, and justify that other person in giving them to the world;—*e.g.*, a false accusation brought by the writer against the recipient of the letters which may be disproved by their publication, will justify such publication, and courts of equity have refused to aid by injunction the writer of the letters in such a case. Sir Thomas Plumer, V.C., whose *dicta* in favour of the abstract right of property in private letters have been quoted above, refused an injunction to prevent the publication of the letters under the particular circumstances of the case before him,(*b*) which are briefly these. The defendant Phipps was the proprietor of a newspaper called *The News*, in which were published from time to time articles and paragraphs on a subject which then engrossed the public attention, which articles and paragraphs were supplied to Phipps by a Mr. Mitford, but were written, as Mitford informed Phipps, by Lady Percival, and in her handwriting. A piece of intelligence in one of these published articles being found to be false, Phipps applied to Lady Percival on the subject, who denied that the intelligence had ever been sent, and stated that the papers containing it were forgeries. Mitford positively asserted the contrary, and to enable Phipps to justify himself to the public delivered to him several letters written by Lady Percival to Mitford upon similar subjects, materially tending to show that the false intelligence published in *The News* had come from Lady Percival through Mitford. Phipps published in *The News* one of the letters given to him by Mitford, and announced an intention of publishing the others. A bill was filed on the part of Lady Percival to restrain the publication of those letters written by her to Mitford, as being of a private nature, and having been sent to him in confidence that he would not part with them or communicate

(*a*) St. Eq. Jur. 947. (*b*) *Percival* v. *Phipps* (2 V. & B. 19).

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their contents to any other person. The answer denied that the letters had been sent in any such confidence. It was urged on behalf of Phipps that a gross imputation had been cast upon him, and that though he might derive a profit from publishing the letters in his own paper, his object was not profit, but the vindication of his character from the imputation thrown upon it, and to effect that object he was entitled to use the letters. And the Vice-Chancellor held that he was entitled to make this use of the letters. "Whatever degree of confidence," he said,(*a*) "or reservation of property may be implied from the transmission of a private letter, it would be too much to hold that the individual who receives it can in no case use it for the purpose of protecting himself from an unfounded imputation; stating that to be the sole and *bonâ fide* object of the publication; and upon the answer in this case it must be taken that the defendant has no purpose of gain, or to deprive another of the benefit derived from a literary composition; but that his only object is by proving recency to answer the imputation cast upon him."

The distinction, to which Sir T. Plumer seems to attach importance, between the publication of private letters without the writer's consent, *for the purpose of profit or gain*, and publication for a different purpose is treated by Lord Eldon, in *Gee* v. *Pritchard* (*b*), as of no moment. His lordship considered the previous cases to have decided that, *ultra* the purposes for which the letter was sent, the property was in the sender. If "that is the principle," he observes, "it is immaterial whether the publication is for the purpose of profit or not. If for profit, the party is then selling, if not for profit, he is giving that a portion of which belongs to the writer." In the case before him, an attempt was made on the part of the defendant to avail himself of the decision in *Percival* v. *Phipps;* but Lord Eldon distinguished the cases, and granted the injunction asked for by the plaintiff. The defendant in this case was the illegitimate son of the plaintiff's deceased husband, and had received many letters from the plaintiff during her husband's lifetime. After her husband's death, the plaintiff ceased to be on terms of friendship with the defendant, and denied the truth of statements made by him as to the expectations which he had been led to entertain from the plaintiff and her husband. The defendant returned to the plaintiff the original letters which she had written to him, but took copies of the letters before returning them, without the plaintiff's knowledge, and advertised his intention to publish the letters, but, as he stated in his

(*a*) 2 V. & B. 25. (*b*) See 2 Swans., 415.

nswer, for private circulation only. This he did, as he alleged, in order to clear his character from the charge of want of veracity which the plaintiff had brought against it. In this case the defendant, by returning the originals, had abandoned whatever property he had—for if he had any right of property it was in the originals,(*a*) and Lord Eldon restrained the threatened publication. In giving judgment he observed, "I do not say there may not be a case, such as the Vice-Chancellor (Sir T. Plumer) thought the case before him, where the acts of the parties supply reasons for not interfering; but that differs most materially from this case. In April last, the defendant having so much of property in these letters as belongs to the receiver, and of interest in them as possessor, thinks proper to return them to the person who has in them, as Lord Hardwicke says, a joint property, keeping copies of them without apprising her, and assigning such a reason as he assigns for the return [his 'being unworthy of the sentiments and expressions of kindness contained in them']. Now I say, that if, in the case before the Vice-Chancellor, Lady Percival had given to Phipps a right to publish her letters, this case is the converse of that; and that the defendant, if he previously had it, has renounced the right of publication."

Lord Eldon was careful to rest his decision in this case on the ground of the plaintiff's property in the letters (as determined by previous cases) and not on any considerations as to wounded feelings. When reference was made to such considerations by the defendant's counsel, his lordship interposed. "I will relieve you from that argument. The question will be, whether the bill has stated facts of which the court can take notice, as *a case of civil property*, which is bound to protect. The injunction cannot be maintained n any principle of this sort, that if a letter has been written the way of friendship, either the continuance or the discon-nuance of that friendship affords a reason for the inter-rence of the court." (*b*)

If the agent or servant of a company write a letter, pparently on behalf of the company, to a shareholder, it is e property of the company, and the agent or servant annot prevent the company from publishing the letter.(*c*) Where the solicitor of an insurance company established London, wrote a letter not marked "private" or "confi-

(*a*) 2 Swans. 418.
(*b*) 5 T. R. 245; see also the American cases *Wetmore* v. *Scoville* 3 Ed. 527, Ch.); and *Woolsey* v. *Judd* (4 Duer, 382).
(*c*) *Per* Lord Romilly, M.R., *Howard* v. *Gunn* (32 Beav. 465).

dential," to one of the shareholders in the country, by which he appeared to negotiate a new arrangement as to certain shares allotted to the country shareholder, he was held not entitled to restrain the publication of this letter in a pamphlet, published after the winding up of the company by its late manager, to whom a copy of it had been sent by the shareholder the day after he received it.(*a*) "If the solicitor of an insurance company established in London," said the Master of the Rolls in this case, "by the direction of the directors, wrote a letter to one of the shareholders in the country, it is clear that such letter is not the property of the solicitor, and that he cannot say that the company have not a right to publish it. Take it a step further, and assume that the solicitor wrote a letter, but not by the direction or on behalf of the directors, though it had all the appearance of being written on their behalf, and by their direction. Thus, if it were written to a person who proposed to take shares in the company, and it related to the affairs of the company, and contained authoritative information on behalf of the company, in answer to an application for shares, and the person who receives it treats it as such, and sends back to the company objecting to its contents, shall the solicitor be allowed to complain of its publication, and to insist that it is a private letter, though it appears to be written on behalf of the directors? The answer is, if that be so, it ought not to have been written. It has all the appearance of having been written by the plaintiff on their behalf, and Jamieson [the shareholder to whom it was addressed] so treats it, for he writes to the manager in answer to it. Can the plaintiff be allowed to say that the company have no right to publish it? and if they have, is not the defendant entitled, as regards the plaintiff, to bring it forward? It is obvious that this was not a private letter, and was not intended to be a private letter."

Summary of the law as to letters.

An excellent summary of the whole law on this subject is contained in the judgment of the American judge Story, in the case of *Folsom* v. *Marsh*.(*b*) "The author of any letter or letters, and his representatives, whether they are literary compositions or familiar letters or letters of business, possess the sole and exclusive copyright therein; and no person, neither those to whom they are addressed, nor other persons, have any right or authority to publish the same upon their own account, or for their own benefit. But, consistently with this right, the persons to whom they are addressed may have, nay, must by implication possess, the right to publish

(*a*) *Howard* v. *Gunn* (33 Beav. 465). (*b*) 2 Story's Rep. 111.

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

Lectures.

The right of an oral lecturer, before the Stat. 5 & 6 Will. 4, c. 65, to restrain the publication for profit of lectures delivered by him stood on a somewhat peculiar footing. In the year 1824, Mr. Abernethy, the distinguished surgeon, delivered a series of lectures on the principles and practice of surgery to the medical students of St. Bartholomew's Hospital. The *Lancet* newspaper proceeded to publish these lectures; and, besides publishing some, it contained an announcement that the remaining lectures would also be published as they were delivered. A bill was filed by Mr. Abernethy against the proprietors of the *Lancet* to restrain the publication.(*b*) It was contended on behalf of the defendants that no man could have any right of property in

(*a*) See 2 Swans. 415, 419, and *Palin* v. *Gathercole* (1 Coll. 565).
(*b*) *Abernethy* v. *Hutchinson* (1 H. & T. 39; 3 L. J. 209, Ch.)

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ideas and language not reduced into writing; and it was acknowledged by Mr. Abernethy, that although a good deal of the materials for his lectures had been reduced by him to writing, yet at the time of delivering the lectures he did not read or refer to any writing before him, but that he delivered them orally. As the written notes were not produced, the Lord Chancellor (Eldon), when the case first came before him, refused to grant an injunction grounded on an infringement of the plaintiff's copyright, because no case had determined that there was such copyright in unpublished productions not reduced into writing. The case was postponed to enable Mr. Abernethy to produce his manuscripts if he wished to do so. The manuscripts were not produced, and Lord Eldon, treating the lectures as orally delivered, refused to grant an injunction on the ground of a right of property in sentiments and language not deposited on paper; though he did grant the injunction on another ground, namely, the existence of an implied contract between the lecturer and his hearers that the latter would make use of the lectures only for their own information, and not publish for profit that which they had not the right of selling. The Lord Chancellor is reported to have stated that where the lecture was orally delivered, it was difficult to say that an injunction could be granted upon the same principle upon which literary composition was protected; because the court must be satisfied that the publication complained of was an invasion of the written work, and this could only be done by comparing the composition with the piracy. But it did not follow that because the information communicated by the lecturer was not committed to writing but orally delivered, it was therefore within the power of the person who heard it to publish it. On the contrary, he was clearly of opinion that whatever else might be done with it, the lecture could not be published for profit. He had no doubt whatever that an action would lie against a pupil who published these lectures; and whether an action would or would not lie against a third person obtaining the lectures from a pupil, an injunction undoubtedly might be granted; because if there had been a breach of contract on the part of the pupil who heard the lectures, and if the pupil could not publish for profit, to do so would be regarded by the court as a fraud in a third party. (*a*)

5 & 6 Will. 4, c. 65.

But now a distinct property in lectures delivered is given to the lecturer by Stat. 5 & 6 Will. 4, c. 65. After

(*a*) 3 L. J. 219, Ch.

stating that printers, publishers, and other persons have frequently taken the liberty of printing and publishing lectures delivered upon divers subjects without the consent of the authors of such lectures, sect. 1 enacts, "that from and after the first day of September, one thousand eight hundred and thirty-five, the author of any lecture or lectures, or the person to whom he hath sold or otherwise conveyed the copy (*a*) thereof, in order to deliver the same in any school, seminary, institution, or other place, or for any other purpose, shall have the sole right and liberty of printing and publishing such lecture or lectures; and that if any person shall, by taking down the same in shorthand or otherwise in writing, or in any other way, obtain or make a copy of such lecture or lectures, and shall print or lithograph or otherwise copy and publish the same, or cause the same to be printed, lithographed, or otherwise copied and published, without leave of the author thereof, or of the person to whom the author thereof hath sold or otherwise conveyed the same, and every person who, knowing the same to have been printed or copied and published without such consent, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such lecture or lectures, shall forfeit such printed or otherwise copied lecture or lectures, or parts thereof, together with one penny for every sheet thereof which shall be found in his custody, either printed, lithographed, or copied, or printing, lithographing, or copying, published or exposed to sale, contrary to the true intent and meaning of this Act, the one moiety thereof to His Majesty, his heirs or successors, and the other moiety thereof to any person who shall sue for the same, to be recovered in any of His Majesty's Courts of Record in Westminster, by action of debt."

Sect. 2 enacts, "that any printer or publisher of any newspaper who shall, without such leave as aforesaid, print and publish in such newspaper any lecture or lectures, shall be deemed and taken to be a person printing and publishing without leave within the provisions of this Act, and liable to the aforesaid forfeitures and penalties in respect of such printing and publishing."

(*a*) "I use the word 'copy,'" said Lord Mansfield, in *Millar* v. *Taylor* (4 Burr. 2396), "in the *technical* sense in which that name or term has been used for ages, to signify an *incorporeal right* to the *sole* printing and publishing of somewhat intellectual communicated by letters." "The copy of a book," said Aston, J., in the same case (*Ib.* 2346), "seems to have been not familiarly only, but *legally* used as a *technical* expression of the *author's sole right of printing and publishing* that work." See also *per* Willes, J. (*Ib.* 2311).

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And sect. 3 provides, "that no person allowed for certain fee and reward, or otherwise to attend and be present at any lecture delivered in any place, shall be deemed and taken to be licensed or to have leave to print, copy, and publish such lectures only because of having leave to attend such lecture or lectures.

Exceptions to copyright in lectures.

Sect. 4 makes an exception in the case of lectures published with leave of the authors or their assignees, and of which the statutory term of copyright had expired, and also in the case of lectures published before the passing of the Act (9th September, 1835).

Sect. 5 makes a further exception. It enacts "that nothing in the Act shall extend to any lecture or lectures, or the printing, copying, or publishing any lecture or lectures, or parts thereof, of the delivering of which notice in writing shall not have been given to the justices living within five miles from the place where such lecture or lectures shall be delivered two days at the least before delivering the same, or to any lecture or lectures delivered in any university or public school or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation, and that the law relating thereto shall remain the same as if this Act had not been passed."

Prints.

There is also a copyright in prints, which will be dealt with in a subsequent chapter; but no copyright, as before stated, exists in prints of a libellous, obscene, or immoral character. (*a*)

Paintings, drawings, and photographs.

A copyright in paintings, drawings, and photographs is conferred by 25 & 26 Vict. c. 68. This will also be treated of in a subsequent chapter.

Newspapers.

On the question whether copyright exists in the case of newspapers, see the chapter on newspapers, *post*.

CHAPTER III.

WHO MAY POSSESS COPYRIGHT.

LEAVING out of consideration at present the question of international copyright, there is no doubt that every person (whether he be a foreigner or a British subject) who owes allegiance, either natural and perpetual or temporary, to the

(*a*) *Vide ante*, p. 11.

sovereign of this country, is capable of possessing the copyright in any innocent work which he publishes in this country during the time that he owes such allegiance.

A natural born British subject before the Naturalization Act of last year (33 Vict. c. 14) was held to carry his allegiance with him throughout the world, and no change of circumstance, time, or place could free him from it.(*a*) An English author, therefore, might reside abroad, and yet have his right as an English author upon publication here. Residence abroad could not release him from his natural allegiance, and therefore he carried with him also the natural rights of a subject of England wherever he went.(*b*) Besides this natural and perpetual allegiance, our law also recognizes a local or temporary allegiance which is due from every alien or stranger born for so long a time as he continues within the sovereign's dominion and protection,(*c*) and which he ceases to owe as soon as he transfers himself from this kingdom to another.(*d*) An alien friend temporarily residing here and consequently owing a temporary allegiance, is entitled to copyright in any work which he publishes here whilst so temporarily residing, however short his period of residence may be. But if the alien does not reside in the British dominions at the time of publishing his work here, is he entitled to copyright in it?(*e*) The answer to be given is not free from doubt.

Cocks v. *Purday* since over-ruled.

In *Cocks* v. *Purday* (*f*) the Court of Common Pleas, following out the general principle that an alien may acquire personal rights and maintain personal actions in respect of injuries done to him, though he cannot maintain real actions, held that a foreigner resident abroad could acquire the copyright in a work first published by him as author or as author's assignee in this country though residing abroad at the time that the work was first published here.(*g*) And in support of this opinion the following considerations were urged, that by the 5 & 6 Vict. c. 45, copyright is to be deemed personal property, and to be transmissible by

(*a*) See *Calvin's Case* (7 Rep. 6 b.).

(*b*) *Vide* judgment of Lord St. Leonards in *Jeffreys* v. *Boosey* (4 H. L. Cas. 977). The Naturalization Act of 33 Vict. c. 14, enables natural born British subjects under certain circumstances to free themselves from their allegiance (ss. 4, 6) and to resume it again (s. 8).

(*c*) *Calvin's Case*, *ubi supra*. (*d*) 2 Steph. Black. 418.

(*e*) See the judgments in *Jeffreys* v. *Boosey*, *ubi supra*.

(*f*) 5 C. B. 860.

(*g*) See also in connection with this opinion *D'Almaine* v. *Boosey* (1 Y. & C. 288), and *Bentley* v. *Foster* (10 Sim. 329), and the opinion of Bayley, J., in *Clementi* v. *Walker* (2 B. & Cr. 861).

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bequest, or, in case of intestacy, to be subject to the same laws of distribution as other personal property, and in Scotland is to be deemed personal and movable estate, and even before that statute it was always treated as personal property, and aliens can acquire personal property; and the opinion expressed by Shadwell, V.C., in *Bentley* v. *Foster* (*a*) was referred to, that "if an alien friend wrote a book, whether abroad or in this country, and gave the British public the advantage of his industry and knowledge, by first publishing the work here, he was entitled to the protection of the laws relating to copyright in this country." And in *Chappell* v. *Purday* (*b*) Lord Abinger, C.B., had declared himself of opinion that a foreigner, who is the author of a work unpublished abroad, might communicate his right of property therein to a British subject, at least for the period prescribed by the statute of Anne. Another decision in favour of the doctrine that a foreigner, though resident abroad at the time of publication, may have copyright in this country if the first publication takes place here, was pronounced by the Court of Queen's Bench in *Boosey* v. *Davidson*,(*c*) where an action was brought for infringement of copyright in certain operatic airs composed by a foreigner and alleged to have been first printed and published in England. The court stated no other ground for their decision than the judgment of the Court of Common Pleas in *Cocks* v. *Purday*.

The Court of Exchequer in *Boosey* v. *Purday* (*d*), decided in the samo year as *Boosey* v. *Davidson*, refused to follow the decision in that case and in *Cocks* v. *Purday*. The plaintiff in *Boosey* v. *Purday* was the assignee of certain airs of an opera which Signor Ricordi had purchased from the composer Bellini, a foreigner, and the action was brought for an infringement by the defendant of the plaintiff's copyright in the dramatic airs. The court held that a foreign author residing abroad, who composes a work abroad, and sends it to this country, where it is first published under his authority, acquires no copyright therein; neither does a British subject to whom such work is assigned by the foreign author gain any such right. Pollock, C.B., in delivering the judgment of the court, said, "We perfectly concur with the Court of Common Pleas, that a foreigner in amity with this country may sue for the infringement of any of his rights, a point which we never doubted; but we thought it clear that a foreigner had no copyright in

(*a*) 10 Sim. 329.
(*b*) 4 Y. & Col. 495.
(*c*) 13 Q. B. 257.
(*d*) 4 Exch. 145.

England by the common law, and that his right must depend wholly upon the construction of the statutes, and if they did not give it to him he could have no right at all. And, with respect to the construction of the statutes, we thought, if there were no binding authorities to the contrary, that the Legislature did not mean to confer a copyright on any but British subjects. . . . . Our opinion is that the Legislature must be considered *primâ facie* to mean to legislate for its own subjects only, in some sense of that term, which would include subjects by birth or residence, being authors, and the context or subject matter of the statutes does not call upon us to put a different construction upon them." And even before the decision in *Cocks* v. *Purday*, Shadwell, V.C., in *Delondre* v. *Shaw*,(*a*) though not dealing in that case with the question of copyright, remarked that "The court does not protect the copyright of a foreigner."(*b*)

Jeffreys v. *Boosey.*

The law on the subject of the copyright of foreigners, which these conflicting decisions had left in considerable doubt, appeared to be finally determined by the House of Lords in the case of *Boosey* v. *Jeffreys*, after all the judges had been called on to deliver their opinions. The facts of that case were as follow:(*c*) Bellini, the celebrated musical composer, an alien friend, composed, while living at Milan, an operatic work "La Sonnambula," in which by the laws there in force, he had a certain copyright. He there on the 19th of February, 1861, by an instrument in writing, bearing date on that day, made an assignment of that copyright to Giovanni Ricordi, which assignment was valid by the laws there in force. Ricordi afterwards came to this country, and on the 9th of June, 1831, by deed assigned, for valuable consideration, the copyright in the said work to Boosey, his executors, administrators, and assigns, but for publication in the United Kingdom only. Boosey printed and published the work in this country before any publication abroad. Then Jeffreys, without any licence from Boosey, printed and published the same work in this country. Boosey brought an action against Jeffreys for the infringement of his copyright, and the action was tried before Rolfe, B. (subsequently Lord Cranworth), who directed the jury, in accordance with the decision in *Boosey* v. *Purday*, to find a verdict for the defendant Jeffreys. The matter came, on bill of exceptions, before the Court of Exchequer Chamber. That tribunal pronounced the direction given by the judge at the trial, to be wrong. A writ of error was then brought in the House

(*a*) 2 Sim. 240. (*b*) See *Ollendorf* v. *Black* (4 De G. & S. 209).
(*c*) See the statement submitted to the judges (4 H. L. Cas. 843).

of Lords, where the question was argued at great length, and the judges were asked to deliver their opinions, which ten of them did in an elaborate and exhaustive manner and at considerable length. Several questions were submitted to them by the House of Lords, but we have only to deal at present with one of the topics that engaged their attention, *i.e.*, whether a foreigner who is not resident here at the time of the publication here of a work composed by him has any copyright in such work. On this subject the judges were divided in opinion, as might have been expected from the opposite decisions which their respective courts had already pronounced. Four judges were of one opinion, and six of another. Williams, Erle, Wightman, Maule, Coleridge, and Crompton, JJ., pronounced in favour of the proposition that a foreign author might gain an English copyright by publishing in England before any publication abroad, though resident abroad at the time of publication, on the grounds that there were no words in the Act, 8 Anne, c. 19 (the first Copyright Act), which confines its benefits to British subjects, by birth or residence, though the context and other provisions of the Act showed that the publication must be British; that the title of the Act ("An Act for the encouragement of Learning, &c.,") did not require such a construction of its provisions, and Parliament might legislate for foreigners in respect of the legal consequences in Great Britain of an act done there; that the nature of the property was analogous to property in other personalty, and that an alien's copyright was analogous to the right which he possessed while residing abroad to prohibit the publication here of words defamatory of his character; (*a*) that to limit the Act of Anne to native authors would be to lessen its beneficial operation; that first publication in England of a work by a foreign author was not a matter *ultra vires*, therefore, the municipal law might deal with it; that the gift by Parliament of copyright to a foreign author publishing in this country was within the province of Parliament, it was a dealing with British interests and a legislation for British persons; that it would be absurd to lay down the doctrine that a foreign author should have no copyright if he remained at Calais whilst his work was being published in England, but that he should gain that copyright if he crossed over to Dover, and there gave directions for and awaited the publication of his work; and the following harsh consequence would also result from the doctrine of the necessary presence in the United Kingdom of the foreign author at the time of

Opinions of the judges.

(*a*) *Pisani* v. *Lawson* (6 Bing. N. C. 90).

the publication of his works,—that a bookseller might purchase a literary work in manuscript from a foreign author resident here, yet might lose the copyright if the author should choose to leave this country and be absent from it, even without the knowledge of the bookseller, at the time of publication; nay, if the bookseller should think it best to publish the works in several volumes at several times, he might have copyright in some of the volumes and not in others—because the existence or non-existence of the right would vary with the accident of the author's being or not being in this country at the dates of the respective publications of the volumes.

Decision of the House of Lords.

Notwithstanding the foregoing very weighty reasons, the law lords, Lords Cranworth, C., Brougham, and St. Leonards, agreed with the views expressed on this point by the minority of the judges, Alderson and Parke, B.B., Pollock, C.B., and Jervis, C.J.; and the House of Lords, reversing the decision of the Exchequer Chamber, upheld the direction given by Rolfe, B. to the jury at the original trial of the case, and thus decided,(*a*) that to entitle a foreigner to the copyright in any work first published by him in this country, *he must be actually resident here at the time of the publication of such work*, and consequently that no assignment by a foreigner, not resident here at the time of publication, can vest in a British subject a copyright in the work of the foreigner published here by that British subject.

The grounds on which the judgment of the House of Lords in this important case rested, will appear from the following extracts from the judgments delivered. Lord Cranworth, C., after recapitulating the facts, said: "It may be assumed that on the facts thus proved, the rights of Bellini, the author (if any), had been effectually transferred to Boosey, the defendant in error; and thus the important question arose, whether Bellini had by our law a copyright which he could transfer through Ricordi to Boosey, so as to entitle the latter to the protection of our laws? . . . . In the first place, it is proper to bear in mind that the right now in question—namely, the copyright claimed by the defendant in error (Boosey)—is not the right to publish or to abstain from publishing a work not yet published at all, but the exclusive right of multiplying copies of a work already published, and first published by the defendant in error (Boosey) in this country. Copyright thus defined, if not the creature, as I believe it to be, of our statute law, is now entirely regulated by it, and, therefore, in determining its limits, we must look

(*a*) See *Routledge* v. *Low* (*post*, p. 31).

exclusively to the statutes on which it depends. . . . The substantial question is whether under the term 'author' (in 8 Anne, c. 19) we are to understand the Legislature as referring to British authors only, or to have contemplated all authors of every nation. My opinion is that the statute must be construed as referring to British authors only. *Primâ facie*, the Legislature of this country must be taken to make laws for its own subjects exclusively, and where, as in the statute now under consideration, an exclusive privilege is given to a particular class at the expense of the rest of Her Majesty's subjects, the object of giving that privilege must be taken to have been a national object, and the privileged class to be confined to a portion of that community, for the general advantage of which the enactment was made. When I say that the Legislature must, *primâ facie*, be taken to legislate only for its own subjects, I must be taken to include under the word 'subjects,' all persons who are within the Queen's dominions, and who thus owe to her a temporary allegiance. I do not doubt but that a foreigner resident here, and composing and publishing a book here, is an author within the meaning of the statute—he is within its words and spirit. . . . Copyright, defined to mean the exclusive right of multiplying copies, commences at the instant of publication; and if the author is at that time in England, and while here he first prints and publishes his work, he is, I apprehend, an author within the meaning of the statute, even though he should have come here solely with a view to the publication. . . . . But if at the time when copyright commences by publication the foreign author is not in this country, he is not, in my opinion, a person whose interests the statute meant to protect. I do not forget the argument that from this view of the law the apparent absurdity results, that a foreigner having composed a work at Calais, gains a British copyright if he crosses to Dover, and there first publishes it, whereas he would have no copyright if he should send it to an agent to publish for him. I own that this does not appear to me to involve any absurdity. It is only one among the thousand instances that happen, not only in law, but in all the daily occurrences of life, showing that whenever it is necessary to draw a line, cases bordering closely on either side of it are so near to each other, that it is difficult to imagine them as belonging to separate classes; and yet our reason tells us they are as completely distinct as if they were immeasurably removed from each other. . . . . If the object of the enactment was to give, at the expense of British subjects, a premium to those

who laboured, no matter where, in the cause of literature, I see no adequate reason for the exception, which it is admitted on all hands we must introduce, against those who not only compose, but first publish abroad. If we are to read the statute(*a*) as meaning by the word 'author' to include 'foreign authors living and composing abroad,' why are we not to put a similar extended construction on the words 'first published?' And yet no one contends for such an extended use of these latter words. Some stress was laid on the supposed analogy between copyright and the right of a patentee for a new invention; but the distinction is obvious. The Crown, at common law had, or assumed to have, a right of granting to any one, whether native or foreigner, a monopoly for any particular manufacture. This was claimed as a branch of the royal prerogative, and all which the statute, 21 Jac. 1, c. 3, s. 6, did was to confine its exercise within certain prescribed limits; but it left the persons to whom it might extend untouched. The analogy, if pursued to its full extent, would tend to show that first publication abroad ought not to interfere with an author's right in this country. For certainly it is no objection to a patent that the subject of it has been in public use in a foreign country. . . . . My opinion is founded on the general doctrine, that a British statute must *primâ facie* be understood to legislate for British subjects only, and that there are no special circumstances in the statute of Anne, relating to authors, leading to the notion that a more extended range was meant to be given to its enactments." The reasons assigned by Lord Brougham were of a similar nature. Lord St. Leonards, in the course of his judgment, said, "I venture to submit to your lordships that it is quite clear, as an abstract proposition, that an Act of Parliament of this country, having within its view a municipal operation—having, as in this particular case, a territorial operation, and being therefore limited to the kingdom—cannot be considered to provide for foreigners, except as both statute and common law do provide for foreigners when they become resident here, and owe at least a temporary allegiance to the Sovereign, and thereby acquire rights just as other persons do; not because they are foreigners, but because, being here, they are here entitled, in so far as they do not break in upon certain

(*a*) The part of the statute 8 Anne, c. 19, referred to is this: "The author of any book or books already composed and not printed and published, or that shall hereafter be composed, and his assignee or assigns, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer."

PART I. CHAPTER III.

rules, to the general benefit of the law for the protection of their property, in the same way as if they were natural born subjects. . . . . It has been decided, and it is no longer to be disputed, nor is it attempted to be disputed, that the first publication must take place here; but that is only by implication from the provisions in the Act of Parliament. Well, then, if the first publication must take place here, must the printing likewise take place here? There is no such actual provision: it is not said so, but I apprehend it is implied; I think it is clearly implied from the provisions of the Act, that the printing must take place here. . . . . If it is clear as I apprehend it to be, that, in the first place, a book which is a foreign composition must be first published here, and, secondly, that it must be printed here; would it not necessarily and naturally follow that the man himself should be here to superintend that publication. Is it not a natural inference from the Act of Parliament, which does not expressly provide for either of the foregoing conditions, that it implies that the man shall be here to superintend his publication, seeing that it shall not only be first published here, but that it shall also be printed here? Nothing could be further from the intention of the Legislature at the time that this Act of Parliament was passed than that a foreigner should be enabled to import books printed abroad; but unless you put that construction upon the Act of Parliament, he would have been able to import books printed abroad, and bringing them here, to have a copyright in their publication. That would plainly be directly contrary to the intention of the Legislature. I think, therefore, that gives us an easy means of interposition as to the meaning of the statute, with regard to the residence of the publisher. . . . . If there is no common law right, which in my opinion there clearly is not,(*a*) and if the statute does not apply to foreigners, *quâ* foreigners (although I entirely, of course, admit, that when a man owes a temporary allegiance, he is entitled to the benefit of it) then there being no common law right, it would be a new right given by Act of Parliament, and the foreigner must bring himself within the terms of that Act of Parliament in order to enjoy it; and to do so, in my apprehension, he must be able to predicate of himself that he is a subject of these realms, at least for the time being."

How far *Jeffreys* v. *Boosey* is a binding authority.

The authority of *Jeffreys* v. *Boosey* as a decision binding at the present day has been much shaken by the opinions

(*a*) It must be remembered that the common law right of which the existence is denied here and elsewhere in the judgments in this case, is a common law copyright *after publication*.

expressed by Lords Cairns and Westbury in *Routledge* v. *Low* (*a*) to the effect that no matter where the author resided at the time of publication, he was entitled to copyright if he first published in the United Kingdom. It was not necessary, however, expressly to decide the point in that case, as the authoress of the book in question resided in Canada at the time of publication here; and two other law lords (Lords Cranworth and Chelmsford) adhered to the view of the law laid down in *Jeffreys* v. *Boosey*.

Opinion of Lord Cairns.

Lord Cairns stated the reasons for his opinion thus: "The intention of the Act is to obtain a benefit for the people of this country by the publication to them of works of learning, of utility, of amusement. This benefit is obtained, in the opinion of the Legislature, by offering a certain amount of protection to the author, thereby inducing him to publish his work here. This is, or may be, a benefit to the author, but it is a benefit given, not for the sake of the author of the work, but for the sake of those to whom the work is communicated. The aim of the Legislature is to increase the common stock of the literature of the country; and if that stock can be increased by the publication for the first time here of a new and valuable work composed by an alien who never has been in the country, I see nothing in the wording of the Act which prevents, nothing in the policy of the Act which should prevent, and everything in the professed object of the Act, and in its wide and general provisions which should entitle such a person to the protection of the Act, in return and compensation for the addition he has made to the literature of the country."

Opinion of Lord Westbury.

Lord Westbury said, "The case of *Jeffreys* v. *Boosey* is a decision which is attached to and depends on the particular statute of which it was the exponent; and as that statute has been repealed, and is now replaced by another Act, with different enactments expressed in different language. The case of *Jeffreys* v. *Boosey*, is not a binding authority in the exposition of this later statute. The Act appears to have been dictated by a wise and liberal spirit, and in the same spirit it should be interpreted, adhering, of course, to the settled rules of legal construction. The preamble is, in my opinion, quite inconsistent with the conclusion that the protection given by the statute was intended to be confined to the works of British authors. On the contrary, it seems to contain an invitation to men of learning in every country to make the *United Kingdom* the place of first

(*a*) L. Rep. 3 H. L. Cas. 100; 18 L. T. N. S. 874; 37 L. J. 454, Ch.

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publication of their works; and an extended term of copyright throughout the whole of the British dominions is the reward of their so doing. So interpreted and applied, the Act is auxiliary to the advancement of learning in this country. The real condition of obtaining its advantages is the first publication by the author of his work in the *United Kingdom*. Nothing renders necessary his bodily presence here at the time, and I find it impossible to discover any reason why it should be required, or what it can add to the merit of the first publication. It was asked, in *Jeffreys* v. *Boosey*, why should the Act (meaning the statute of Anne) be supposed to have been passed for the benefit of foreign authors? But if the like question be repeated with reference to the present Act, the answer is, in the language of the preamble, that the Act is intended 'to afford greater encouragement to the production of literary works of lasting benefit to the world;' a purpose which has no limitation of person or place. But the Act secures a special benefit to British subjects, by promoting the advancement of learning in this country, which the Act contemplates as the result of encouraging all authors to resort to the United Kingdom for the first publication of their work. The benefit of the foreign author is incidental only to the benefit of the British public. Certainly the obligation lies on those who would give the term 'author' a restricted signification to find in the statute the reasons for so doing. If the intrinsic merits of the reasoning on which *Jeffreys* v. *Boosey* was decided be considered (and which we are at liberty to do, for it does not apply to this case as a binding authority), I must frankly admit that it by no means commands my assent."

33 Vict. c. 14.

Sect. 2 of the Naturalization Act, 1870 (33 Vict. c. 14) enacts that "real and personal property of *every description* may be taken, acquired, held, and disposed of by an alien *in the same manner in all respects as a natural-born British subject*; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject." This enactment, unless its very general words are in some manner explained away as not intended to apply to the case of copyright, would appear to do away wholly with the effect of the decision in *Jeffreys* v. *Boosey* as to all future cases. For all copyright is "personal property" by 5 & 6 Vict. c. 45, s. 25: It can be acquired by any natural-born British subject by first publishing his work in this country *wherever he is at the time of its publication*: By the enact-

ment above set out, real and *personal property of every description* may be "acquired" by an alien "in the same manner in all respects as a natural-born British subject;" from which it would seem to follow that an alien may acquire copyright in a work which he first publishes here, wherever he is at the time of its publication.(*a*) Though the question is not quite free from doubt, in all probability the ultimate court of appeal, should it ever come before that tribunal for determination, will decide it in favour of the alien in accordance with the opinions of Lords Westbury and Cairns above referred to.

Meaning of residence in *British dominions*

It is quite settled that it is not necessary in order to entitle a foreign author to copyright in his work, that he should be resident within the United Kingdom at the time of its first publication here. It is sufficient that he should at that time be resident in *any part of the British dominions*. And the words "British dominions" are defined by 5 & 6 Vict. c. 45, s. 2, to mean and include all parts of the United Kingdom of Great Britain and Ireland, the islands of Jersey and Guernsey, all parts of the East and West Indies, and all the colonies, settlements, and possessions of the Crown, which now are or hereafter may be acquired. In conformity with this it was determined by the Court of Appeal in Chancery, in the case of *Low* v. *Routledge*,(*b*) that an alien friend (a native of the United States of America) could, by a temporary residence in Canada at the time of publication in England, acquire a British copyright in the work published here. In that case it was agreed between the plaintiffs and an American authoress, from whom they had purchased the manuscript of a book written by her, that she should go to Montreal and reside there till after the publication of the work in England by the plaintiffs. She resided at Montreal from the 19th of May, 1864, till after the 4th of June, 1864, when the book was published for the first time by the Messrs. Low, in London. An injunction was granted by Vice-Chancellor Kindersley to restrain

(*a*) An argument in favour of the applicability of the above section to cases of copyright is furnished by the fact that certain exceptions are expressly made, of which copyright is not one. It is provided [sect. 1] that this enactment "shall not confer any right on an alien to hold real property situate out of the United Kingdom, and shall not qualify an alien for any office or for any municipal, parliamentary, or other franchise; and shall not entitle an alien to any right or privilege as a British subject, except such rights and privileges in respect of *property* as are hereby expressly given to him," and also [sect. 14] that nothing in the Act contained "shall qualify an alien to be the owner of a British ship."

(*b*) 35 L. J. 114, Ch.; 13 L. T. N. S. 421.

Messrs. Routledge from publishing an edition of the same work; and on appeal the Lords Justices upheld his decision. Lord Justice Turner observed: "It was said for the defendants that the same word 'author,' which is contained in this statute, was also contained in the statute of Anne, the first Copyright Act, and that strong opinions were expressed by the judges, and by the law lords in the House of Lords, in the case of *Jeffreys* v. *Boosey*, that the word 'author' in the statute of Anne means an author resident in England at the time of publication, and that the same construction ought to be given to the word 'author' in the Stat. 5 & 6 Vict. c. 45, now under our consideration. But there is no provision in the statute of Anne that the statute shall extend to the colonies, and in the statute we are now considering it is expressly so provided." It was also urged on behalf of the defendants that 5 & 6 Vict. c. 45, did not extend to colonies having legislatures of their own, as Canada; but the Lord Justice held that the word "colonies," in the absence of a context to control it, must extend to all colonies. This decision was affirmed by the House of Lords.(*a*)

Even if a statute of the colony in which the alien resides at the time of the publication of his work here, prevents an alien acquiring a copyright in a work published by him in the colony during his residence there, that would make no difference as to his title to copyright here. An alien has rights as a subject of the Crown whilst residing in one of its colonies, as well as rights as a subject of the colony; and though his civil rights within the colony depend upon the colonial laws, his civil rights beyond the limit of the colony are independent of those laws. "Every alien," said Turner, L.J., in the case last referred to, "coming into a British colony becomes temporarily a subject of the Crown, bound by, subject to, and entitled to the benefit of, the laws which affect all British subjects. He has obligations both within and beyond the colony into which he comes. As to his rights within the colony, he may well be bound by its laws; but as to his rights beyond the colony he cannot be affected by those laws, for the laws of a colony cannot extend beyond its territorial limits."

Publication in United Kingdom indispensable.

Publication in the United Kingdom is indispensable to copyright. That this was the intention of the Legislature is shown by various provisions of the statute; besides which "it would be very inconsistent with the usual practice of the Imperial Parliament to create a system of copyright law

(*a*) See L. Rep. 3 Eng. & Ir. App. 100; 18 L. T. N. S. 874; 37 L. J. 454, Ch.

for all the colonies and dependencies in the empire, many of which have representative institutions of their own, without any consultation with those colonies or dependencies, and without any consideration whether a uniform and arbitrary system, such as that introduced by this Act, would be suitable to the varied circumstances, states of civilisation, and systems of jurisprudence and judicature in these different colonies and possessions."(*a*)

But when copyright once exists, the area over which it extends is the whole of the British dominions.(*b*)

British subject first publishing abroad.

It is important to observe that by the International Copyright Act (7 & 8 Vict. c. 12, s. 19) a British subject who first publishes abroad is, equally with a foreigner, deprived of any copyright save such as he may acquire under that Act; and if there is no treaty giving effect to the Act in his particular case, he has no copyright in this country. This was so decided by Wood, V.C., in *Boucicault* v. *Delafield*,(*c*) in which case the plaintiff prayed for an injunction to restrain the defendant from producing a drama ("The Colleen Bawn") written by the plaintiff, and as it appeared on the hearing of the case, represented by the plaintiff at New York prior to its being represented in England. The Vice-Chancellor refused to grant the injunction and dismissed the bill with costs, being of opinion that the words of the 19th section of 7 & 8 Vict. c. 12, took away whatever rights the plaintiff might otherwise have had. If he had first represented his drama here, he would have been entitled to the provisions of the Dramatic Copyright Act. Then 7 & 8 Vict. c. 12, was passed, enabling Her Majesty to make arrangements conferring on other nations the privileges accorded to all people who first publish their works here. If the plaintiff had this sort of double right it was the very thing which the 7 & 8 Vict. c. 12, was intended to extinguish. The statute says in effect (sect. 19) that "if any person, British subject or not, chooses to deprive this country of the advantage of the first representation of his work, then he may get the benefit of copyright, if he can, under the arrangement which may have been come to pursuant to 7 & 8 Vict. c. 12, between this country and the country which he so favours with his representation; but if he chooses to publish his performance in a country which has not entered into any treaty or made any such arrangement with regard to copyright, then this country has

(*a*) *Per* Lord Cairns, C., *Routledge* v. *Low* (L. Rep. 3 Eng. & Ir. App. 108; 18 L.T.N.S. 874; 37 L.J.454, Ch.) (*b*) *Routledge* v. *Low*, *ubi supra*.
(*c*) 1 H. & M. 597; 9 L. T. N. S. 709; 33 L. J. 38, Ch.

nothing more to say to him; he must be taken to have elected under which of the two statutes with respect to copyright he wishes to come, by performing his work in one country instead of the other, and he is thereby excluded from all advantage of publishing in the other."(*a*)

Unpublished works.

The property which an author has in his unpublished ideas embodied in a tangible shape being independent of statute (*b*) it should seem that an alien friend might prevent the unauthorised publication here of any of his unpublished works.(*c*)

Besides the copyright which may be possessed by individual authors and proprietors, there is also a copyright enjoyed in certain works by the Crown, and in others by the Universities, to which attention will now be directed.

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CROWN AND COLLEGE COPYRIGHT IN BOOKS.

Works in which Crown copyright exists.

THE copyright claimed by the Crown extended to the English Translation of the Bible, the Book of Common Prayer, the Statutes, Orders of the Privy Council, and State Proclamations; also to Almanacs, Lilley's Latin Grammar, the Year-books and reports of judicial proceedings. The exclusive right of printing these was held to be vested in the King; and he granted letters patent authorising others to print and publish them. Some part of this claim has now become obsolete, but a large part still remains unquestioned, and has been recognized in various decisions of courts, both of Common Law and Equity. The claim of the Crown to this copyright has by some been based upon a right of property similar to the right of a private author or his assigns; (*d*) by others it has been treated as grounded on naked prerogative and reasons of state policy. It is impossible to decide the point satisfactorily, nor is the matter one of importance.

(*a*) *Per* Wood, V.C. (1 H. & M. 597; 9 L. T. N. S. 709; 33 L. J. 38, Ch.)

(*b*) See *Prince Albert* v. *Strange* (2 De G. & S. 652; 1 Mac. & G. 25).

(*c*) It has been held in America that the sect. (9) of the Act of Congress (Act of 1831, c. 16) which gave redress for the unauthorised printing or publishing of manuscripts, operated in favour of a resident of the United States who had acquired the proprietorship of an *unprinted* literary composition from a non-resident alien author: (*Keene* v. *Wheatley*, Amer. Law Reg. 45, cited Law's Digest of Patent, Copyright, and Tradesmark Cases, p. 256.)

(*d*) *E.g.*, Lord Mansfield in *Millar* v. *Taylor* (4 Burr. 2401).

The English translation of the Bib.

Blackstone (*a*) rests the claim of the Crown to copyright in English translations of the Bible on two grounds, that the translation was made at the expense of the Crown, and that the Sovereign is the head of the Church. Lord Mansfield (*b*) regarded it as a mere right of property founded on the purchase of the translation by the King in the time of James I. Lord Lyndhurst (*c*) refers it to another consideration, namely, the character of the duty (carrying with it a corresponding prerogative) imposed on the Sovereign as the chief executive officer of the government to superintend the publication of the works upon which the established doctrines of religion are founded, a duty extending to Scotland as well as England. On whatever ground the claim rests, its validity seems now beyond dispute, though the reported cases on the subject are between rival patentees, of whom neither would raise the question of the validity of their patents as against the public in general. An Irish Lord Chancellor, indeed, in 1794, doubted the right of the Crown to grant a monopoly of this kind, and held that a patentee claiming an exclusive right of printing Bibles must establish his patent at law before he could have an injunction in equity.(*d*) But Lord Eldon, in 1802, granted an injunction to restrain the King's printer in Scotland, who had a patent for the sale of Bibles there, from printing or selling Bibles in England.(*e*) And in 1828, the House of Lords held that the King's printers in Scotland had, by virtue of their patent, a right to prevent the importation from England by others of Bibles and other works contained in their patent.(*f*)

The exclusive right of printing and publishing and selling copies of the Bible, New Testament, and Book of Common Prayer, is vested by letters patent of the 13 Eliz. in the Universities of Oxford and Cambridge, concurrently with the Queen's printer, and no one else may print or publish in England any such copies, or sell in England any other copies of the said books than such as have been printed and published by or for the Universities and the Queen's printer, or one of them.(*g*)

(*a*) 2 Steph. Black. 39; see also the remarks of Yates, J., in *Millar* v. *Taylor* (4 Burr. 2382).
(*b*) 4 Burr. 2405.
(*c*) *Manners* v. *Blair* (3 Bligh, N. S. 402); see also the opinions of Lord Camden in *Donaldson* v. *Becket* (4 Burr. 2408), and of Skinner, C.B., in *Eyre* v. *Carnan* (6 Bac. Abr. Prer. F. p. 509).
(*d*) *Grierson* v. *Jackson* (Ridg. Ir. T. R. 304).
(*e*) *Universities of Oxford and Cambridge* v. *Richardson* (6 Ves. 689).
(*f*) *Manners* v. *Blair* (3 Bligh, N. S 391).
(*g*) *Universities of Oxford and Cambridge* v. *Richardson* (*ubi supra*).

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It seems to be agreed that the Bible may be printed by others than those having the patent right, if it be accompanied by *bonâ fide* notes.(*a*)

There is no Crown copyright in the Hebrew Bible, the Greek Testament, or the Septuagint. They are all common, according to Lord Mansfield;(*b*) and, said that learned judge, "if any man should turn the Psalms, or the writings of Solomon or Job into verse, the King could not stop the printing or the sale of such a work. It would be the author's work."

Nor has any attempt ever been made to prevent any person from publishing a translation of one book, or of a *part* of the Bible, from the original text, and enjoying a copyright in his production.(*c*)

The Bible patent of the Queen's printer for Scotland expired in 1839. The patent of the Queen's printer for England has lately been renewed during pleasure, notwithstanding the recommendation of a committee of the House of Commons that the exclusive privilege of printing and publishing English translations of the Bible should not be renewed.

The Book of Common Prayer.

The claim of the Crown to the exclusive publication of the Book of Common Prayer is rested on similar grounds—the duty and prerogative of the Sovereign as head of the Church and as chief executive magistrate, to superintend the publication of books of divine service.(*d*) It seems that down to the 34th year of Henry VIII. the different books used in divine service were not printed here, but were imported from abroad. A patent was granted in that year for the sole printing of such books, and in the first year of Elizabeth the exclusive right of printing books of divine service was inserted in the same patent with the right of printing the Acts of Parliament, which had some time before been granted, and from that time they were regularly enjoyed together by the King's patentee. In 1781, in the case of

(*a*) 2 Ev. Stat. p. 19, note 11. (*b*) 4 Burr. 2405.
(*c*) Godson on Patents and Copyright, 442.
(*d*) In *Manners* v. *Blair* (3 Bligh, N. S. 391), it was contended that as to the Book of Common Prayer the King could not *in Scotland* confer the exclusive right of printing it on his printer there, as the King was not the supreme head of the Scotch Church as he was of the English; and the Scotch court from which the appeal was brought to the House of Lords seems to have been of that opinion. Lord Lyndhurst, however, in moving the judgment of the House of Lords, rested the claim of the Crown to copyright in the Prayer Book as well as the Bible on the executive character of the Sovereign—a character which he has equally in Scotland and England; and the patent of the King's printer in Scotland was held valid as to the Book of Common Prayer as well as the translation of the Bible.

Eyre v. *Carnan*(*a*), an injunction was granted to restrain the defendant from printing and publishing a form of prayer which had been ordered to be read in all churches. And in *Manners* v. *Blair*,(*b*) before the House of Lords in 1828, the copyright of the Crown was fully recognised.

The Queen's printer enjoys the sole right of printing and publishing the Book of Common Prayer.

Lilly's Latin grammar.

The claim of the Crown, now obsolete, to the copyright in Lilly's Latin Grammar was founded on the alleged original compilation and publication of the grammar at the king's expense, independently of any idea of prerogative.(*c*)

Almanacs.

Various grounds for the claim of the Crown, at one time asserted, to copyright in almanacs have been alleged. In the *Stationers' Company* v. *Seymour*(*d*) (Temp. Chas. II.), the right to grant the exclusive privilege of printing almanacs was held to vest in the king; first, because an almanac has no certain author, and, therefore, by the rule of our law, the sovereign had the property in it; secondly, because the almanacs made yearly are but applications of the general rules laid down in the almanac prefixed to the Book of Common Prayer which regulate the moveable feasts of the Church. And the addition of prognostications and other things that are common in almanacs was held not to alter the case, "any more than if a man should claim a property in another man's copy, by reason of some inconsiderable additions of his own." Notwithstanding the decision in this case the Court of King's Bench in the case of the *Stationer's Company* v. *Partridge*,(*e*) strongly inclined against the prerogative right to the printing of almanacs. No judgment, indeed, was given in that case, but it stood over, that the court might see if they could make it like the case of the Book of Common Prayer, and show that the right of the Crown had any foundation in property; and it was never moved afterwards. The subject, however, received a positive decision adverse to the claim of the Crown in the *Stationers' Company* v. *Carnan*.(*f*) That was a case sent from the Court of Exchequer for the opinion of the Court of Common Pleas, and that court, after hearing counsel on both sides of the question, certified their opinion "that the Crown had not a prerogative or power to make such grant [of almanacs] to the plaintiffs exclusive of any other or others." In consequence of this, it was enacted by 21 Geo. 3, c. 56, s. 10, that 500*l*. a-year should be paid to

(*a*) Cited 6 Bac. Abr. 509. (*b*) 3 Bligh. N. S. 391. (*c*) 4 Burr. 2329.
(*d*) 1 Mod. 256. (*e*) 10 Mod. 105; 4 Burr. 2402; 6 Bac. Abr. 508.
(*f*) 2 W. Bl. 1004.

the Universities of Oxford and Cambridge severally, out of the duty upon almanacs, as a compensation for the annual sum of 1000*l.*, for which they had demised to the Stationers' Company the privilege of printing almanacs. In 1799, Lord North brought in a Bill to revest in the Universities and the Stationers' Company the exclusive right of printing almanacs, but the Bill was thrown out in the House of Commons after Erskine had been heard at the bar of the House against it. No further assertion of the right of the Crown appears to have been made since.

Nautical almanacs.

With regard to nautical almanacs, sect. 2 of 9 Geo. 4, c. 66, enacts that "It shall and may be lawful to and for the Lord High Admiral, or the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland for the time being, to cause such nautical almanacs or other useful table or tables which he or they shall from time to time judge necessary and useful, in order to facilitate the method of discovering the longitude at sea, to be constructed, printed, published and vended . . . . and that every person who, without the special licence and authority of the Lord High Admiral or Commissioners for executing the office of Lord High Admiral aforesaid, for the time being, to be signified under the hand of the Secretary of the Admiralty, for the time being, shall print, publish, or vend, or cause to be printed, published, or vended, any such almanac or almanacs, or other table or tables, shall for every copy of such almanac or table so printed, published, or vended, forfeit and pay the sum of twenty pounds, to be recovered with costs of suit, by any person to be authorised for that purpose by the Lord High Admiral or Commissioners for executing the office of Lord High Admiral aforesaid (such authority to be signified under the hand of the Secretary of the Admiralty as aforesaid), by action of debt, bill, plaint, or information, in any of His Majesty's Courts of Record at Westminster; and that the proceeds of the said penalty, when recovered, shall be paid and applied to the use of the Royal Hospital for Seamen at Greenwich."

A narrative of a voyage of discovery prepared under the orders of the Crown is the property of the Crown; but a publisher authorised to publish it by the Secretary to the Admiralty, the profits remaining at their disposition, was held by Lord Chancellor Thurlow not entitled to restrain a stranger from publishing it.(*a*)

The Crown still possesses the exclusive right of printing

(*a*) *Nicol* v. *Stockdale* (3 Swans. 687).

Acts of Parliament and other State documents.

and publishing Acts of Parliament. Blackstone rests the right on grounds of political and public convenience; the king, as executive magistrate, possessing the right of promulgating to the people all acts of State and Government.(*a*) Lord Clare(*b*) recognised the right, because it is necessary that there should be a responsibility for correct printing, and because copy can only be had from the rolls of Parliament, which are within the authority of the Crown. In olden times the king's officers transmitted authentic copies of all state ordinances to the sheriffs, who proclaimed them in their county courts: when the demand for authentic copies began to increase, and when the introduction of printing facilitated the multiplication of copies, the king's patentee, by command of the king, supplied copies to the people, this seeming an obvious and reasonable extent of that duty which lay upon the Crown to furnish the people with the authentic text of their ordinances.(*c*)

The right of the Crown was recognised in repeated decisions,(*d*) some of which, however, proceeded upon notions which are now exploded. The right of the patentees of the Crown to the sole printing of the statutes, as now recognised, must depend upon usage, and the force of the decision of the Court of King's Bench, in *Basket* v. *The University of Cambridge*,(*e*) in 1758, and upon the recognition of the doctrine of prerogative copies by the House of Lords in the case of *Manners* v. *Blair*,(*f*) in 1828.(*g*) The former case did not present for direct decision the question of the validity of patents for the exclusive printing of the statutes, as between the Crown and the public, the dispute being there between rival patentees under patents from different sovereigns, each party therefore being interested in upholding the general prerogative. The Court of Chancery sent the case into the King's Bench for the opinion of that court, and after argument the validity of the patents given to both the parties litigant was upheld. This of course assumes the validity of the claim of the Crown.

Statutes with *bonâ fide* notes.

If *bonâ fide* notes accompany statutes printed by others than those having the patent right, the copyright of the latter, it seems, is not infringed;(*h*) but there is no express

(*a*) 2 Bl. Com. 410. (*b*) *Grierson* v. *Jackson* (Ridg. Rep. 304).
(*c*) See judgment of Skinner, C.B., in *Eyre* v. *Carnan* (6 Bac. Abr. 511).
(*d*) *Atkins's* case (Carter, 89, Bac. Abr. Prer. F. 4 Burr. 2315), *Roper* v. *Streater* (Skin. 234), *Stationers' Company* v. *Parker* (Skin. 233), *Eyre* v. *Carnan* (6 Bac. Abr. 509), *Basket* v. *University of Cambridge* (1 W. Bl. 105), *Baskett* v. *Cunningham* (*Id.* 370; 2 Eden, 137).
(*e*) 1 W. Bl 105. (*f*) 3 Bligh, N. S. 391. (*g*) Curtis on Copyright, 126.
(*h*) Maugham, 106; 2 Evans's Statutes, 19.

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decision on this subject. The notes must, however, be *bonâ fide*, and not merely colourable or collusive. In *Baskett* v. *Cunningham* (*a*) the defendant, in conjunction with several booksellers, was publishing, in weekly numbers, a digest of the statute law, methodised under alphabetical heads, with large notes from Coke and other writers on the law. He had contracted with Strahan and Woodfall, the proprietors of the patent for printing law books, to print this work, and it was printed at their press. Baskett, the king's printer (whose patent extended to all statutes), filed a bill for an injunction. It was urged for the defendant that the work was not within the meaning of the letters patent, being a work of labour and industry, and the method entirely new. The Lord Chancellor, however, was of opinion that the work was within the patent of the king's printer, and that the notes were merely collusive; but he would not interfere between the two contending patents in the summary method of injunction, but left them to adjust their respective rights at law. He therefore ordered an injunction to issue to restrain the proprietors from printing at any other than at a patent press; which, as Woodfall and Strahan were strictly in league with Baskett, and were at that time jointly concerned in a new edition of the statutes, was equivalent to a total injunction.

Except, then, in the case of editions of the statutes published with *bonâ fide* notes, the right to print and publish the statutes is vested in the Universities of Oxford and Cambridge, concurrently with the king's patentees.

It seems that the concurrent authority which the two Universities have with the patentees of the Crown to print Acts of Parliament and abridgments of them, has not been extended to the Sovereign's proclamations, Orders in Council, and other State papers, which would accordingly appear to be vested in the king's printer solely.(*b*)

Reports of judicial proceeding.

Besides the reasons of State already mentioned, a further ground has been alleged for the claim of the Crown to the exclusive right to print and publish all reports of judicial proceedings, namely, the payment by the king of the salaries of the judges who pronounce the law, and the payment also, in former times, of the costs of compiling and publishing the volumes of reports. The right was twice affirmed by the House of Lords in the reign of Charles II.- with respect to Rolle's Abridgment(*c*) and Croke's Reports.(*d*) Shortly after the Restoration, an Act of Parliament having

(*a*) 1 W. Bl. 370. (*b*) Maugham, 106.
(*c*) Carter, 89; Bac. Abr. Prer. F. 5; 4 Burr. 2315.
(*d*) Skin. 234; 1 Mod. 217; 4 Burr. 2316.

prohibited the printing of law books without the licence of the Lord Chancellor, the two Chief Justices, and the Chief Baron of the Exchequer, it became the practice to prefix such a licence to all reports published after that period, in which it was usual for the rest of the judges to concur, and to add to the *imprimatur* a testimonial of the *great judgment and learning* of the author. The Act was renewed from time to time, but finally expired in the reign of William III. The same form of licence and testimonial, however, continued in use for a long time after, until the judges refused to grant them any longer, which they did some time before the appearance of "Douglas's Reports."(*a*) The Reports since then have appeared without them. The court, it seems, regarded as a contempt the publication of their proceedings without their authority, and Sir James Burrow, in the preface to his "Reports of Cases decided in the King's Bench," apologises for publishing them without an *imprimatur*, and states that if he gives offence in doing so, he will stop and suppress his work.(*b*) Since the "Year Books," it seems, no judicial proceedings have been published under authoritative care and inspection, either by the House of Lords or by any court in Westminster Hall, except State trials.(*c*)

The courts, in treating as a contempt the unauthorised publication of their reports, appear not to have proceeded so much on the ground of a sole right of property in them, as on the expediency, with a view to the due administration of justice, of having careful and accurate reports of the decisions which serve as precedents for future cases. This, at any rate, is the ground on which the House of Lords claims the right of prohibiting the publication, otherwise than as it directs, of the report of any trial on impeachment or indictment that takes place before it. In *Gurney* v. *Longman*,(*d*) where an injunction was granted until the hearing, restraining the publication by the defendant of an unauthorised report of Lord Melville's trial, Lord Erskine, C., said: "Upon the case of *Bathurst* v. *Kearsley*,(*e*) and the practice of the House of Lords, I may grant the injunction; which

(*a*) See preface to Doug., p. vii. With reference to these licences, Sir Jas. Burrow says, (Preface, p. v.) "I have been assured that some now possessed of judicial offices have declared they never would sign one, because it hangs out false colours, and misleads those that think it gives the least approbation or authority to the work."

(*b*) Preface, p. v. (*c*) *Ib.* (*d*) 13 Ves. 493, 507.

(*e*) This was a case in Chancery, in 1776. The claim of the plaintiff, who had obtained the order of the House for the publication of the trial of the Duchess of Kingston, was acquiesced in by the defendant, and the case passed without discussion: (13 Ves. 494).

I do, not upon anything like literary property, but upon this only, that these plaintiffs are in the same situation as to this particular subject, as the king's printer exercising the right of the Crown as to the prerogative copies. I shall not state anything as to other courts, but shall act upon this precedent." His lordship desired that it should be understood that he had not delivered any judgment of this case further than by granting the injunction until the hearing, upon the precedent of *Bathurst* v. *Kearsley;* and that he should therefore consider the questions as open in any future stage. The case was ultimately compromised.

The practice of the House of Lords has been to make an order that the Lord Chancellor or Lord Speaker do cause the trial to be published; and that no other person do presume to print or publish the same; and, with the exception of Lord Oxford's case and a few others, such an order appears to have been made in almost every instance of a trial before them, whether upon impeachment or indictment. The Lord Chancellor or Lord Speaker, upon this order, appoints a publisher of the trial.(*a*)

Present state of the law as to judicial reports.

The courts have not for a long time asserted a claim to the exclusive publication of their own reports, and in two modern cases, *Butterworth* v. *Robinson,*(*b*) and *Saunders* v. *Smith,*(*c*) the plaintiffs were treated by the Court of Chancery as possessing a copyright in certain law reports published by them. In the former case an injunction was granted to restrain the defendant from publishing a colourable abridgment of the Term Reports, of which the plaintiff was proprietor; and in the second case an injunction was refused only because the plaintiff's conduct was such as misled the defendant into publishing the book complained of. The existence of the plaintiffs' property in the reports was not questioned in either case.

Publication of reports during progress of a trial.

The courts have not, however, abandoned their right to restrain the publication of their proceedings in cases where such publication would be likely to hinder an impartial trial, or otherwise defeat the ends of justice. Thus, on the trial of Thistlewood and others for treason in 1820, Abbot, C.J., prohibited, by a public statement in court, the publication of any of the proceedings until the trial of all the prisoners should be concluded. Notwithstanding this prohibition, a

(*a*) See the case of the Earl of Cardigan, tried before the House of Peers in 1841, and the order made by the House on the 19th February of that year (Lord's Journals, vol. 73, p. 46). Messrs. Gurney were appointed by the Lord Speaker (Shaftesbury) to publish a report of the trial.

(*b*) 5 Ves. 709. (*c*) 3 My. & Cr. 711.

report of the trial of the first two prisoners tried was published in the *Observer* newspaper. Its proprietor was fined 500*l*. for the offence, on failing to appear to answer for contemptuously publishing such proceedings. On the argument of the case before the Court in Banc,(*a*) Bayley, J., after stating the circumstances which rendered it advisable that the publication of the trial should be delayed in the present case, observed: "It is argued that if the court have this power of prohibiting publication, there is no limit to it, and that they may prohibit altogether any publication of the trial. I think that that does not follow. All that has been done in this case is very different, for the prohibition here has only been till the whole trial was completed." And Holroyd, J., added: "I take it to be clear that a court of record has a right to make orders for regulating their proceedings, and for the furtherance of justice in the proceedings before them, which are to continue in force during the time that such proceedings are pending. It appears to me that the arguments as to a further power of continuing such orders in force for a longer period, do not apply. It is sufficient for the present case that the court have that power during the pendency of the proceedings. This order was made to delay publication only so long as it was necessary for the purposes of justice, leaving every person at liberty to publish the report of the proceedings subsequently to their termination. I am, therefore, of opinion that this was an order which the court had the power to make." We find a recent assertion of the right in the case of *Tichborne* v. *Tichborne*,(*b*) where the reasons for exercising it are fully stated. In this case a motion was made on the part of the plaintiff that the publisher of the *Pall Mall Gazette* might be committed to the Queen's prison, for a contempt of the court in having published in that paper an article containing comments on certain affidavits which had been filed in support of the plaintiff's case, but had not yet been brought before the court. Similar applications were at the same time made to commit the publishers of certain other newspapers, for having published the same article. The Vice-Chancellor (Wood) said: "I have no hesitation in saying that a gross contempt of court has been committed in this case. The first observation I would make is, that, from the time of Lord Hardwicke downwards, the rule which that great judge laid down in *Rouch* v. *Garvan*, (*c*)

(*a*) *The King* v. *Clement* (4 B. & Ald. 218).
(*b*) 17 L. T. N. S. 5; 15 W. R. 1072; L. Rep. 7 Eq. 55, note.
(*c*) 2 Atk. 469.

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has been the rule which the court has adopted for its guidance, namely, the determination on the part of the court to discountenance any attempt to prejudice mankind against the merits of a case before it has been heard. I have not the slightest doubt that such an attempt has been made here, and that it has been made in the most offensive manner. An opinion has been pronounced by the author of this article (who sits down to examine these affidavits with a clear and decided bias) with all that boldness which persons under the screen of the anonymous, and having no responsibility cast upon them, think themselves entitled to indulge in. But those who have responsibility cast upon them, this court and every tribunal which has to administer justice, is bound to protect every suitor from such an attempt to pervert the course of justice. I am not entitled to consider myself above being influenced by articles of this description, though I should hope I am. I am not entitled to think that the jury whom I may have to summon in the case are above such influences, though perhaps I ought to do so. But this I am bound to say, and every authority bears me out in saying, that it is the duty of the court to protect every suitor against that which can affect the minds of persons who might be willing to give evidence in a case, obviously one of some degree of contrariety of evidence, and possibly (for I know nothing about it) of doubt and difficulty, and which may prevent persons so critically situated from giving evidence (and in a stage of the cause when a voluntary affidavit is the simple mode of arriving at a result upon an interlocutory application) if they are to be the subject of criticisms of this description, obviously coming from a quarter having a considerable bias." In reply to an argument made use of on behalf of the publisher, that the comments did not transgress the rules which have been laid down as to fair comments on matters of public interest and public notoriety, the Vice-Chancellor said: "In the first place let me observe, that rule does not extend to comments of any description on a matter that is pending, waiting for argument, and waiting for decision; and I think this court would be failing extremely in the administration of justice, if it allowed comments of such a description as are here contained to be made on any documents whatever, which are before the writer and not before the court, but which are afterwards to come before the court, and which comments have a clear and distinct tendency towards directing and swaying the mind of the court or jury, or whoever may have to determine the cause." The proprietor of the

Pall Mall Gazette having made a humble submission and apology, the Vice-Chancellor thought it sufficient for the purposes of justice to order him to pay the costs of the motion. A similar order was made with respect to the printer of another paper which had gone beyond a mere insertion of the article from the *Pall Mall Gazette*, and the motions against the other papers were abandoned.(*a*)

Copyright of English and Scotch universities, and colleges of Eton, Westminster, and Winchester.

By 15 Geo. 3, c. 53, the Universities of Oxford and Cambridge, the four universities in Scotland, and the colleges of Eton, Westminster, and Winchester have granted to them for ever the sole liberty of printing and reprinting at their respective presses, all such books as had been before the year 1775, or should thereafter at any time "be bequeathed or otherwise given by the author or authors of the same respectively, or the representatives of such author or authors, to or in trust for the said universities, or to or in trust for any college or house of learning within the same, or to or in trust for the said four universities in Scotland, or to or in trust for the said colleges of Eton, Westminster, and Winchester, or any of them, for the purposes mentioned,(*b*) unless the same should have been bequeathed or given, or should thereafter be bequeathed or given, for any term of years, or other limited term."(*c*)

Copyright is given only so long as the books or copies belonging to the universities or colleges are printed at their own printing presses within the said universities or colleges respectively, and for their sole benefit and advantage. If they delegate, grant, lease, or sell their copyrights or exclusive rights of printing the books or any part thereof, or allow, permit, or authorise any person or persons or body corporate to print or reprint the same, then the privileges granted by the Act are to become void and of no effect. They may, however, sell such copies so bequeathed or given in like manner as any author or authors may do.(*d*)

Registration.

In order that the penalties for piracy may be enforced, it is necessary that every book be entered in the register book at Stationers' Hall within two months after the bequest or gift of it shall have come to the knowledge of the vice-chancellors of the said universities, or heads of houses and colleges of learning, or of the principal of any of the said four universities respectively. The register book

(*a*) See further on this subject, the chapter on "Libellous Contempts of Courts of Justice," *post*, and the cases cited there.

(*b*) *i.e.*, "for the advancement of learning, and other beneficial purposes of education within the said universities and colleges."

(*c*) Sect. 1. (*d*) Sect. 3.

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may be inspected without fee, and the clerk is to give a certificate of any entry on payment of a fee not exceeding sixpence.(*a*)

If the clerk refuse to make entry or give certificates of entries, the university or college which owns the copyright (notice being first given of such refusal by an advertisement in the *Gazette*) is to have the like benefit as if such entry or certificates had been duly made and given, and the clerk who refuses is for every offence to forfeit £20 to the proprietors of the copyright.(*b*)

Piracy.

If any one prints, reprints, or imports, or causes to be printed, reprinted, or imported, any such book or books, or, knowing the same to be so printed or reprinted, sells, publishes, or exposes to sale, or causes to be sold, published, or exposed to sale, any such book or books, he is to forfeit the books and every sheet of them, to the proprietor of the copyright, and one penny for every sheet found in his custody either printed or printing, published or exposed to sale contrary to the true intent and meaning of the Act, one half to go to the Crown, the other half to the prosecutor.(*c*)

Trinity College, Dublin.

The Act of 41 Geo. 3, c. 107, s. 3, confers on Trinity College, Dublin, a similar copyright and under similar conditions in all books given or bequeathed to it.

5 & 6 Vict. c. 45, which (s. 1) repeals the Act of 41 Geo. 3, c. 107, provides (s. 27) that nothing contained therein shall affect or alter the rights of the two universities of Oxford and Cambridge, the colleges or houses of learning within the same, the four universities in Scotland, Trinity College, Dublin, and the several colleges of Eton, Westminster, and Winchester, in any copyrights theretofore vested or thereafter to be vested in them.

CHAPTER V.

PROPERTY IN UNPUBLISHED WORKS.

Unpublished manuscripts.

It has already been stated that every new, and it should be added innocent, product of mental labour which has been embodied in writing or some other material form becomes the exclusive property of its author; the law securing it to him as such, and restraining every other person from infringing his right. Whether the ideas thus

(*a*) Sect. 4. (*b*) Sect. 5. (*c*) Sect. 2.

unpublished take the shape of written manuscripts of literary, dramatic, or musical compositions, or whether they are the designs for works of ornament or utility planned by the mind of an artist, they are equally inviolable while they remain unpublished, and the author possesses an absolute right to publish them or not as he thinks fit, and (if he does not desire to publish them) to hinder their publication either in whole or in part by any one else. "It is certain every man has a right to keep his own sentiments if he pleases. He has certainly a right to judge whether he will make them public or commit them only to the sight of his friends; in that state a manuscript is in every sense his peculiar property, and no man can take it from him, or make any use of it which he has not authorised, without being guilty of a violation of his property. And as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication, and whoever deprives him of that privilege is guilty of a manifest wrong, and the court have a right to stop it."(*a*) The ideas of an author have been quaintly compared to "birds in a cage, which none but he can have a right to let fly, for till he thinks proper to emancipate them they are under his own dominion."(*b*) "The property," says Lord Cottenham,(*c*) "of an author or composer of any work, whether of literature, art, or science, in such work unpublished, and kept for his private use or pleasure, cannot be disputed after the many decisions in which that proposition has been affirmed or assumed. I say 'assumed,' because in most of the cases which have been decided, the question was not as to the original right of the author, but whether what had taken place did not amount to a waiver of such right. . . . . If then such right and property exist

(*a*) *Per* Yates, J. (4 Burr. 2378). (*b*) *Ib.*

(*c*) *Prince Albert* v. *Strange* (13 Jur. 112; 1 Mac. & G. 42; 18 L. J. 126, Ch.); see *Bartlett* v. *Crittenden* (4 M'Clean, 301); *Hoyt* v. *M'Kenzie* (3 Barb. Ch. 323); *Wheaton* v. *Peters* (8 Pet. 657). "No length of time, when the invention does not go into public use, can invalidate the right of the inventor. He may take his own time to perfect his discovery, and apply for a patent. And the same principle applies to the manuscript of an author. If he permit copies to be taken for the gratification of his friends, he does not authorise those friends to print them for general use. This is the author's right, from which arise the high motive of pecuniary profit and literary reputation. When the inventor consents to the construction and use of his machine he yields the whole value of his invention. But an author's manuscripts are very different from a machine. As manuscripts, in modern times, they are not and cannot be of general use:" (M'Lean, J., *Bartlett* v. *Crittenden*, *ubi supra*.)

in the author of such works, it must so exist exclusively of all other persons."

This property is independent of statute.

For this exclusive property in the *unpublished* products of his mental labours the author, it must be remembered, is not indebted to any Copyright Acts. His right is independent of statute, and, as observed by Lord Cottenham in the judgment from which the preceding extract is taken, depends entirely on the common law right of property. To the same effect Knight Bruce, V.C., on the final hearing of *Prince Albert* v. *Strange*,(*a*) in the court below, remarks—"Upon the principle, therefore, of protecting property it is that the common law, in cases not aided nor prejudiced by statute, shelters the privacy and seclusion of thoughts and sentiments committed to writing, and desired by the author to remain not generally known. . . . . Such then being, as I believe, the nature and foundation of the common law as to manuscripts, independently of Parliamentary additions and subtractions, its operation cannot of necessity be confined to literary subjects. That would be to limit the rule by its example. Wherever the produce of labour is liable to invasion in an analogous manner, there must, I suppose, be a title to analogous protection or redress."

The protection afforded by the common law to unpublished compositions cannot be evaded by translation, abridgment, summary, or even review.(*b*)

Prince Albert v. *Strange.*

How complete the right of the author is to prevent every, even the slightest infringement of the property in his unpublished productions is forcibly shown by the facts of the case in which the preceding opinions have been judicially expressed—a case which is in fact the leading one on the subject now treated of. In *Prince Albert* v. *Strange* (*c*) it appeared that Her Majesty the Queen and the Prince her husband had occasionally for their amusement made drawings and etchings, principally of subjects of private and domestic interest to themselves, and had some lithographic impressions struck off by means of a private press kept for that purpose, for their own use, and not for publication. Some few impressions had indeed been given to private

(*a*) 2 De G. & Sm. 695.

(*b*) *Per* Knight Bruce, V.C., in *Prince Albert* v. *Strange* (2 De G. & Sm. 693).

(*c*) 2 De G. & S. 652; 1 Mac. & G. 25; 13 Jur. 45, 109, 507. There was also an information filed by the *Attorney-General* v. *Strange*, for the purpose of protecting the interests of Her Majesty in those portions of the etchings which were the property of Her Majesty, and praying relief as to them similar to that prayed in the bill of Prince Albert.

friends of Her Majesty and the Prince, but no further publication was intended or desired. Some further copies being required, the plates for the purpose of printing them were sent to Mr. Brown, a printer at Windsor, and whilst they remained in his possession one of his workmen surreptitiously made some impressions of the etchings for himself. These surreptitiously procured impressions were subsequently obtained by a Mr. Judge, and from his possession they passed into that of the defendant Strange, a London publisher. Strange printed a catalogue of the etchings, in which was expressed an intention of publicly exhibiting the impressions of them, which had come into his possession by means of Judge. The catalogue was entitled "A Descriptive Catalogue of the Royal Victoria and Albert Gallery of Etchings," and contained, a long introduction stating the general nature of the subjects, a detailed list of sixty-three etchings with observations upon them, chiefly of a commendatory character. The bill prayed that the defendants might be ordered to deliver up to the plaintiff all impressions and copies of the said several etchings made by the plaintiff; and that they, their servants, &c., might be restrained by injunction from exhibiting the said gallery or collection of etchings, and from selling or in any manner publishing, and from printing the said descriptive catalogue, or any work being or purporting to be a catalogue of the said etchings, and that all the copies of the said catalogue in the possession or power of the said defendants might be given up to be destroyed. An interim injunction having been granted by Knight Bruce, V.C., extending to Judge as well as Strange, the defendant Strange put in his answer, stating, amongst other things, his original belief that the impressions had come honestly into Judge's hands, that Judge wrote the descriptive catalogue, which he (Strange) then printed, striking off only fifty-one copies, after which the type was broken up, that the catalogue had never been published, or sold, or exposed for sale, and that on receiving the first information that the contemplated exhibition was disapproved of by Her Majesty and the Prince, he had abandoned the whole scheme; and he expressly denied that he ever threatened or intended to make such exhibition, or to make any copies or engravings of the etchings. After this answer had been put in, a motion was made on behalf of Strange to dissolve the injunction granted against him, so far only as it sought to restrain him from selling or in any manner publishing or printing the descriptive catalogue of the etchings, leaving unquestioned

the remaining portion of the injunction against exhibiting, publishing, or parting with the etchings described in the catalogue. It was contended in support of the motion and of the defendant's asserted right to print and publish the catalogue, that although the owner of a print might prevent another from publishing a copy of it, it was impossible to prevent the other from describing it, and printing and publishing such description; that the law of England could not prevent a party obtaining knowledge through the medium of perceiving these etchings, from using that knowledge, and from conveying that information to others, and a Court of Equity, in the absence of contract, could not interfere with the use of that knowledge; it was difficult to understand how the rights of anyone could be interfered with by the making of a catalogue describing the articles and making remarks upon them in the shape of friendly, if not flattering criticism; that if a spectator had a right to contemplate any of the productions of so exalted a personage, which he might do without any invasion of domestic privacy, he had a right to communicate full information connected with those productions; and this, substantially, was all that had been done by the descriptive catalogue; that it was a fallacy to say, as had been said on the part of the plaintiff, that privacy is essential to the right of property, for though the owner of anything may use every means in his power to prevent that thing being seen by another, yet if that other person sees it, the owner can have no right of property in the notion or idea created in the mind of the person who has seen it; that there is no property in the ideas created by seeing the etchings—the property is confined to the etchings; and no regard could be paid to a mere injury to private feelings, and that in substance the complaint is of an offence not against law but against manners.

Notwithstanding, however, the ingenious arguments by which a distinction between the publication of copies of the (unpublished) etchings themselves and that of a mere descriptive catalogue of them was endeavoured to be maintained, the Vice-Chancellor (Knight Bruce), and on appeal the Lord Chancellor (Cottenham), refused to admit the distinction, and held that the plaintiff was entitled to restrain the publication of the one as well as the other. Though the fraudulent manner in which the impressions of the etchings had been originally acquired formed one of the grounds on which the decision rested, the right of the plaintiff to restrain the publication of the catalogue on the

sole ground of his property in the things described was unmistakably asserted by both the learned judges. "Property in mechanical works or works of art," said Knight uce, V.C., (*a*) "executed by a man for his own amusement, instruction, or use, is allowed to subsist certainly, and may, before publication by him, be invaded, not merely by copying, but by description or by catalogue, as it appears to me. A catalogue of such works may in itself be valuable. It may also as effectually show the bent and turn of the mind, feelings, and taste of the artist, especially if not professional, as a list of his papers. The portfolio or the studio may declare as much as the writing table. A man may employ himself in private in a manner very harmless, but which disclosed to society may destroy the comfort of his life, or even his success in it. Every one, however, has a right, I apprehend, to say that the produce of his private hours is not more liable to publication without his consent, because the publication must be creditable or advantageous to him, than it would be in opposite circumstances. Addressing the attention specifically to the particular instance before the court, we cannot but see that the etchings, executed by the plaintiff and his consort for their private use, the produce of their labour, and belonging to themselves, they were entitled to retain in a state of privacy, to withhold from publication. That right, I think it equally clear, was not lost by the limited communication which they appear to have made, nor confined to prohibiting the taking of impressions without or beyond their consent, from the plates their undoubted property. It extended also, I conceive, to the prevention of persons unduly obtaining a knowledge of the subjects of the plates, from publishing (at least by printing or writing, though not by copy or resemblance) a description of them, whether e or less limited or summary, whether in the form of a catalogue or otherwise." And similarly Lord Cottenham. (*b*) "It being admitted that the defendant could not publish a copy—that is an impression—of the etchings, how in principle does a catalogue, list, or description differ? A copy or impression of the etching would only be a means of communicating knowledge and information of the original, and does not a list and description do the same? The means are different, but the object and effect are similar; for in both, the object and effect is to make known to the public more or less of the unpublished work and

(*a*) 2 De G. & S. 696; 13 Jur. 58.
(*b*) 1 Mac. & G. 43; 18 L. J. 126, Ch.; 13 Jur. 112.

composition of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others. . . . . Upon the first question, therefore—that of property—I am clearly of opinion that the exclusive right and interest of the plaintiff in the composition or work in question being established, and there being no right or interest whatever in the defendant, the plaintiff is entitled to the injunction of this court to protect him against the invasion of such right and interest by the defendant, which the publication of any catalogue would undoubtedly be."

Points decided by *Prince Albert* v. *Strange*.

The elaborate judgments in this important case have established the following points:—That the right of property of the author or composer of any works of literature, art, or science in such works, so long as they remain unpublished, is so complete and absolute that no one else, without his permission, may publish even a list or descriptive catalogue of them; that the circulation amongst a few private friends of impressions of etchings not otherwise published is not such a publication of them as disentitles the owner to the protection of the aforesaid right, and that this right is but part of the general common law right of property.

Earlier cases.

The earliest case on the subject of copyright before publication that we find in the books is that of *Webb* v. *Rose*,(*a*) in which Sir Joseph Jekyll, M.R., in 1732, granted an injunction to restrain the clerk of a deceased conveyancer from printing unauthorised the conveyancing drafts of his late master. The bill in that case was filed by the son and devisee of the conveyancer. In *Forrester* v. *Waller*,(*b*) in 1741, an injunction was granted to hinder the printing of the plaintiff's notes obtained surreptitiously without his consent. In *Manley* v. *Owen*,(*c*) in 1755, a bill was filed by some printers who had bought from the Lord Mayor the copy of the sessions paper of trials, to enjoin the defendants from printing it. The Lord Chancellor considered that the right to print purchased from the Lord Mayor gave the plaintiffs the property, and the injunction prayed for was granted.(*d*)

In *Morris* v. *Kelly* (*e*) Lord Eldon granted an injunction to restrain the performance at the English Opera House of

(*a*) Cited 4 Burr. 2330. (*b*) *Ib.* (*c*) Cited 4 Burr. 2329.

(*d*) See also *Duke of Queensberry* v. *Shebbeare* (2 Ed. 329), cited *post*, p. 59; and as to letters *Pope* v. *Curl*, *ante*, p. 12.

(*e*) 1 Jac. & W. 481.

the comedy of the "Young Quaker," of which the plaintiffs, the proprietors of the Haymarket Theatre, had purchased the copyright in the manuscript.(*a*) This was in 1820, several years before the Act of 3 & 4 Will. 4, c. 15, gave to authors of plays the sole right of representing them, and it is not easy to see on what ground the injunction was granted.

It matters not how the unpublished work of any one who does not intend to publish it may have come into the hands of another person than the author, that other person cannot publish it without the author's consent. "If any person takes it to the press without his consent, he is certainly a *trespasser*, though he came by it by *legal means*, as by a loan or by devolution; for he transgresses the *bounds* of his trust, and therefore is a trespasser."(*b*) And the law is the same whether the case be *mechanical* or *literary*; whether it be an epic poem or an orrery. The inventor of the one as well as the author of the other has a right to determine "whether the world shall see it or not."(*c*)

What is a previous publication.

It being essential to the right of which we now treat that no previous publication should have taken place, it becomes important to determine what constitutes a previous publication in the eye of the law.

Publication abroad.

The publication of a work in a foreign country disentitles the author to a copyright in it here. This, before the Legislature interfered in the matter, had been judicially determined in several cases. In *Clementi* v. *Walker* (*d*) it was decided that if an author first published abroad, and then instead of using due diligence to publish here, forebore to publish until some other person had honestly published here, the author could not insist upon his privilege, and at a distance of time stop a publication which in the interim had taken place here, or treat the continuance of that publication as a piracy. "Whether the act of printing and publishing abroad," said the learned judge who delivered the judgment of the court in that case, "makes the work at once *publici juris*, it is not necessary now to decide; but we have no doubt that it becomes *publici juris* if the author does not take prompt measures to publish here."(*e*) And in *Guichard* v. *Mori*,(*f*) an injunction was refused on the

(*a*) See the prior case of *Macklin* v. *Richardson* (Amb. 694), cited *post*.
(*b*) *Per* Yates, J., in *Taylor* v. *Millar* (4 Burr. 2379).
(*c*) *Ib.*, p. 2386. (*d*) *Clementi* v. *Walker* (2 Barn. & Cress. 861).
(*e*) See *Page* v. *Townsend* (5 Sim. 395) as to publication abroad of *prints engraved*.
(*f*) 9 L. J. (1831) 227, Ch.; see also *Heddaraick* v. *Griffin* (3 Sess. Cas., 2nd Ser., 383).

ground that there had been a publication abroad before there was any publication in this country.

But where there was a contemporaneous publication abroad and in this country it was held that the copyright of the author here was not infringed by the foreign publication.(*a*) And the language of Bayley, J., in *Clementi* v. *Walker*, is in favour of the author's title to copyright, provided he print and publish here "promptly" and with due "diligence" after the publication abroad.(*b*)

7 Vict. c. 12, s. 19.

Sect. 19 of 7 Vict. c. 12, now enacts that "neither the author of any book, nor the author or composer of any dramatic piece or musical composition, nor the inventor, designer, or engraver of any print, nor the maker of any article of sculpture, or of such other work of art as aforesaid, which shall, after the passing of this Act, be first published out of Her Majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act."

In the case of dramatic representation, first representation abroad is a first publication abroad within the meaning of this section.(*c*)

Publication at home.

Of course a publication at home equally disentitles the author to any property in his work other than that copyright after publication, which is secured to him by statute, and of which we shall afterwards treat at length.

Printing, &c. for private circulation.

An author may lend or let his manuscript to others, or may print for private circulation only, without foregoing the right which he has in the work before publication.(*d*)

Public exhibition of a picture.

Though the public exhibition of a picture at the Royal Academy and in picture galleries is, in one sense, a publication of it, yet it is a publication which may be restricted by the rules of the place of exhibition, by which the managers may preclude any use being made of their rooms for the purpose of copying; and an exhibition under such circumstances would not disentitle the proprietor to an injunction to restrain the piracy of the picture.(*e*)

Publications by engravings.

The publication of an engraving of a picture in a magazine, with an article describing the picture, is not a publication of the picture itself.(*f*)

(*a*) By Erle, J., *Cocks* v. *Purday* (2 Car. & K. 269, Nisi Prius).
(*b*) 2 Barn. & Cress. 870.
(*c*) *Boucicault* v. *Delafield* (1 H. & M. 597; 9 L. T. N. S. 709; 33 L. J. 38, Ch.)
(*d*) See the opinion of Erle, J., in *Jeffreys* v. *Boosey* (4 H. L. C.), and *Bartlett* v. *Crittenden* (5 M'Clean, 37).
(*e*) *Turner* v. *Robinson* (10 Ir. Ch. Rep. 121, 516). (*f*) *Ib.*

Nor would the distribution by a sculptor amongst his friends of copies of a plaster cast taken from the bust of a statue be a publication of the statue itself.(*a*) The exhibition of the picture itself for the purpose of obtaining subscribers to an engraving of it is not a publication of the picture.(*b*) Nor, as already stated, is the private circulation among friends of lithographic impressions of drawings a publication of the drawings themselves.(*c*)

It is by publication of the thing itself that the common law right is lost, and not by the publication of something else that resembles it; so that the author of a literary work does not lose his common law right of property in it before its publication by previously publishing an abridgment of it.(*d*)

Publication of abridgment.

The public performance of a play by the author's permission is not such a publication of it by him as disentitles him to restrain the unauthorised printing or publishing of it by any other person. This was decided in *Macklin* v. *Richardson*.(*e*) The plaintiff in that case was the author of the farce called "Love à la Mode," which was performed, by his special permission, at the different theatres several times in 1760, and the following years, but never printed or published by him; and it appeared that when the play was over the plaintiff used to take the copy away from the prompter. The defendants employed a short hand writer to go to the playhouse and take down the words of the farce from the mouths of the actors. These notes having been corrected by one of the defendants from his own memory, the first act of the farce was published by them in a magazine called the *Court Miscellany*, of which they were the proprietors, and notice was given that the second act would be published in the next month's *Miscellany*. The plaintiff filed a bill to restrain this publication: and the Lord Commissioner (Smythe) granted an injunction. He said, "It has been argued to be a publication by being acted, and therefore the printing is no injury to the plaintiff; but that is a mistake, for besides the advantage from the performance, the author has another means of profit from the printing and publishing; and there is as much reason that he should be protected in that right as any other author."

Performance of a play.

The acting of a piece is in no case a publication of it. In *Colman* v. *Wathen*(*f*) the defendant acted on the stage a piece of which the plaintiff had purchased the copyright, and it was sought to make the defendant liable for the

(*a*) 10 Ir. Ch. Rep. 134. (*b*) *Ib.* (*c*) *Prince Albert* v. *Strange*, *ante* p. 50.
(*d*) *Ib.* 133. (*e*) Ambl. 694. (*f*) 5 T. R. 245.

penalty under the statute 8 Anne, c. 19, as for an unauthorised publication of the piece. Buller, J., said, "reporting anything from memory can never be a publication within the statute. Some instances of strength of memory are very surprising; but the mere act of repeating such a performance cannot be left as evidence to the jury that the defendant had pirated the work itself."(*a*)

What conduct is deemed to authorise publication.

In connection with the author's property in unpublished works an important question arises as to what conduct on his part may be deemed to have authorised their publication.

In the case of letters written and sent to another person we have already seen that the writer does not lose his right to prevent their publication.(*b*) We have seen also that a licence to act an unpublished play is not a licence to print or publish the play.(*c*) Nor does the mere gift of copies of the author's work to a few friends amount to an abandonment of his copyright before publication in the work.(*d*)

Where the author of a musical composition had sold several thousand copies of it in manuscript, a year before it was printed, it was held that he had not thereby lost the copyright.(*e*) Abbot, C. J., in that case, was of opinion that it was not the intention of the Legislature in conferring a copyright upon authors, to impose on them as a condition precedent, that they should not sell their compositions in manuscript before they were printed.

Nor does the mere parting with the possession of a manuscript, or entrusting its possession to another person, or a permission to that person to take and hold a copy of the manuscript amount to an authorisation of its publication by that other person. Such acts must be deemed strictly limited in point of effect to the very occasions expressed or implied, and ought not to be construed as a general gift or authority for any purposes of profit or publication to which the receiver may choose to devote them.(*f*) "Suppose," says Willes, J., in *Millar* v. *Taylor*,(*g*) "the original or a transcript was given or lent to a man to read, for his own use; and he publishes it; it would be a violation of the

(*a*) See also *Murray* v. *Elliston*, 5 B. & Ald. 657.
(*b*) *Ante*, pp. 11, *et seq.* (*c*) *Ante*, p. 57.
(*d*) *Prince Albert* v. *Strange*, *ante*, p. 50.
(*e*) *White* v. *Geroch* (2 B. & Ald. 298).
(*f*) St. Eq. Jur. 943; See *Bartlett* v. *Crittenden* (4 M'Clean, 303; 5 M'Clean, 41), where the Court says, "To make a gift of a copy of the manuscript is no more a transfer of the right or abandonment of it than it would be a transfer or an abandonment of an exclusive right to republish, to give the copy of a printed work."
(*g*) 4 Burr. 2330.

author's common law right to the copy. This never was doubted, and has often been determined."

Where the son of the great Earl of Clarendon gave permission to a Mr. Gwynne to take a copy of the manuscript of his deceased father's "History of the Reign of Charles II.," and Mr. Gwynne's son and administrator sold it to a Dr. Shebbeare, the Court of Chancery, at the suit of the Duke of Queensberry (the personal representative of the Earl of Clarendon and his son), restrained Dr. Shebbeare from printing and publishing the copy of the manuscript.(*a*) The Lord Keeper Henley said it was not to be presumed that Lord Clarendon (the younger), when he gave a copy of his work to Mr. Gwynne, intended that he should have the profit of multiplying it in print; that Mr. Gwynne might make every use of it, except that.(*b*) Where, however, the author of a poem had sent it to a bookseller, and had allowed it to remain in his hands unpublished for twenty-three years, Lord Eldon was of opinion that the writer had abandoned his right as an author, and refused to grant an injunction to prevent the publication of the poem by the bookseller.(*c*) Notwithstanding this decision, the decided cases seem to warrant the rule laid down by Willes, J., in *Millar* v. *Taylor*,(*d*) that "when express consent is not proved, the negative is implied as a tacit condition."

A teacher of the art of book-keeping, who had reduced to writing the system he taught, on separate cards for the convenience of imparting instruction to his pupils, and permitted his students to copy these cards, with a view to their own instruction, and to enable them to instruct others, was held in an American case(*e*) not to have thereby abandoned these manuscripts to the public, or authorised their publication. "The students," said the court, "who made these copies, have a right to them, and to their use as originally intended. But they have no right to a use which was not in the contemplation of the complainant and of themselves when the consent was first given. Nor can they, by suffering others to copy the manuscripts, give a greater licence than was vested in themselves."

Where a person contracted for reward to write a certain Alteration of manuscript before publication.

(*a*) 2 Eden. 329.

(*b*) We learn from a note to this case that Dr. Shebbeare afterwards recovered before Lord Mansfield, a large sum against Mr. Gwynne for having represented that he had a right to print the manuscript.

(*c*) *Southey* v. *Sherwood* (2 Meriv. 435). (*d*) 4 Burr. 2330.

(*e*) *Bartlett* v. *Crittenden* (4 M'Clean, 300).

portion of a book to be published by another, equity will not aid him by injunction to prevent his portion of the work being printed and published in an altered or mutilated form.(a) Wood, V.C., intimated an opinion, though the point did not arise in the case before him, that, unless there be a special contract, either express or implied, reserving to the author a qualified copyright, the purchaser of a manuscript is at liberty to alter and deal with it as he thinks proper. The court is not moved in such a case by the possible effects of the alterations as affecting the writer's reputation. "The possible effect on reputation," said Wood, V.C., "unless connected with property, is not a ground for coming to this court, though it may be an ingredient for the court to consider, when the question of a right of property also arises."

Summary of the law.

To sum up, then, the law relating to the property in unpublished works:—

Manuscripts. The author or owner of unpublished manuscripts has a right independent of statute to the exclusive use of them, and to prevent their publication by any one else.

Letters. The writer of letters has a special property in them, and has a right to prevent their publication by the receiver, unless by his own misconduct (for the decided cases go no further than this) he has rendered their publication necessary to the vindication of the receiver's character from some unfounded imputation. And, with respect to this right, there would seem to be no distinction between private letters, or letters of friendship, and letters intended as literary compositions.

Lectures. The author, or his assignee, of lectures, has now by statute(b) the sole right to publish them, provided notice of the delivering of the lectures shall be given two days at least before the delivery, to two justices living within five miles of the place where they are to be delivered. But the right does not extend to lectures delivered in a university, public school, or college, or on any public foundation, or by any one in virtue of any gift, endowment, or foundation.

Dramatic compositions. The author, or his assignee, of a dramatic composition has a right similar to the foregoing to prevent the printing and publishing of his composition. And he does not lose his exclusive right of printing and publishing it, by allowing it to be represented on the stage. He has now, also, by Stat. 3 & 4 Will. 4, c. 15, s. 1, the sole right of having it represented in any part of the British dominions.

Musical compositions. Musical compositions, when in manuscript, stand on the same footing with other unpublished compositions, and by sect. 20 of 5 & 6 Vict. c. 45, the provisions of 3 & 4 Will. 4,

(a) *Cox* v. *Cox* (11 Hare, 118). (b) *Vide ante*, pp. 20-22.

c. 15, as to the sole right of representing dramatic are extended also to musical compositions.

Engravings, maps, and charts, also, whilst unpublished, stand on the same footing as the foregoing.

Engravings, maps, and charts.

CHAPTER VI.

COPYRIGHT AFTER PUBLICATION.

On the subject of copyright after publication, widely different views have been entertained by some of our ablest lawyers living at different times. There have been those who considered the title of the author to the property in the creations of his intellect as of so absolute a nature that it was not only exclusive but also perpetual, and gave him the sole right to determine, not only during his life, but for all time after his death, who should enjoy the benefits of his literary works. On the other hand, there have been those who, though not doubting the author's title to the property in the products of his mind before he has published them, were of opinion that by the act of publication his compositions became *publici juris*, and the author's right to a property in them ceased thenceforth for ever. Neither of these two opposite opinions represents the law on the subject as it is now finally determined. The first-mentioned opinion was the prevailing one down to the year 1744. "The general consent of the kingdom for ages," Lord Mansfield considered to be in favour of that view of the question, and the decisions in several cases proceeded on the ground of its correctness. The question assumed the form, whether copyright in the productions of an author existed at common law previous to and independently of statutory enactment, and if it had an existence previous to statutes, whether the statutes dealing with the subject and conferring on authors a copyright for a certain number of years took away from them all copyright in their works after the time so specified had expired. In other words, had an author copyright in his published works indefinite and unlimited in point of time, or was his right strictly confined to the period marked out in the legislative enactments relating to copyright ?

Anne, c 19.

The first Act of Parliament which deals with the question of copyright after publication is the 8 Anne, c. 19, and it

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conferred on authors (or their assigns) of works published before the year 1710 a copyright of twenty-one years' duration, "and no longer," and on the authors or assignees of works published after that date a copyright of fourteen years "and no longer," to commence from the day of first publication. Did this Act deprive authors of copyright in their productions after the expiration of the period of twenty-one or fourteen years?

For a long time it was held that it did not; that the author had a general right of property in his works which he did not lose by publication, and of which the statute of Anne did not deprive him. In 1735 (more than twenty-one years after the passing of 8 Anne, c. 19), Sir Joseph Jekyll, M.R., granted an injunction to restrain the printing of "The Whole Duty of Man," which had first appeared in 1657.(*a*) As the statutory term of copyright had passed, the plaintiff's title to an injunction could only rest on the ground of his general common law right of property independent of and outlasting the statutory period limited by the Act of Anne. In the same year (1735) Lord Talbot granted an injunction to restrain the printing of Pope's and Swift's "Miscellanies," though many of the pieces were published before the statute of Anne,(*b*) and the injunction was acquiesced under. In 1736 Sir Joseph Jekyll restrained the publication of Nelson's "Festivals and Fasts," though the book was first published in 1703.(*c*) In 1739 Lord Hardwicke granted an injunction against the publication of Milton's "Paradise Lost," though the title of the plaintiffs was derived from an assignment from the author made in 1667.(*d*) In 1752 Lord Hardwicke granted a similar injunction with respect to the publication of an annotated edition of the same poem.(*e*) And all the foregoing injunctions were acquiesced under.

In 1761 an opportunity occurred for the first time of determining the question by a Court of Error, in the case of *Tonson* v. *Collins*,(*f*) an action relating to the copyright in the *Spectator*, which had been purchased from Addison and Steele. But the action, before its final determination,

Millar v. *Taylor* (overruled).

was discovered to be a collusive one, and it fell to the ground in consequence. An important case,(*g*) however, soon after occurred (in 1769) in which the subject was very

(*a*) *Eyre* v. *Walker* (cited 4 Burr. 2325).
(*b*) *Motte* v. *Faulkner* (cited *ib.*). (*c*) *Walthoe* v. *Walker* (*Ib.*).
(*d*) *Tonson* v. *Walker* (cited 4 Burr. 2326).
(*e*) *Tonson* v. *Walker* (3 Swans. 672).
(*f*) 1 W. Black. 301, 321, 345. (*g*) *Millar* v. *Taylor* (4 Burr. 2303.)

fully discussed by the Court of King's Bench, and in which the first of the two opinions referred to at the beginning of this chapter was maintained by the majority of the court. The action was brought to recover damages for the publication of an edition of Thompson's "Seasons," a work which the plaintiff had purchased from its author in 1729, and had continued to publish from that time down to the year 1763, when the defendant Millar published the edition complained of without the plaintiff's license or consent. The term of years during which the statute of Anne secured the copyright to the author had long since expired, and the plaintiff's claim could only rest upon the ground of a perpetual property at common law, independent of statutes, in the author or his assignees. The jury found the facts of the case in a special verdict, and also that before the reign of Queen Anne it was usual to purchase from authors the perpetual copyright of their books, and to assign the same from hand to hand for valuable consideration, and to make the same the subject of family settlements. Lord Mansfield, C.J., and Willes and Aston, JJ., gave judgment in favour of the plaintiff and his right at common law, independently of and unaffected by the statute of Anne, Yates, J., being of a contrary opinion. The judgment of the majority of the court was based not only on the decided cases already referred to, but on the broad ground of natural justice and equity. They considered that as every man has an exclusive property in his works before publication, he continues to possess it after publication, publication being no abandonment of his right. And as for the statute of Anne, they were of opinion that it was merely intended to give for a term of years a more efficient protection, where the entry and the other provisions of the Act had been complied with, and not to abridge the duration of the author's exclusive property in his work.

Donaldson v. Beckett.

But this did not long continue to be law. The subject came at last, on appeal, before the House of Lords in 1774, in the case of *Donaldson* v. *Beckett*, (*a*) and the decision in *Millar* v. *Taylor* was distinctly overruled. The case came on appeal from the Court of Chancery, in which Lord Apsley had followed, as of course, the ruling of the King's Bench in *Millar* v. *Taylor*. After the question had been fully argued, the judges were called on to deliver their opinions in answer to certain questions put to them. Ten of them, against one, were of opinion that at common law an author of any book or literary composition had the sole right of first printing and publishing it for sale. Eight were

Opinions of the judges

(*a*) 4 Burr. 2408.

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of opinion that the author might bring an action against any person who printed, published, and sold the same without his consent; one denied the author's right to do so, and two others considered the action would lie only when the invasion was coupled with fraud or violence. Seven judges against four were of opinion that the law did not take away the author's right after publication, and that no person could reprint and sell for his own benefit the author's work without his consent. Six against five were of opinion that the statute of Anne took away the common law copyright after publication, and that an author is thereby precluded from every remedy except upon the foundation of that statute, and on the terms and conditions prescribed by it. Seven judges against four were of opinion that the author of any literary composition, and his assigns had the sole right of printing and publishing the same in perpetuity, by the common law. And six judges against five were of opinion that this right in perpetuity is restrained and taken away by the statute of Anne. Lord Mansfield did not deliver his opinion, but it was known that he adhered to the doctrines laid down in his judgment in *Millar* v. *Taylor*. Lord Camden addressed the House of Lords against the doctrine of a common law copyright, and especially denounced as odious and selfish the doctrine of a *perpetual* copyright after publication. He was followed on the same side by Lord Apsley, C. The House reversed the decree pronounced by the Court of Chancery, and thus finally decided that whether copyright after publication did or did not exist at common law before the statute of Anne, that statute had abrogated the right, and that no author had a property in his works for any longer period than that set out in the statute.

Decision.

This decision appears to have caused great alarm amongst the booksellers of London, very many of whom had purchased old copyrights, not within the protection of the statute of Anne, on the faith of the previous decisions and the general opinion that the common law right of property in literary works had not been interfered with by that statute. They petitioned Parliament to relieve them from the consequences of the recent decision of the House of Lords. A committee was appointed by the House of Commons to investigate the matter; evidence was taken, and a Bill was introduced to vest in the purchasers of old books, not protected by the Act of Anne, the sole property in them for a limited time. After debates of a very acrimonious character, and after counsel had been heard at the bar for

and against the Bill, it passed the House of Commons, but was thrown out in the House of Lords, owing chiefly to the opposition of Lord Camden.

The universities were more fortunate, for in 1775 they obtained an Act(*a*) enabling the two English universities, and the Scotch, together with the colleges of Eton, Westminster, and Winchester to retain the perpetual copyright in books given or bequeathed to them for the advancement of useful learning, and other purposes of education.

Foundation of copyright after publication.

On whatever basis of natural right the title of an author to the sole property in the products of his mental faculties may rest in the last resort, it is now clear that the copyright after publication enjoyed by British subjects is not regarded as a property derived from or carved out of any general right of property, but is a territorial monopoly, the creation of our municipal law, and bounded and regulated by the Copyright Acts.(*b*) An author has no right or property in his work after publication other than that which is conferred on him by the different statutes which have been passed from time to time with reference to the subject of copyright. To these, therefore, we must look in order to determine the nature and extent of the author's right, the conditions on the performance of which it is dependent, and the mode in which infringements of his statutory rights are to be dealt with.

Historical Summary of the Copyright Act.

It has already been stated that down to the year 1710 whatever rights authors had in their works were left undefined by any statutory enactments, and in consequence, as the Act of Anne (8 Anne, c. 19) passed in that year tells us in its preamble, "printers, booksellers, and other persons" frequently took "the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families." For the purpose of preventing such practices in future, and for the encouragement of learned men to compose and write useful books, that statute enacted that from and after the 10th day of April, 1710, "the author of any book or books already printed, who hath not transferred to

8 Anne, c. 19.

(*a*) 15 Geo. 3, c. 53.

(*b*) See the remarks of Crompton, J., in *Jeffreys* v. *Boosey* (4 H. L. 847). In the elaborate opinions given by the judges to the House of Lords in this case the arguments for and against the existence of copyright at common law are fully stated.

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any other the copy or copies(*a*) of such book or books, in order to print or reprint the same, shall have sole right and liberty of printing such book and books for the term of *one and twenty years*, to commence from the said 10th day of April, and no longer; and that the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and his assignee or assignees shall have the sole liberty of printing and reprinting such book or books for the term of *fourteen years*, to commence from the day of first publishing the same, and no longer." And the Act inflicted a penalty on those who should, within the time specified in the Act, print, reprint, or import, or cause to be printed, &c., "without the consent of the proprietor or proprietors thereof first had and obtained in writing," or should sell, publish, or expose to sale any book or books so printed, &c., without consent, the penalty being a forfeiture of the book or books to the proprietor of the copy, and one penny for every sheet found in the offender's possession, one moiety to go to the Sovereign, the other to any person suing for it.(*b*)

The benefit of the preceding enactment was, however, extended only to those books published after the passing of the Act, whose proprietor's title was entered in the register book of the Stationers' Company in the manner usual before the Act.(*c*)

The Act furthermore empowered every person who considered the price of a book too high to bring the matter before the Archbishop of Canterbury, the Lord Chancellor or Lord Keeper, the Bishop of London, the Chief Judge of the King's Bench, the Chief Judge of the Common Pleas, the Chief Baron of the Exchequer, the Vice-Chancellors of the two English universities, the Lord President of the Sessions, the Lord Justice General, or the rector of the College of Edinburgh, one or more of whom might examine into the cause of complaint and settle the price of the book as seemed just, and make the bookseller or printer pay all the costs of the person making the complaint.(*d*)

Provision was made that nine copies of every book should be given to different libraries, and the rights of the universities were saved.(*e*) With respect to books in other languages, the Act provided that nothing contained in it should extend or be construed to extend "to prohibit the importation, vending, or selling of any books in Greek, Latin, or any

(*a*) By the word "copy" in this statute and in the early cases on the subject, is meant what we now call copyright. *Vide ante*, p. 21, note (*a*).
(*b*) Sect. 1. (*c*) Sect. 2. (*d*) Sect. 4. (*e*) Sect. 5.

other foreign language printed beyond the seas, anything in this Act contained to the contrary notwithstanding." (*a*)

The next statute dealing with the subject of copyright was the 8 Geo. 2, c. 13, entitled "An Act for the Encouragement of the Arts of Designing, Engraving, and Etching Historical and other Prints by vesting the Properties thereof in the Inventors and Engravers during the time therein mentioned." It conferred a copyright of equal duration to that given to the authors of books by the statute of Anne, viz., fourteen years, on every person who should "invent and design, engrave, etch, or work in mezzotinto or chiaro oscuro, or from his own works and invention should cause to be designed and engraved, etched, or worked in mezzotinto or chiaro oscuro any historical or other print or prints . . . . which shall be truly engraved, with the name of the proprietor on each plate, and printed on every such print or prints." And it inflicts a penalty (sect. 1) on every one who should engrave, etch, or work as aforesaid, or copy and sell, or cause to be engraved, etched, or copied and sold in whole or in part, or print, reprint, or import for sale, or cause to be printed, reprinted, or imported for sale any such print as aforementioned, without the previous consent of the proprietor had in writing, and signed in the presence of two or more credible witnesses, or who should without the consent of the proprietor so obtained sell or expose to sale, or in any other manner dispose of or cause to be published, sold, or exposed to sale any such print or prints, knowing them to be printed or reprinted without the proprietor's consent, the penalty being five shillings for every print found in the offender's custody either printed or published and exposed to sale, or otherwise disposed of contrary to the true intent and meaning of the Act, one moiety of the penalty to go to the Sovereign and the other moiety to any person who should sue for it.

8 Geo 2, c. 13. Extension of copyright to engravings.

The Act does not extend to purchasers of plates from the original proprietors. (*b*)

The time for bringing actions for anything done in pursuance of the Act, or for any offence committed against the Act, was limited to three months after the discovery of the offence. (*c*)

The preceding Act having reference only to those who "invented and designed," or "from their own works and invention" engraved, &c., any prints, was found to be ineffectual for the purposes intended. So 7 Geo. 3, c. 38, was passed, extending the benefit and protection of the former

7 Geo. 3, c. 38.

(*a*) Sect. 8. (*b*) Sect. 2. (*c*) Sect. 4.

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Act to every person who should "engrave, etch, or work in mezzotinto, or chiaro oscuro, or cause to be engraved, etched, or worked, any print taken from any picture, drawing, model, or sculpture, either ancient or modern . . . . in like manner as if such print had been graved or drawn from the original design of such graver, etcher, or draughtsman," and the protection afforded by both Acts is extended to the proprietors for twenty-eight instead of fourteen years.

The time for bringing actions for penalties is also by this Act extended to six months after the commission of the offence.

17 Geo. 3, c. 57. Further remedy by action.

The penalties inflicted by the two preceding Acts being found insufficient to protect the property of artists, the Legislature added an additional security in the Act 17 Geo. 3, c. 57, by giving to the proprietor of historical and other prints, maps, charts, plans, &c., a special action upon the case against any person who should within the time limited by the Acts offend against any of the provisions contained therein, to recover such damages as a jury on the trial of such action, or on the execution of a writ of inquiry thereon, should give or assess, together with double costs of suit.

38 Geo. 3, c. 71. Models and casts.

38 Geo. 3, c. 71, vests the sole right and property of making models or casts in the original proprietor, for the term of fourteen years, from the time of first publishing the same, and gives to the proprietor an action on the case against all persons offending against his right during that term; an exception being made in the case of persons who purchase the right from the original proprietors.

The time for bringing actions is limited to six months after the discovery of the offence.(*a*)

41 Geo. 3, c. 107. Extension of the term of copyright.

The 41 George 3, c. 107,(*b*) afforded further protection to the proprietors of books. It increased the penalty for an infringement of the proprietor's copyright to threepence per sheet, besides the forfeiture of the book; and furthermore gave to the proprietor an action on the case against every bookseller, printer, or other person "in any part of the United Kingdom, or in any part of the British dominions in Europe," who should, after the passing of the Act, print, reprint, or import, or cause to be printed, reprinted, or imported, without the consent of the proprietor first had in writing, signed in the presence of two or more credible witnesses, any book or books, or who, knowing them to be printed, reprinted, &c., without the proprietor's consent, should sell, publish, or expose them to sale, or cause them to be sold, &c.; the pro-

(*a*) See the chapter on "Paintings, Drawings, and Photographs," *post*.
(*b*) Repealed by 5 & 6 Vict. c. 45, s. 1, except as to rights existing or proceedings pending at the time of passing of that Act.

prietor to recover such damages as the jury should award or assess with double costs of suit.

Sect. 1 further provided that, if at the expiration of the term of fourteen years the author or authors should still be living, he or they should have the sole right of printing or disposing of copies for another term of fourteen years; but the Act did not extend to books already published, nor indemnify against penalties under former Acts in force at the date of the union of Great Britain and Ireland. Sect. 4 provided that no booksellers, &c., should be liable to the penalty of threepence per sheet, unless before publication the title to the copyright were entered by the proprietor or proprietors at Stationers' Hall, London, nor if the consent of the proprietor or proprietors were so entered.

It was also enacted (sect. 7) that no person should import into any part of the United Kingdom for sale, any book first composed, written, or printed and published within the United Kingdom, and reprinted elsewhere; and it imposed on every person importing, selling, or keeping for sale any such books a penalty of £10, together with double the value of every copy so imported, &c., and a forfeiture of the books themselves. Such books might be seized by officers of Customs or Excise, who were to be rewarded for the seizure. But the 7th section did not extend to books which had not been printed or reprinted in some part of the United Kingdom within twenty years preceding the importation, or to books reprinted abroad and inserted among other books or tracts to be sold therewith in any collection, where the greatest part of such collection should have been first composed or written abroad. The Act also contained provisions as to the giving of certificates by the clerk of the Stationers' Company, and as to the copyright in books given or bequeathed to Trinity College, Dublin; and the period for bringing actions under the Act was fixed at six months.

Again the Legislature interfered, and with a design similar to that of the preceding statutes, by the Act 54 Geo. 3, c. 156.(a) After making provision for the delivery, on demand, of every book, twelve months after publication, for the use of certain public libraries, it altered the term of copyright in books, enacting that, instead of a copyright for fourteen years in the author and his assignee, and then, if the author were alive at the expiration of that term, for fourteen years more in the author himself, the author and his assignee should have the sole liberty of printing and reprinting his book or

54 Geo. 3, c. 15. Further extension of the term.

(a) Repealed by 5 & 6 Vict. c. 45, s. 1, except as to rights existing, or proceedings pending at the time of passing of that Act.

books for the full term of twenty-eight years from the day of first publication, to continue during the remainder of the author's natural life, should he outlive the twenty-eight years. Penalties similar to those inflicted by preceding Acts were imposed on all who should infringe the proprietor's rights by printing, reprinting, or importing, &c. Sects. 8 and 9 provided that the authors of books already published, and their personal representatives, or the assignees of either, should have the benefit of the extension of the term of copyright to twenty-eight years; and if the authors were living at the end of twenty-eight years from the first publication, the sole right of publication should be in them during life. The Act also extended the time for instituting actions, suits, &c., for offences against the Act to twelve months from the commission of the offence.

3 & 4 Will. 4, c. 15. Right of dramatic representation.

Dramatic literary property which had hitherto been unnoticed by Parliament was next dealt with. 3 & 4 Will. 4, c. 15, enacted that, after the passing of that Act, the author, or his assignee, of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author or his assignee, or which should thereafter be composed, and not printed or published by the author or his assignee, should have as his own property the sole liberty of representing, or causing to be represented, at any place of dramatic entertainment whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the isles of Man, Jersey and Guernsey, or in any part of the British dominions, any such production as aforesaid, and should be deemed the proprietor thereof; and the author of any such production, printed and published by him or his assignee within ten years before the passing of the Act, or which should thereafter be so published, should, from the time of passing the Act, or from the time of such publication, respectively, until the end of twenty-eight years from the publication, or if the author or authors, or the survivor of the authors, was alive at the end of that period, during the residue of his natural life, have, as his own property, the sole liberty of representing it, or causing it to be represented at any place of dramatic entertainment.(*a*)

An exception is made in cases where, before the passing of the Act, the author or his assignee had consented to, or authorised the representation.(*b*)

On every person infringing the proprietors' copyright, the Act imposes a penalty of not less than forty shillings for every unauthorised representation; or the proprietor

(*a*) Sect. 1. (*b*) *Ib.*

may recover, with double costs of suit, the full amount of the benefit arising from the representation, or the injury or loss sustained by him from it.(a)

The period for bringing actions is twelve calendar months after the offence is committed.(b)

5 & 6 Will. 4, c. 65. Lectures.

The next subject dealt with by statutory enactment was the publication of lectures without consent. 5 & 6 Will. 4, c. 65, gave to the authors of lectures, or their assignees, the sole right of publishing them, and imposed on every person, whether he attends the lectures for fee and reward or not, who publishes them without consent, a penalty of a penny for every sheet found in the offender's custody, either printed, lithographed, or copied, or printing, lithographing, or copying, published or exposed to sale, besides a forfeiture of the copies themselves. The same penalty is imposed on printers or publishers of newspapers publishing the lectures without leave. But the Act excepts from its provisions lectures, of the delivery of which notice in writing shall not have been given to two justices living within five miles of the place where they are to be delivered two days at least before the delivery of them; also lectures delivered in universities and other public foundations, or in virtue of any gift, endowment, or foundation.(c)

6 & 7 Will. 4, c. 59. Ireland.

6 & 7 Will. 4, c. 59, extended to Ireland the provisions of 17 Geo. 3, c. 57, relating to the protection of copyright in prints and engravings.

1 & 2 Vict. c. 59. International copyright.

The International Copyright Act of 1 & 2 Vict. c. 59,(d) empowered Her Majesty, by Order in Council, to grant a copyright in England, for the same term that English subjects might enjoy it, to foreign authors whose governments should engage to secure the same privilege to British authors.

5 & 6 Vict. c. 45. Final extension of the term of copyright.

Next came the comprehensive statute of 5 & 6 Vict. c. 45, repealing the former Acts of 8 Anne, c. 19; 41 Geo. 3, c. 107, and 54 Geo. 3, c. 146, except as to proceedings then pending at law or in equity, or to causes of action or suit, or rights of contract then subsisting.

This Act extends the term of copyright in every book published in the lifetime of its author to the natural life of the author, and the further term of seven years, commencing at the time of his death; or to the term of forty-two years altogether, from the first publication of the book, should that number of years not have elapsed at the end of seven years from the death of the author; or if the book be published after his death, to the term of forty-two years from the first publication thereof. In cases of subsisting copy-

(a) Sect. 2. (b) Sect. 3. (c) *Vide ante*, pp. 20-22.
(d) Repealed by 7 Vict. c. 12.

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right the Act extended the term of enjoyment to that last-mentioned, except where it belonged to an assignee for other consideration than that of natural love and affection.

Sect. 5 empowers the Judicial Committee of the Privy Council to license the publication of books which the proprietor refuses to republish after the death of the author. Provision is next made for the delivery of copies of books to certain libraries, and a penalty is imposed for default in delivering them.(*a*) The mode of registering books at Stationers' Hall, and the consequences of a false entry are determined.(*b*)

The remedy for piracy provided by sect. 15 is an action on the case to be brought in any court of record in that part of the British dominions in which the offence shall be committed; and sect. 16 deals with the form of the defendant's plea in such an action. The provision in 41 Geo. 3, c. 107, as to the importation of books first composed, &c., here, and re-printed elsewhere, is re-enacted.

Sect. 18 deals with the question of copyright in productions appearing in encyclopædias, periodicals, and works published in a series, reviews, or magazines.

Sect. 19 enables the proprietors of encyclopædias, periodicals, and serials to enter at once the title at Stationers' Hall, and thereupon to have the benefit of the registration of the whole.

Musical compositions.

The provisions of 3 & 4 Will. 4, c. 15, relating to dramatic literary property, are extended to musical compositions, and the extended term of duration of copyright in books provided by the present Act is applied also to the liberty of representing dramatic pieces and musical compositions, the first public representation or performance of any dramatic piece or musical composition being deemed equivalent, in the construction of the Act, to the first publication of any book.(*c*) All the remedies provided by 3 & 4 Will. 4, c. 15, are given to the proprietors of the right of dramatic or musical representation; and it is provided that the right of representation shall not be conveyed by the assignment of the copyright.(*d*)

Books pirated are to become the property of the proprietor of the copyright, who, after demand thereof in writing, may recover the same or damages for their detention in an action of detinue, or sue for and recover damages for their conversion in an action of trover.(*e*) But no proprietor of copyright commencing after the Act shall sue or proceed for any in-

(*a*) Sects. 6-10.
(*b*) Sects. 11-14. See the chapter on "Copyright in Books," *post*.
(*c*) Sect. 20.
(*d*) Sects. 21, 22. See the chapter on "Dramatic and Musical Compositions," *post*.
(*e*) Sect. 23.

fringement before making entry in the book of registry of the Stationers' Company.(*a*)

The Act further contains clauses as to the mode of pleading and giving evidence on the trial of an action, and limiting the time for instituting proceedings for offences against the Act to twelve months from the commission of the offence, and saving the rights of the Universities and of the Colleges of Eton, Westminster, and Winchester, and all their subsisting rights, contracts, and engagements.(*b*)

7 Vict. c. 12. Amendments of International Copyright.

The Act 7 Vict. c. 12, was passed to amend the law relating to International Copyright. It repeals the International Copyright Act of 1 & 2 Vict. c. 59, and enables Her Majesty, by Order in Council, to confer more extended privileges on authors of books, prints, articles of sculpture, and other works of art, first published in foreign countries, by giving them a copyright of not greater duration than that enjoyed in works of a similar character first published in the United Kingdom. It also enables Her Majesty to direct that authors and composers of dramatic pieces first publicly represented and performed in foreign countries, shall have similar rights in the British dominions. Sect. 6 enumerates particulars as to registry and delivery of copies, which must be observed with respect to all the foregoing. Sect. 10 prohibits the importation of copies of books wherein copyright is subsisting under the Act, printed in foreign countries other than those wherein the book was first published. Translations are excluded from the operation of the Act.(*c*) And by sect. 19 the authors of works (books, dramas, prints, or articles of sculpture) published in foreign countries, are not to be entitled to any copyright, or exclusive right of representation or performance, otherwise than under this Act.

Other clauses deal with the deposit of books, &c., and with the publication of Orders in Council, none of which is to have any effect unless it states that protection similar to that given by the Order in Council has been secured by the foreign power to which it is so given, to the proprietors of works first published in the dominions of Her Majesty.(*d*)

10 & 11 Vict. c. 95. Colonial Copyright.

The law relating to the protection in the colonies of books entitled to copyright in the United Kingdom, was amended by 10 & 11 Vict. c. 95, which provides that where the proper legislative authorities in any British possession shall pass an Act or make an ordinance containing due provision for securing or protecting the rights of British authors in such possession, and shall submit such Act or ordinance to Her Majesty, Her Majesty, if she think such Act or ordinance sufficient for the purpose of securing to British authors

(*a*) Sect. 24. (*b*) Sects. 26-28. (*c*) Sect. 18. (*d*) Sects. 11-17.

reasonable protection within such possession, may issue an Order in Council declaring that so long as such Act or ordinance continues in force within such colony, the prohibitions contained in any Acts of Parliament against the importing, selling, letting out to hire, exposing for sale or hire, or possessing foreign reprints of books first composed, written, printed, or published in the United Kingdom, and entitled to copyright therein, shall be suspended as far as regards such colony.(*a*)

15 & 16 Vict. c. 12. Further amendment of the law of International Copyright.

The last statutory enactment on the subject of international copyright is 15 & 16 Vict. c. 12, which extends and explains the previous Acts, besides enabling Her Majesty to carry into effect a convention with France on the subject. Under this Act the Queen may, by Order in Council, direct that the authors of books published after a specified day in any foreign country, their executors, administrators, or assigns, shall be empowered (subject to the provisions contained in the Act) to prevent the publication in the British dominions of any translations of such books not authorised by them for a period, to be specified in the Order of Council, not exceeding five years from the first publication of an authorised translation, and in the case of books published in parts, for a period not exceeding, as to each part, five years from the first publication of an authorised translation of that part. On such order being made the provisions in the laws which protect British copyright are to be applied to prevent the publication of unauthorised translations.

Similar provisions are made to prevent unauthorised translations for the same length of time of dramatic works first publicly represented in any foreign country.

Fair imitations and adaptations to the English stage of dramatic pieces are excepted from the operation of the statute; also all articles of a political nature, in foreign newspapers or periodicals, and similar articles on other subjects where the author has not notified his intention to reserve the right.(*b*)

The requisites which foreign authors must comply with in order to entitle themselves to the benefits of this act are specified, and provisions are inserted to prevent the importation of pirated copies.(*c*)

Lithographs.

Lastly, the Act clears up a previously existing doubt as to prints taken by lithography, by applying to them the provisions contained in the different statutes relating to other prints and engravings.(*d*)

(*a*) See the chapter on "Colonial Copyright," *post*. (*b*) Sect. 7.
(*c*) Sects. 9, 10. See the chapter on "International Copyright," *post*.
(*d*) Sect. 14.

The legislature came in the last place to the aid of authors of paintings, drawings, and photographs. In 1858 Lord Lyndhurst presented a petition to the House of Lords from the Society of Arts, the Royal Institute of British Architects, and a number of sculptors, painters, photographers, and others, asking for an extension of the law of copyright to works of fine art. A committee was appointed and a report presented, and a Bill was introduced to give effect to the report. A dissolution of Parliament, however, delayed the matter for a while, but in 1862 the Act 25 & 26 Vict. c. 68, was passed to accomplish the prayer of the petition. Previously to that statute the authors of paintings, drawings, and photographs had no copyright in their works.(*a*) The statute confers on the author of every original painting, drawing, and photograph, and his assigns, the sole and exclusive right of copying, engraving, reproducing, and multiplying it and the design thereof for the term of the natural life of the author, and seven years after his death. Provisions are contained in the Act as to registry and assignment, and to prohibit the importation of pirated works; and for infringement of the copyright conferred by the Act, a penalty is imposed of 10*l.* for each offence, besides a forfeiture of all copies.

25 & 26 Vict. c. 68. Paintings, drawings, and photographs.

The foregoing is but a rapid summary of the legislative enactments on the subject of copyright, in their chronological order. The chief provisions of the various Acts will be considered in detail when treating in succeeding chapters of the different subjects in which copyright exists.

CHAPTER VII.

COPYRIGHT IN BOOKS.

THE Act of 5 & 6 Vict. c. 45, s. 2, defines "copyright" to mean the sole and exclusive liberty of printing or otherwise multiplying (*b*) copies of any subject to which the said word is in the Act applied.

Definition of copyright.

The same section provides that the word "book" shall be construed to mean and include every volume, part or

Meaning of "book."

(*a*) See the preamble to this statute.

(*b*) This gives a wider meaning to the term than that given by the Statute of Anne, which was "the sole right and liberty of *printing*," and thus protects literary works from unauthorised publication by other means than the press: (see *per* Talfourd, J., *Novello* v. *Sudlow* (12 C. B. 189; 16 Jur. 671).

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division of a volume, pamphlet, sheet of letter-press,(a) sheet of music, map, chart, or plan separately published.(b)

A newspaper is not, according to Malins, V.C.,(c) a book within this section, and does not require to be registered under sect. 13, in order to entitle the proprietor to restrain the piracy of it.

Duration of copyright.

With respect to the duration of copyright in books, sect. 3 enacts "that the copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns."

Copyright in books published before the Act.

In the case of books published before the passing of the Act (1st July, 1842), and in which copyright then subsisted, sect. 4 enacts, "that the copyright which at the time of passing this Act shall subsist in any book theretofore published (except as hereinafter mentioned) shall be extended and endure for the full term provided by this Act in cases of books thereafter published, and shall be the property of the person who at the time of passing of this Act shall be the proprietor of such copyright: Provided always, that in all cases in which such copyright shall belong in whole or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this Act, but shall endure for the term which shall subsist therein at the time of passing of this Act, and no longer, unless the author of such book, if he shall be living, or the personal representative of such author, if he shall be dead, and the proprietor of such copyright shall, before the expiration of such term, consent and agree to accept the

(a) A label used in the sale of any article is said by an American Judge (M'Clean) not to be a book within the provisions of the Copyright Act: (*Coffeen* v. *Brunton*, 4 M'Clean, 516.)

(b) See *Hime* v. *Dale* (2 Camp. 27 n.); *Clementi* v. *Goulding* (2 Camp. 25); *Back* v. *Longman* (Cowp. 623).

(c) *Cox* v. *Land and Water Journal Company* (L. Rep. 9 Eq. 324; 21 L. T. N. S. 548.)

benefits of this Act in respect of such book, and shall cause a minute of such consent in the form in that behalf given in the schedule to this Act annexed to be entered in the book of registry hereinafter directed to be kept, in which case such copyright shall endure for the full term by this Act provided in cases of books to be published after the passing of this Act, and shall be the property of such person or persons as in such minute shall be expressed."

The copyright, then, in every book published during the author's lifetime is to last, at least, for forty-two years from the time of its first publication, and may last for any longer period that may be covered by the duration of the author's life, with seven more years added. If the book is published after his death, the copyright lasts for forty-two years from first publication. Copyrights subsisting at the time of the passing of the Act are extended to the same limits, but not in the case of assignees of the copyright for other consideration than that of natural love and affection, unless with the concurrence of the proprietor and author or his personal representative.

Though the Act gives a meaning to the word "book," which includes dramatic and musical compositions, besides reviews, serials, &c., we shall treat in this chapter only of books commonly so called, and reserve for a separate treatment the most important of the other productions which the word is used in the Act to include.

Whether there must be a known author.

With respect to the question whether there must be a known author by whose life and from whose death the statutory period of copyright is to be determined, the observations of Lord Deas in the Scotch case of *Maclean* v. *Moody*,(*a*) in the year 1858, are deserving of attention. In that case an argument was addressed to the court against the title of the claimants to copyright in a shipping list called "The Clyde Bill of Entry," to the following effect;—that the object of the statute 5 & 6 Vict. c. 45, was to encourage literary merit; that intellectual labour constituting authorship is alone thereby protected; that there can be no authorship without an author; that the claimants were not the authors in the present case, nor did they name the authors; that the life of the author affords the only criterion the statute gives for measuring the endurance of the privilege; and that without the statutory means of measuring the privilege, the privilege itself cannot exist. Lord Deas said, "I am humbly of opinion that this argument, although ingenious, is unsound. The

(*a*) Cases in Court of Sessions, vol. 20, p. 1163.

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Act does not confine the privilege to works of literary merit. . . . . Neither does the Act confine the privilege to cases in which there is a known author, whose life shall afford a measure for the endurance of the privilege. A person may find a manuscript in his ancestor's repositories, or get a gift of it and publish it, and he may be entitled to copyright, although he cannot tell who was the author, or whether the author is living or dead. The Crown might, I presume, get up a publication and be entitled to copyright, and yet the Crown never dies. . . . . That the first publisher may have copyright in the work, although he cannot point out the author, appears to me implied in sect. 16 of the statute, which requires the defendant 'if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book' to give notice of 'the name of the person whom he alleges to have been the author or first publisher.' I think it is here assumed that there may be cases in which, if the plaintiff be 'the first publisher' he may be entitled to copyright, although no author has been or can be named upon either side. In all such cases it is obvious that the endurance of the privilege can have no reference to the author's life, but must be for forty-two years after the first publication."

Author.

An author may be described as one who, by his own intellectual labour applied to the materials of his composition, produces an arrangement or compilation new in itself.(*a*) Where the incidents of a person's life were furnished by him to another who prepared them for publication, and the copyright was taken out in the name of the person furnishing the facts, it was held in America that he was not the author, and that a person claiming as his assignee could not maintain an action for infringement.(*b*)

Assistants employed by the publishers of a shipping list compiled from statistics contained in custom house books to which the publisher had sole right of access for the purpose of publication, were said by Lord Deas(*c*) not to be authors in the sense of sect. 18 of 5 & 6 Vict. c. 45, nor in any reasonable sense whatever.

The person who arranges a pianoforte score of an opera is the author or composer of such arrangement, and must be registered as such.(*d*)

(*a*) *Atwill* v. *Ferrett* (2 Blatch. 46).
(*b*) *De Witt* v. *Brooks* (cited Law's American Digest of Patent and Copyright Cases, p. 174).
(*c*) *Maclean* v. *Moody* (20 Scotch Sess. Cas. 2nd Ser. 1164.)
(*d*) *Wood* v. *Boosey* (L. Rep. 3 Q. B. 223; 18 L. T. N. S. 105).

A person who merely procured a drawing or design to be made was held not entitled to relief under 8 Geo. 2, c. 13.(*a*) But the proprietor of a periodical containing translations made from foreign works by persons employed and paid by him and from works imported by him at considerable expense, obtained an injunction to prevent the unauthorised publication of these translations.(*b*)

Where a person, employed as a performer and stage manager of a theatre, agreed to write a play which was to be performed in the employer's theatre so long as it should continue to draw good audiences, it was held in America that the person who wrote the play was the proper person to take out the copyright, and that the employer had no right or interest in it, except the privilege of having it performed at his theatre.(*c*)

A Scotch publisher brought out an edition of the works of Dr. Channing, the American author, which had already been published in America. Various slight alterations and corrections were made with the assistance of Dr. Channing for this edition, and the publisher sent him by way of acknowledgment a sum of money, but not as the result of any contract entered into. Another publisher having published a new edition reprinted from the former, it was held by the Court of Session that the former publisher had no copyright in his edition, and could not prevent the publication of a reprint of it.(*d*)

How far book must be original.

How far a book must be original in order to entitle its author to copyright in it is a question to which only a general answer can be given. It may be expressed thus: the law will secure to a man the property in every genuine product of his own mental labour, whether that product take the form of compilation, abridgment, new arrangement, or wholly original work—if, indeed, there can be any such thing as a wholly original work. On this subject an eminent American Judge (Story) says, with great propriety,(*e*) "In truth, in literature, in science, and in art,

(*a*) *Jeffreys* v. *Baldwin* (Amb. 163); see *Pierpoint* v. *Fowle* (2 Wood. & Min. 46) and *Binns* v. *Woodruff* (4 Wash. 53), and as to alterations in a musical composition made for another person, *Atwill* v. *Ferrett* (2 Blatch. 46). See further as to the authorship of musical compositions, *Reed* v. *Carusi* (8 Amer. L. Rep. O. S. 411).

(*b*) *Wyatt* v. *Barnard* (3 Ves. & B. 77).

(*c*) *Roberts* v. *Myers* (13 Mo. L. Rep. 400, cited Law's Digest of Patent, Copyright, and Trades Mark Cases, p. 211).

(*d*) *Hedderwick* v. *Griffin* (3 Scotch Sess. Cas. 2nd Ser. 383).

(*e*) *Emerson* v. *Davies* (3 St. 779); see also in *Gray* v. *Russell* (1 St. 16).

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

The law requires no such impracticable standard of originality as that alluded to in the extract just made. It requires only that the work should contain something distinctively the property of the author, which gives a character to it. "Something he must show to have been produced by himself; whether it be a purely original thought or principle, unpublished before, or a new combination of old thoughts, and ideas, and sentiments, or a new application or use of known and common materials, or a collection, the result of his industry and skill. In whatever way he claims the exclusive privilege accorded by these laws, he must show something which the law can fix upon as the product of his own and not another's labours. But in order that the law should do this ample justice to the great variety of claimants it is necessary that its rules should be capable of adaptation to the objects of their labour. They must include in their range everything that can be justly claimed as the peculiar product of individual efforts; otherwise they would exclude from the benefits of literary property objects which are as clearly the products of individual labour as the most original thoughts ever written, namely, new and important combinations and arrangements, or collections of materials known and common to all mankind."(a)

Test of originality.

The test "whether the claimant's book contain any substantive product of his own labour?" has been recognised and applied in several cases. In 1797, one Cary was employed to make a survey of the different roads in Great Britain. Having completed his survey he published

(a) Curtis on Copyright, 171, 172.

a book called "Cary's New Itinerary," which followed the plan and contained much of the materials of an older work called "Patterson's Road Book," but contained also many corrections of and additions to it. A person named Faden having published a book bearing the same relation to Cary's that Cary's did to Patterson's, Cary filed a bill in Chancery to restrain Faden from publishing his book, on the ground that it was not original, but either in whole or part a copy of Cary's. The Lord Chancellor (Loughborough) refused to grant an injunction, thinking the two books very different. He said, "What right had the plaintiff to the original work? If I were to do strict justice I should order the defendants to take out of their book all that they have taken from the plaintiff, and reciprocally the plaintiff to take out of his all he has taken from Patterson. I think the plaintiff may be contented that a bill is not filed against him?"(*a*) An action was brought in 1801 by the same plaintiff against Messrs. Longman and Rees for publishing a pirated edition of the same or a similar work, the book published by the defendants being professedly a twelfth edition of the original work by Patterson, but containing nine-tenths of Cary's alterations and improvements. The plaintiff was held entitled to recover. Lord Kenyon, C.J., said, "certainly the plaintiff had no title on which he could found an action to that part of his book which he had taken from Mr. Patterson's; but it is as clear that he had a right to his own additions and alterations, many of which were very material and valuable: and the defendants are answerable at least for copying those parts in their book. . . . . The courts of justice have been long labouring under an error, if an author have no copyright in any part of a work unless he have an exclusive right to the whole work."(*b*)

According to Lord Eldon,(*c*) if a person collects an account of natural curiosities and such articles, and employs the labour of his mind by giving a description of them, that is as much a literary work as many others that are protected by injunction and by action. It is equally competent to any other person perceiving the success of such a work to set about a similar work, *bonâ fide* his own; but it must be in substance a new and original work, and must be handed out to the world as such.

Where subject is common.

The fact that the subject of the work is common does not deprive an author of copyright in the product of the labour which he has *bonâ fide* spent on it, or render it less neces-

(*a*) *Cary* v. *Faden* (5 Ves. 23). (*b*) 1 East. 358.
(*c*) See judgment in *Hogg* v. *Kirby* (8 Ves. 221).

sary for any subsequent author to have recourse to the original sources; as we learn from the case of *Patterson's Road Book*, already referred to. (*a*) So in *Longman* v. *Winchester* (*b*) the plaintiffs were held entitled to copyright in the "Court Calendar," a work consisting of lists of members of the Houses of Peers and Commons, &c., and an injunction was granted restraining the defendants from copying and publishing the plaintiffs' work. "The question before me," said Lord Eldon, "is whether it is not perfectly clear that in a vast proportion of the work of these defendants no other labour has been applied than copying the plaintiffs' work. From the identity of the inaccuracies it is impossible to deny that the one was copied from the other *verbatim et literatim*. To the extent, therefore, in which the defendant's publication has been supplied from the other work the injunction must go; but I have said nothing that has a tendency to prevent any person from giving to the public a work of this kind if it is the fair fruit of original labour; the subject being open to all the world; but if it is a mere copy of an original work this Court will interpose against that invasion of copyright." (*c*)

A work entitled "The Guide to Science," which laid no claim to any originality with reference to the scientific doctrines treated in it, but contained in the form of questions and answers a scientific exposition of some of the ordinary phenomena of human life, in parts digested from different works, was held to constitute an original work in which the author was entitled to copyright. (*a*) Wood, V.C., said, "That an author has a copyright in a work of this description is beyond all doubt. If anyone by pains and labour collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of his former general reading, or out of works consulted by him for the express

(*a*) "Take the instance of a map describing a particular county; and a map of the same county afterwards published by another person; if the description is accurate in both, they must be pretty much the same; but it is clear the latter publisher cannot on that account be justified in sparing himself the labour and expense of actual survey, and copying the map previously published by another:" (*Per* Lord Eldon in *Longman* v. *Winchester*, 16 Ves. 269.)

(*b*) 16 Ves. 269.

(*c*) And see the remarks of Wood, V.C., in *Kelly* v. *Morris* (L. Rep. 1 Eq. 702; 14 L. T. N. S. 222; 35 L. J. 423, Ch.; 14 W. R. 496).

(*d*) *Jarrold* v. *Houlston* (3 K. & J. 708).

purpose, the reduction of questions so collected, with such answers under certain heads and in a scientific form, is amply sufficient to constitute an original work of which the copyright will be protected. Therefore, I can have no hesitation in coming to the conclusion that the book now in question is in that sense an original work, and entitled to protection."

"This I hold to be clearly settled," said Lord Jeffrey, in *Alexander* v. *Mackenzie*, (*a*) "that even though the materials from which a work is taken be *in medio*, as it is called, yet if those materials be arranged in a new form, the effect of that will be to afford the author the protection of copyright in that form. In all cases, in short, although the materials are expressly *in medio*, and open to everybody, when a particular degree of judgment in the selection of those materials has been used, and when the subject *in medio*, so open to the world at large, has been to a certain extent snatched at and appropriated, such selection is in itself recognised as a certain degree of mental effort, which is entitled to the benefit of copyright." In that case the Court of Session held the pursuer entitled to copyright in certain practical forms or styles of the writs and instruments introduced by the Heritable Securities and Infeftment Acts, those Acts giving only general descriptions of the forms to be used. "It is said," observed Lord Fullerton in his judgment, (*b*) "that owing to the particular nature of the styles they cannot be the subject of copyright, because they are drawn up precisely after the form prescribed in the statute, and because any styles relating to the same subjects as those given by the complainer must, if the directions of the statutes and phraseology of conveyancers were used, be expressed in the same manner exactly as those proposed by the complainer. Now, it may be quite true that if the statute had supplied certain forms by which the operations intended to be thereby regulated were to be done, if the statute had contained, as such statutes sometimes do, an appendix exhibiting certain schedules of forms which it was only necessary for anyone to copy in order to avail himself of the provisions of the Act, then I hold that the reprinting of such forms in a separate publication would not give him a copyright in those forms. But the case here is different, for the statute only gives very general directions and descriptions of the styles that are to be used. The schedules are very general in their terms, and it is no doubt of great practical importance to suit these general directions to each case falling under the statute as

(*a*) 9 Scotch Sess. Cas. 2nd Ser. 758, 27 Feb. 1847.
(*b*) *Id.*, pp. 754, 755.

it may arise. The preparing and adjusting of such writings require much care and exertion of mind. As to invention, that is a different thing; it does not require the exercise of original or creative genius, but it requires industry and knowledge."

The same principle was applied to a book of chronology; (*a*) to the case of maps; (*b*) to the case of an annotated catalogue of books published by a bookseller; (*c*) and, in America, to the case of an elementary book of arithmetic containing an original arrangement and combination of materials, (*d*) and a new edition of a Latin grammar containing alterations, additions, and notes. (*e*)

The subject of a work may not in general be a subject of copyright, but still, if a man expends time and labour in producing a work on that subject, he has a copyright in the individual work. Thus, though an "East India Calendar" is not a subject of copyright, still if a man from his situation having access to the repositories in the India House, has by considerable expense and labour procured with correctness all the names and appointments on the Indian Establishment, he has a copyright in that individual work. (*f*)

Degree of originality in cases of copyright and patent.

Whether a greater degree of originality is necessary to sustain a claim to copyright than that which would be sufficient to support a title to a patent does not distinctly appear. In the case of patent inventions, suggestions of servants employed in perfecting a discovery, tending to facilitate its practical application, may be adopted by the employer and incorporated into his design without detracting from his claim to originality. In *Barfield* v. *Nicholson*, (*g*) Sir John Leach suggested the application of a similar principle to copyright. Chief Justice Jervis, however, leaned to a different opinion in the case of *Shepherd* v. *Conquest*, (*h*) remarking that the enactments upon which literary property and patents for inventions are respectively founded, differ widely in their origin and details; and that in order to show that the position and rights of an author within the Copyright Acts are not to be measured by those of an inventor within the patent laws, it is only necessary to bear in mind that, whilst on the one hand a person who imports from abroad the invention of another previously unknown here, without

(*a*) *Trusler* v. *Murray* (cited in note to *Cary* v. *Longman*, 1 East, 363).
(*b*) See 17 Ves. 425. (*c*) *Hotten* v. *Arthur* (11 W. R. 934).
(*d*) *Emerson* v. *Davies* (3 St. 768). See *Baily* v. *Taylor* (1 Tamlyn, 305), and *Lennie* v. *Pillans* (5 Scotch Sess. Cas. 2nd Ser. 416).
(*e*) *Gray* v. *Russell* (1 Story, 17).
(*f*) *Matthewson* v. *Stockdale* (12 Ves. 276).
(*g*) 2 Sim. & St. 1; 2 L. J. 90, 102, Ch. (*h*) 17 C. B. 444.

any further originality or merit in himself, is an inventor entitled to a patent, on the other hand a person who merely reprints for the first time in this country a valuable foreign work, without bestowing upon it any intellectual labour of his own, as by translation, which to some extent must impress a new character, cannot thereby acquire the title of an author within the statutes relating to copyright. The Chief Justice proceeded: "We do not think it necessary in the present case to express any opinion whether, under any circumstances, the copyright in a literary work, or the right of representation can become vested *ab initio* in an employer other than the person who has actually composed or adapted a literary work. It is enough to say in the present case, that no such effect can be produced where the employer merely suggests the subject, and has no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flowed from the mind of the person employed. It appears to us an abuse of terms to say that in such a case, the employer is the author of a work to which his mind has not contributed an idea; and it is upon the author in the first instance that the right is conferred by the statute which creates it."

Musical compositions.

The addition of words, prelude, and accompaniment to an old air was held to give the adapter a copyright in the whole composition;(*a*) and where a person adapted words to an old air and procured a friend to compose an accompaniment, his assignee was held entitled to describe himself in an action for piracy, as proprietor of the copyright in the entire composition.(*b*)

As to how far an arrangement for the pianoforte of the score of an opera is an original work, see *Wood* v. *Boosey*.(*c*)

Engravings in a book.

Engravings and prints were deliberately excluded from the operation of 5 & 6 Vict. c. 45. But in *Bogue* v. *Houlston*(*d*) Sir James Parker, V.C., was of opinion that where there are designs forming portion of a book in which a person has copyright under that act, such copyright extends to the illustrations and designs of the book as well as to the letter-press. The plaintiff had published a book containing letter-press illustrated by wood-engravings, the engravings being printed on the same paper as the letter-press itself. The defendants published a work with a different title and different letter-press, but containing pirated copies of the

(*a*) *Lover* v. *Davidson* (1 C. B. N. S. 182).
(*b*) *Leader* v. *Purday* (7 C. B. 4).
(*c*) 7 B. & S. 869; 9 B. & S. 175; L. Rep. 2 Q. B. 340; L. Rep. 3 Q. B. 223; 18 L. T. N. S. 105.
(*d*) 5 De G. & Sm. 275.

wood-engravings. The plaintiff had complied with the requisitions of 5 & 6 Vict. c. 45, but not with those of the act for the protection of engravings by printing the date of publication and the name of the proprietor on each copy. The Vice-Chancellor granted an injunction, the plaintiff undertaking to bring an action to try the right at law. "It appears to me," said Sir James Parker, "that a book must include every part of the book, it must include every print, design, or engraving which forms part of the book, as well as the letter-press therein, which is another part of it. Prints published separately do not appear to have been within that act by that express definition.(*a*) But the case now before the Court is not the case of separately published prints, but the case of designs forming part of a book. There is no decision of any court of law, or of this court either way upon this point."

Abridgments and translations.

How far abridgments and translations may be new and original works, and the authors entitled to copyright in them, will be more conveniently treated of when we come to deal with the subject of piracy.(*b*)

Copyright may be of part of a work.

In *Low* v. *Ward*(*c*) it was urged in argument that there could not be copyright as to a part of a work only, but the Court overruled the argument. "There are numerous cases," said Giffard, V.C., "showing that where the parts of a work can be separated, there may be a copyright in any distinct part of it. I may instance the cases of the last canto of Lord Byron's 'Childe Harold,' Croker's Notes to 'Boswell's Life of Johnson,' and of particular articles in cyclopædias. There is no analogy in this respect between a patent and the case of copyright, as it matters not whether the copyright is for the entire work or for a part only."

STATUTORY REQUISITES TO BE OBSERVED.

The statutory requirements to be observed by the proprietors of copyright are the registration of the work at Stationers' Hall, and the deposit and delivery of a certain number of copies of it.

1. *Registration.*

Book of Registry to be kept at Stationers' Hall.

Sect. 11 of 5 & 6 Vict. c. 45, provides as follows, with respect to keeping a Book of Registry at Stationers' Hall: "that a book of registry, wherein may be registered, as hereinafter enacted, the proprietorship in the copyright of books, and assignments thereof, and in dramatic and

(*a*) Sect. 2 of 5 & 6 Vict. c. 45.
(*b*) See the chapter on "Piracy," *post*. (*c*) L. Rep. 6 Eq. 418.

musical pieces, whether in manuscript or otherwise, and licences affecting such copyright, shall be kept at the hall of the Stationers' Company, by the officer appointed by the said company for the purposes of this Act, and shall at all convenient times be open to the inspection of any person, on payment of one shilling for every entry which shall be searched for or inspected in the said book; and that such officer shall, whenever thereunto reasonably required, give a copy of any entry in such book, certified under his hand, and impressed with the stamp of the said company, to be provided by them for that purpose, and which they are hereby required to provide, to any person requiring the same, on payment to him of the sum of five shillings; and such copies so certified and impressed shall be received in evidence in all Courts, and in all summary proceedings, and shall be *primâ facie* proof of the proprietorship or assignment of copyright or licence as therein expressed, but subject to be rebutted by other evidence, and in the case of dramatic or musical pieces shall be *primâ facie* proof of the right of representation or performance, subject to be rebutted as aforesaid."

Certified copies to be received in evidence.

Sect. 12 enacts, "that if any person shall wilfully make or cause to be made any false entry in the registry book of the Stationers' Company, or shall wilfully produce or cause to be tendered in evidence any paper falsely purporting to be a copy of any entry in the said book, he shall be guilty of an indictable misdemeanor, and shall be punished accordingly."

Making a false entry in the book of registry, a misdemeanor.

And sect. 13 provides, "that after the passing of this Act it shall be lawful for the proprietor of copyright in any book heretofore published, or in any book hereafter to be published, to make entry in the registry book of the Stationers' Company of the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright, in the form in that behalf given in the schedule to this Act annexed, upon payment of the sum of five shillings to the officer of the said Company."

Entries of copyright.

The statute authorises any person to make an entry as proprietor. It does not say what such person may require to do in order to satisfy the keeper of the register, before the keeper will make such registration.(*a*)

No copyright is acquired by the registration of a book

(*a*) 18 Scotch Sess. Cas. 915.

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before its actual publication; the protection afforded by the Act not being prospective, but dating only from the time of the first publication of the work.(*a*)

Form of requiring entry of proprietorship.

The following is the form requiring entry of proprietorship given in the schedule to 5 & 6 Vict. c. 45.

I *A. B.* of do hereby certify, that I am the proprietor of the copyright of a book, intituled *Y. Z.*, and I hereby require you to make entry in the register book of the Stationers' Company of my proprietorship of such copyright, according to the particulars underwritten.

Title of Book.	Name of Publisher and Place of Publication	Name and Place of Abode of the Proprietor of the Copyright.	Date of First Publication.
Y.Z.		*A.B.*	

Dated this day of 18

Witness, *C.D.* (Signed) *A.B.*

Form of entry.

And the form of original entry of proprietorship of copyright of a book (*b*) given in the same schedule is as follows:—

Time of making the Entry.	Title of Book.	Name of the Publisher, and Place of Publication.	Name and Place of Abode of the Proprietor of the Copyright.	Date of First Publication.
	Y.Z.	*A.B.*	*C.D.*	

An author may associate with himself by registry

(*a*) *The Correspondent Newspaper Company (Limited)* v. *Saunders* (13 W. R. 804; 12 L. T. N. S. 540; 11 Jur. N. S. 540). In *Platt* v. *Walter* (17 L. T. N. S. 159) Lord Chelmsford says, "That protection given by common and statute law, which is called copyright, is only in respect of some published or unpublished literary production, and, therefore, there can be no copyright in the prospective series of newspapers. The copyright may attach upon each successive publication, but that which has no present existence cannot be the subject of this species of property."

(*b*) As to the mode of registering in the case of a periodical publication, see *post*, p. 99.

under the Act, any person or persons he pleases, and such persons have a right to sue jointly with him for any infringement of copyright in the work so registered.(*a*)

The "directors of, and subscribers to, the Customs Annuity and Benevolent Fund" having published the "Clyde Bill of Entry and Shipping List," registered their individual names as proprietors. Although they did not state on the register who was the author of the work, nor whether they had acquired the right to it by purchase or assignment, it was held by the Scotch Court of Session that they had sufficiently complied with the provisions of the Act, and had set forth a sufficiently *primâ facie* title to try the question of copyright on an application for an interdict.(*b*)

Time of first publication.

The day of the month, as well as the month and the year must be stated in the entry; it is not enough to give the month and year only.(*c*)

Consequence of non-registration;

The consequence of non-registration is stated in sect. 24, which enacts, "that no proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain any action or suit at law or in equity, or any summary proceeding, in respect of any infringement of such copyright, unless he shall, before commencing such action, suit, or proceeding, have caused an entry to be made, in the book of registry of the Stationers' Company, of such book, pursuant to this Act: Provided always, that the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof as aforesaid: Provided also, that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the Act passed in the third year of the reign of His late Majesty King William the Fourth, to amend the laws relating to dramatic literary property, or of this Act, although no entry shall be made in the book of registry aforesaid."

A separate article from a periodical publication is not a book within the meaning of the Act, so as to require registration under this section; and, therefore, non-registration

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

(*b*) *Maclean* v. *Moody* (Scotch Sess. Cas. 2nd Ser., vol. 20, 1154, June 23, 1858).

(*c*) *Mathieson* v. *Harrod* (L. Rep. 7 Eq. 272; 38 L. J. 129, Ch.; 19 L. T. N. S. 629); and see *Low* v. *Routledge* (L. Rep. 1 Eq. 42; 3 H. L. Cas. 100; 33 L. J. 717, Ch.); and *per* Blackburn J., in *Wood* v. *Boosey* (L. Rep. 2 Q. B. 340), a case decided under sect. 6 of the International Copyright Act (7 Vict. c. 12).

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does not by force of sect. 24 disentitle the author to proceed for any infringement of his right with respect to it.(*a*)

According to Malins, V.C.,(*b*) a newspaper proprietor may sue for a piracy of its contents, without registering it.(*c*)

The enactment contained in sect. 24 has made an important change in the law as to the bringing of actions in cases where a book has not been registered. Previously to this enactment it was not necessary in order to entitle a plaintiff claiming as owner of copyright to sue, that his work should be registered at Stationers' Hall. Although he was bound to register for certain purposes,(*d*) it was decided that where there was no registration, the person entitled to copyright might protect his right by action or suit.(*e*) But now, as to books first published after the Act, although the author has copyright in them, he cannot sue, either at law or in equity, to protect himself against infringement of his copyright, unless he has registered his book at Stationers' Hall pursuant to the statute.(*f*) This, however, applies only to books first published after the Act; it does not affect any book published before.

Inaccuracy in registration.

The registration of a book, according to sect. 13, must be strictly accurate in all the particulars mentioned in that section, viz.: "the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright." Errors as to these will, by force of sect. 24, prevent the author or proprietor from proceeding by action, suit, or otherwise, until such errors have been amended. They will also invalidate a subsequent assignment under the Act.(*g*) Thus, where "the time of the first publication" of a book was entered on the registry as the 25th May, 1864, when, in fact, it was first published on the 23rd May in that year, this was of itself held fatal to the fact of the registry of proprietorship operating by way of assignment.(*h*) And where the entry on the registry of the name of the publisher was "Sampson Low, Son, and Marston," whereas the name of the firm was "Sampson

(*a*) *Murray* v. *Maxwell* (3 L. T. N. S. 466); *Mayhew* v. *Maxwell* (1 John. & H. 312).

(*b*) *Cox* v. *Land and Water Journal Co.* (L. Rep. 9 Eq. 324; 21 L. T. N. S. 548).

(*c*) See the remarks on this case in the chapter on "Newspapers," *post.*

(*d*) Registration was necessary to entitle the proprietor to recover the penalty imposed by statute for the violation of his copyright.

(*e*) See *Beckford* v. *Hood* (7 T. R. 620).

(*f*) 1 Drew. 353; see p. 364.

(*g*) *Low* v. *Routledge* (33 L. J. 717, Ch.; 10 L. T. N. S. 838; 10 Jur. N. S. 922; 12 W. R. 1069).

(*h*) *Ib.*

Low, Son, and Co.," this also was held of itself fatal to the right of the firm to sue.(*a*) "One almost regrets," said Kindersley, V.C., in the case in which these points were decided, "to be obliged to come to the consideration of points which are so very technical as these which I am obliged to consider; but, at the same time, they are points not only which a defendant or plaintiff has a right to take, but which are of importance with reference to the carrying out of the clearly expressed intention of the Legislature, which has thought fit to require, in order to produce certain effects, that certain strict particulars shall be complied with. It is, in point of fact, a concession of a certain means of assignment upon condition; and, in order to acquire the right to that mode of assignment, you must perform the condition which the Legislature has required." With respect to the mistake in the entry of the name of the firm, the Vice-Chancellor said: "Though it is probably optional either to enter the name of the firm of publishers, or the names of the individuals composing that firm, if you profess to enter the real name of the firm you must do so. . . . . I am almost ashamed to descend to these minute particulars, but it must be done; and it is sufficient for me to say that in my opinion, either of these inaccuracies is quite sufficient to lead me to hold that the entry of the proprietorship is insufficient, and, upon that ground, that there is no valid assignment effected by the subsequent entry which immediately follows that of the assignment." The errors in the entries at Stationers' Hall were corrected after this decision, and a second Bill was filed by the plaintiffs, praying for an injunction to restrain the defendants from printing, publishing, &c., the book in question; and the injunction was granted.(*b*)

Where, however, the place of abode of the proprietor of copyright in a song was described in the entry at Stationers' Hall as "65, Oxford-street," whereas he was in America at the time of publication, and had no place of abode in England, "65, Oxford-street" being the address of his publishers, the Court of Common Pleas held that this was sufficient to satisfy the requisites of the Act.(*c*)

It seems that non-registration, when intended to be set up as a defence to an action for piracy, should be distinctly pleaded.(*d*)

Subsequent editions.

If the first edition of a book has been published before 5 & 6 Vict. c. 45, although other editions have been

(*a*) *Low* v. *Routledge*, *ubi supra*, p. 90.
(*b*) *Ib.*
(*c*) *Lover* v. *Davidson* (1 C. B. N. S 182).
(*d*) *Chappell* v. *Davidson* (18 C. B. 194).

published since that Act, and have not been registered pursuant to its provisions, the proprietor is entitled to protect by action or suit his copyright in so much of the work as appeared in the first edition. (*a*)

But where a second edition of a book printed after July 1, 1842, is not a mere reprint of a first edition published before that date, but contains considerable and material alterations and additions, as to those it is a new work; and in order to enable the proprietor to sue in respect of any infringement of his rights in those portions of the second edition which are new, if those only are infringed, he must register the book in which they are contained.(*b*) And the extent of the alterations contained in the second edition is immaterial; to whatever extent a new edition is made a new work, the new part cannot be protected by suit until registration. But that effect of the Act of Victoria has no operation as to the old parts: as to them the copyright is left where it was.(*c*)

Effect of neglect at Stationers' Hall.

The object of registration being to give notice to all other publishers that the publication is protected by the statute, if there be any neglect on the part of the officials at Stationers' Hall as to the registration, the public is not bound, and the remedy of the publisher must be against the party causing such neglect. It cannot affect those who are thereby kept in ignorance of the existence of the copyright.(*d*)

Remedy to persons aggrieved by entries in register.

Sect. 14 of 4 & 5 Vict. c. 45, enacts, "that if any person shall deem himself aggrieved by any entry made under colour of this Act in the said book of registry, it shall be lawful for such person to apply by motion to the Court of Queen's Bench, Court of Common Pleas, or Court of Exchequer, in term time, or to apply by summons to any judge of either of such courts in vacation, for an order that such entry may be expunged or varied; and that upon any such application by motion or summons to either of the said courts, or to a judge as aforesaid, such court or judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as to such court or judge shall seem just; and the officer appointed by the Stationers' Company for the purposes of this Act shall, on the production to him of any such order for expunging or varying any such entry, expunge or vary the same according to the requisitions of such order."

(*a*) *Murray* v. *Bogue* (1 Drew. 365, 366). (*b*) *Ib.* 365.

(*c*) *Ib.* 366. The case of *Novello* v. *Sullow* (16 Jur. 689) is in no way opposed to the doctrine above laid down, as in that case the work had been duly registered, and the whole argument turned on the construction of sect. 15 of 5 & 6 Vict. c. 45.

(*d*) *Per* Wood, V.C., in *Cassell* v. *Stiff* (2 K. & J. 287).

There are not many reported cases of application for relief under this section of the Act. A rule absolute to "vary or expunge" at the option of the applicant, an unauthorised entry in the register at Stationers' Hall, was granted by the Court of Common Pleas in *ex parte Bastow.*(*a*)

A rather wide discretion was exercised by the Court of Queen's Bench in *ex parte Davidson.*(*b*) Robert Cocks brought an action against Davidson for publishing three pieces of music, in which Cocks claimed the copyright. Two of the pieces were registered in the name of Cocks, and the third in the name of a person who had assigned the copyright to him. A rule *nisi* to expunge or vary the entries was obtained upon an affidavit of Davidson, not asserting a copyright in the airs in himself, but deposing to his belief that the three airs were old, and that the persons who on the entries professed to be the authors were not really the authors. The ground suggested for expunging the entries was that they would be *primâ facie* evidence against Davidson on the trial of the action brought against him. The court declined to expunge the entries, but on the refusal of the counsel for Cocks to consent not to use the entries on the trial, an order was made by the court, *proprio vigore,* without consent, that the rule should be enlarged till the trial of an issue to determine the question of copyright, in which Cocks should be plaintiff and Davidson defendant, and on the trial of which the entries should not be used.

The Court of Common Pleas in a subsequent case(*c*) in which the same person applied for assistance, distinctly disclaimed the power exercised by the Court of Queen's Bench in the preceding case. The Court of Common Pleas refused to expunge an entry of proprietorship unless it was clearly and unequivocally shown to be false, or to vary it unless satisfied by affidavit that in so doing they would make a true entry. "We can only expunge or vary or confirm the entry:" said Crowder, J., "I think we have no power to do that which was done by the Court of Queen's Bench in *Ex parte Davidson.*" The circumstances of the case before the Court of Common Pleas were somewhat peculiar. Mr. Lover, the author of a song called "The Low Back'd Car," being in America, and wishing to secure to himself the copyright in England and in America by a simultaneous publication in both countries, instructed his publishers here to publish it in London, on a certain day. This was done, and the song was registered at Stationers' Hall, but in the entry

(*a*) 14 C. B. 631. (*b*) 2 El. & Bl. 577.
(*c*) *Ex parte Davidson* (18 C. B. 297).

the publishers described themselves as the proprietors of the copyright. The song having been published in this country by Davidson, from a copy sent from America, where the publication was alleged to have taken place three days before the publication here, Mr. Lover obtained a judge's order to vary the entry by substituting his name as proprietor, and got an injunction and brought an action for the infringement of his copyright. A rule to expunge or vary the amended entry having been obtained on behalf of Davidson, the Court discharged it with costs, considering that no case had been made out for its interference.

Person "aggrieved."

Whether under the circumstances of the case last referred to Davidson was a person "aggrieved" within the meaning of sect. 14 of 5 & 6 Vict. c. 45, it was not necessary to decide. Jervis, C. J., was of opinion that he was; Crowder, J., was doubtful, and the language of Willes, J. seems to point to an opposite conclusion. He asks, "Has any right of the applicant been interfered with or injuriously affected? I do not see that it has. This is not the case of a contested title: the applicant does not suppose himself to have been the original author of the composition in question: he claims to publish a thing to which he has no right whatever, merely because the person who is the author, and who therefore ought to have the sole right of publishing it here, has happened (it may be) to publish it in America a little too early, or has made an unintentional mistake in the date on the title page, or has incorrectly described his place of abode in the entry in the book at Stationers' Hall. I do not think it is a case in which we ought to interfere." In *Graves'* case (*a*) Blackstone, J., used similar language, and Hannen, J., said, "A person to be 'aggrieved' within the meaning of the statute must show that the entry is inconsistent with some right that he sets up in himself or in some other person, or that the entry would really interfere with some intended action on the part of the person making the application."

2. *Deposit and delivery of copies.*

To British Museum.

Sect. 6 of 5 & 6 Vict. c. 45, enacts, "that a printed copy of the whole of every book which shall be published after the passing of this Act, together with all maps, prints, or other engravings belonging thereto, finished and coloured in the same manner as the best copies of the same shall be published, and also of any second or subsequent edition which shall be so published with any additions or alterations, whether the same shall be in letter-press, or in the maps, prints, or

(*a*) L. Rep. 4 Q. B. 721, 724; 20 L. T. N. S. 877; 17 W. R. 1018.

other engravings belonging thereto, and whether the first edition of such book shall have been published before or after the passing of this Act, and also of any second or subsequent edition of every book of which the first or some preceding edition shall not have been delivered for the use of the British Museum, bound, sewed, or stitched together, and upon the best paper on which the same shall be printed, shall within one calendar month after the day on which any such book shall first be sold, published, or offered for sale within the bills of mortality, or within three calendar months if the same shall first be sold, published, or offered for sale in any other part of the United Kingdom, or within twelve calendar months after the same shall first be sold, published, or offered for sale in any other part of the British dominions, be delivered on behalf of the publisher thereof, at the British Museum."

Time.

Mode of delivering at the British Museum.

As to the mode of delivering at the British Museum, sect. 7 provides, "that every copy of any book which under the provisions of this Act ought to be delivered as aforesaid, shall be delivered at the British Museum between the hours of ten in the forenoon and four in the afternoon on any day except Sunday, Ash Wednesday, Good Friday, and Christmas Day, to one of the officers of the said Museum, or to some person authorised by the trustees of the said Museum to receive the same, and such officer or other person receiving such copy is hereby required to give a receipt in writing for the same, and such delivery shall to all intents and purposes be deemed to be good and sufficient delivery under the provisions of this Act."

To other libraries.

Sect. 8 provides, as to the other libraries, "that a copy of the whole of every book and of any second or subsequent edition of every book containing additions and alterations, together with all maps and prints belonging thereto, which after the passing of this Act shall be published, shall on demand thereof in writing, left at the place of abode of the publisher thereof at any time within twelve months next after the publication thereof, under the hand of the officer of the Company of Stationers who shall from time to time be appointed by the said company for the purposes of this Act, or under the hand of any other person thereto authorised by the persons or bodies politic and corporate, proprietors and managers of the libraries following; (*videlicet,*) the Bodleian library at Oxford, the public library at Cambridge, the library of the faculty of advocates at Edinburgh, the library of the college of the Holy and Undivided Trinity of Queen Elizabeth near Dublin, be delivered, upon the paper

of which the largest number of copies of such book or edition shall be printed for sale, in the like condition as the copies prepared for sale by the publisher thereof respectively, within one month after demand made thereof in writing as aforesaid to the said officer of the said Company of Stationers for the time being, which copies the said officer shall and he is hereby required to receive at the hall of the said company, for the use of the library for which such demand shall be made within such twelve months as aforesaid; and the said officer is hereby required to give a receipt in writing for the same, and within one month after any such book shall be so delivered to him as aforesaid to deliver the same for the use of such library."

Time.

By sect. 9, "if any publisher shall be desirous of delivering the copy of such book as shall be demanded on behalf of any of the said libraries at such library, it shall be lawful for him to deliver the same at such library, free of expense, to such librarian or other person authorised to receive the same (who is hereby required in such case to receive and give a receipt in writing for the same), and such delivery shall to all intents and purposes of this Act be held as equivalent to a delivery to the said officer of the Stationers' Company."

Penalty for default in delivering copies.

Sect. 10 defines the penalty for non-compliance with the foregoing provisions. It enacts "that if any publisher of any such book or of any second or subsequent edition of any such book shall neglect to deliver the same pursuant to this Act, he shall for every such default forfeit, besides the value of such copy of such book or edition which he ought to have delivered, a sum not exceeding five pounds, to be recovered by the librarian or other officer (properly authorised) of the library for the use whereof such copy should have been delivered, in a summary way, on conviction before two justices of the peace for the county or place where the publisher making default shall reside, or by action of debt or other proceeding of the like nature, at the suit of such librarian or other officer, in any court of record in the United Kingdom, in which action, if the plaintiff shall obtain a verdict, he shall recover his costs reasonably incurred, to be taxed as between attorney and client."

These provisions of the Act require the delivery of every book and of every volume thereof; they do not apply to a part of a volume, and the publishers of such part cannot, therefore, be made liable for non-delivery of it.(*a*)

Consequence of non-delivery.

It is to be observed that the only consequence of not depositing or delivering the copies is the liability to the

(*a*) *British Museum* v. *Payne* (4 Bing. 548).

penalty imposed by this section. Neglect of the duty does not incapacitate the proprietor of the copyright from proceeding at law or in equity for an infringement of it, as omission to register, so long as it continues, does by force of sect. 24.

Power of Privy Council to license publication of books.

The Judicial Committee of the Privy Council has power to license the publication of books which the proprietor refuses to republish after the death of the author. Sect 5. of 5 & 6 Vict. c. 45, after reciting that "it is expedient to provide against the suppression of books of importance to the public," enacts "that it shall be lawful for the Judicial Committee of Her Majesty's Privy Council, on complaint made to them that the proprietor of the copyright in any book after the death of its author has refused to republish or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a license to such complainant to publish such book, in such manner and subject to such conditions as they may think fit, and that it shall be lawful for such complainant to publish such book according to such licence."

For the law relating to the assignment of copyright in books, see the chapter on the "Transfer of Copyright," *post*; and with reference to the infringement of copyright, and the remedies for it, see the chapters on "Piracy," and "Remedies for Infringement," *post*.

CHAPTER VIII.

COPYRIGHT IN PERIODICAL PUBLICATIONS.

The property in reviews, magazines, and other periodicals is in general of the same nature as that in books, commonly so called, of which we have treated in the preceding chapter. There is, however, a modification in the term of enjoyment, and there are some questions which occur with respect to these productions which it has been considered more convenient to discuss by themselves.

The sections of the Copyright Act (5 & 6 Vict. c. 45) which deal with the subjects of our present consideration are the 18th (concerning the nature and duration of the right), and the 19th (as to registration).

Nature of the right.

Sect. 18 enacts, "that when any publisher or other person shall, before or at the time of the passing of this Act, have projected, conducted, and carried on, or shall

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hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for (*a*) by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act;(*b*) except only that in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act."

Duration of the right.

Limitation of right.

This section also provides, "that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof, or his assigns."

(*a*) With reference to the language of this portion of the section, Shadwell, V.C., says, in *Brown* v. *Cooke* (16 L. J. 143, Ch.), "It seems to me that there is an inaccuracy in the language; and the only possible way of making it English would be by referring the words 'and paid for' to the former words, 'shall have been or shall hereafter be composed, &c.'"

(*b*) A similar view of the rights of proprietors of periodicals was taken before the passing of this Act. Sir John Leach said, in *Barfield* v. *Nicholson* (2 L. J. 96, 102; 2 Sim. & S. 1), "I am of opinion that under that statute (8 Anne, c. 19) the person who embarks in the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own peculiar acquirements, that he, the person who so forms the plan and scheme of the work, and pays different artists of his own selection, who, upon certain conditions, contribute to it, is the author and proprietor of the work, if not within the literal expression, at least within the equitable meaning of the statute of Anne, which, being a remedial law, is to be construed liberally." And see the prior case of *Wyatt* v. *Barnard* (3 V. & B. 77).

Reservation by authors of right of publishing in a separate form.

It further provides, "that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid."

It will be seen from sect. 18 that the duration of the copyright in all literary productions appearing in the works therein enumerated is the same as in the case of books; but the enjoyment of that period of copyright is divided between the proprietor or projector, &c., of the larger work in which the literary production appears, and the author of the literary production; the former enjoying the right for twenty-eight years, the latter for the remaining twelve. It is further to be observed that the right of the proprietor, &c., of the larger work during the twenty-eight years is not of an absolute character, the right to publish any contribution in a separate form without the author's consent not being included in it.

Mode of registration.

Sect. 19 enacts, "that the proprietor of the copyright in any encyclopædia, review, magazine, periodical work, or other work published in a series of books or parts, shall be entitled to all the benefits of the registration at Stationers' Hall under this Act, on entering in the said book of registry the title of such encyclopædia, review, periodical work, or other work published in a series of books or parts, the time of the first publication of the first volume, number, or part thereof, or of the first number or volume first published after the passing of this Act in any such work which shall have been published heretofore, and the name and place of abode of the proprietor thereof, and of the publisher thereof, when such publisher shall not also be the proprietor thereof."

Title of Periodical.

Registering the title of an intended magazine cannot give a copyright in that name. (*a*) It was contended in *Hogg* v. *Maxwell* that as by sects. 2 and 13 of 5 & 6 Vict. c. 46, every "part" of a book may be registered, and a right to restrain the piracy of it thereby acquired, the registration of the title "Belgravia" by the Messrs. Hogg, in October, 1863, three years before the publication of a magazine bearing that name, gave them a copyright in that title.

(*a*) *Hogg* v. *Maxwell* (L. Rep. 2 Ch. App. 316; 16 L. T. N. S. 133; 36 L. J. 433, Ch.).

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In reply to this, Cairns, L.J., in giving judgment in that case, observed: "It is said that the word 'Belgravia,' being used upon the title-page of the magazine, was part of a volume. But at the time of making the entry in the register at Stationers' Hall there was no volume, no part of a volume, no sheet, no separate fraction of a publication of any kind or description. There was nothing in existence except that very entry itself, and the entry of the name of a future publication. It is quite absurd to suppose that the Legislature, in providing for the registration of that which was to be the *indicium* of something outside the registry, in the shape of a volume or part of a volume, meant that by the registration of one word copyright in that one word could be obtained, even although that one word should be registered as what was to be the title of a book or of a magazine. . . . . I apprehend that if it were necessary to decide the point it must be held that there cannot be what is termed copyright in a single word, although the word should be used as a fitting title for a book. (*a*) The copyright contemplated by the Act must be not 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." A doubt had previously been expressed by Wood, V.C., in *The Correspondent Newspaper Company* v. *Saunders* (*b*) whether the title of a periodical formed part of the copyright, the object of the Act as to that class of publications being to regulate the rights as between the contributors and the proprietors.

Nor will any amount of expenditure incurred upon a work not yet given to the world, or any outlay in advertisements of the title of the work, give a right to an injunction restraining another person from using the same title. (*c*) "That expenditure upon a work not given to the world," says Turner, L.J., (*d*) "can create, as against the world, an exclusive right to carry on a work of this nature seems to me a proposition quite incapable of being maintained. It never, so far as I am aware, has been thought that any such equity exists. Then, if the expenditure alone will not confer such a right, will the advertisements do so? . . . . He, the plaintiff, does not by his advertisements, come under any

(*a*) See *Jollie* v. *Jaques* (1 Blatch. 627).
(*b*) 11 Jur. N. S. 541; 12 L. T. N. S. 540; 13 W. R. 804.
(*c*) *Maxwell* v. *Hogg* (L. Rep. 2 Ch. App. 307; 16 L. T. N. S. 131; 36 L. J. 433, Ch.).
(*d*) *Ib.*

obligation to the public to publish the work, and therefore the effect of holding the advertisements to give him a title would be that, without having given any undertaking or done anything in favour of the public, he would be acquiring a right against every member of the public to prevent their doing that which he himself is under no obligation to do, and may never do. . . . . There is a great distinction between the case of advertisement followed by publication and a case resting upon advertisement only. In the case of advertisement followed by publication the party publishing has given something to the world, and there is some consideration for the world's giving him a right; but in the case of mere advertisement he has neither given, nor come under any obligation to give, anything to the world, so that there is a total want of consideration for the right which he claims."

But though two periodicals (as well as two books) may have a similar title, the form, title, and mode of publication of one periodical cannot be imitated by another in such a manner as would necessarily mislead the public and induce them to purchase the latter work as continuing parts of the former one. *Hogg* v. *Kirby* (*a*) was such a case. There the plaintiff had published the *Wonderful Magazine*, which the defendant had agreed to sell upon commission. After five numbers had been published, the agreement between plaintiff and defendant was put an end to. The sixth number was advertised by the plaintiff to appear on the 31st December, and was published on that day. On the 1st January a publication was put forth by the defendant under a similar title, described as a *new series improved*. The defendant's publication contained an index to the contents of the five numbers already published, and continued an article not finished in number five, beginning with the word at the bottom of the last page. The execution of the two works was generally similar, and the device on the cover the same, though not exactly similar in the execution. Lord Eldon was of opinion that the defendant had published this work, not as his own original work, but as a continuation of the work of the plaintiff, and intending to represent it as such. His lordship accordingly granted an injunction restraining the defendant from printing, publishing, &c., any copies of the work, but granted the injunction in such terms as to make it clear that it was to operate upon nothing but the publication handed out to the world as the continuation of the plaintiff's work. "I am

(*a*) 8 Ves. 215.

anxious," said Lord Eldon, "that nothing in the injunction shall imply that reviews, magazines, and other works of this species may not be multiplied."

The injunction granted in the case before Lord Eldon was extended to all communications from correspondents to the defendant in his capacity as publisher of the plaintiff's work.

Conduct disentitling to protection.

Even where the statutory requisites as to registration have been duly observed, the conduct of the proprietor of a periodical may be of such a nature as to disentitle him to aid from a court of equity by means of interlocutory injunction; *e.g.*, if he lie by and knowingly allow another person to incur expense in bringing out a work, which is an infringement of his strict legal right. Thus in *The Correspondent Newspaper Company* v. *Saunders* (*a*) a company was formed in June, 1864, to establish and carry on a weekly paper called *The Correspondent*, but the paper was not brought out until after the appearance of advertisements of the intended publication by the defendants of a paper bearing the same title, which advertisements appeared in the month of April, 1865. The title had been registered by the company in April, 1864, but ineffectually, as the protection afforded by the Copyright Act is not prospective. The defendants registered the same title on the 3rd of March, 1865, in ignorance of the intended publication by the company, and incurred considerable expense in advertisements. This becoming known to the company, they brought out the first number of *The Correspondent*, on the 3rd of May, 1865, and on the same day registered the title at Stationers' Hall. On that day also, they wrote to the defendants for the first time, telling them that they would insist on their copyright in the name *Correspondent*. On Saturday, the 6th of May, 1865, the defendants published the first number of their paper, under the title of *The Public Correspondent*, whereupon the company applied for an injunction to restrain the publication of this paper, or of any paper of which the word *Correspondent* should form a part. Wood, V.C., after expressing a doubt whether the title is part of the copyright, said, "It is no doubt true that a title may be acquired, as in a trade mark, but it seems that the defendants, prior to May, 1865, had contemplated taking this title for their paper. Then the question is this; there being two persons equally honest, and one of them having given notice that he is about to produce an article with a certain name, and the other contemplating the same thing, whether or not the first, by

(*a*) 12 L. T. N. S. 540; 11 Jur. N. S. 540; 13 W. R. 804.

bringing out his article a day or two sooner than the other, acquires a right by way of trade mark. The plaintiffs' position is this. The defendants in perfect good faith, and not knowing of this rather dormant company, bring out their advertisements. It was incumbent on the plaintiffs then to communicate with them as quickly as possible, because the defendants were incurring great expense, and by their advertisements really playing into the hands of the plaintiffs. The plaintiffs, however, laid by for eight days, and did not give the defendants notice till after they had brought out their own paper, and as it is to be observed, on a Wednesday, either for the purpose of gaining priority, or else having changed their day of publication, thus supplying one of the ingredients of mistake [it was said that the papers were mistaken for each other and that the plaintiffs were thereby damnified]." An interlocutory injunction was refused, and the motion was ordered to stand over till the hearing. This decision, however, was partly grounded on the doubt entertained by the Vice-Chancellor whether there could be copyright in the name of a periodical. (*a*)

Rights of contributors.

Although sect. 18 of 5 & 6 Vict. c. 45, enacts that the proprietor, projector, &c., of an encyclopædia or periodical publication, "composed of articles, essays, &c., shall enjoy the same rights" in articles, &c., composed on the terms that the copyright therein shall belong to him, "as if he were the actual author thereof;" this right, as already pointed out, is limited by the subsequent part of the section which prohibits the proprietor, &c., from publishing any contribution in a separate form without the author's consent. The author's right to prohibit separate publication in such a case is founded on the words of this enactment, which give him a future right of property in his composition, viz., the option of publishing it or not in a separate form at the end of twenty-eight years, a right which would be seriously injured if, being minded at the end of that period to publish his writings separately or in a collected form, he should find that they had already been published separately from the periodical work to which they were contributed. (*b*)

This right of the author of an article in a periodical to prevent a separate publication is not copyright within the meaning of the 24th section of 5 & 6 Vict. c. 45, and so no registration by the author is necessary to entitle him to an injunction to restrain such separate publication. (*c*)

(*a*) See the opinion of Lord Cairns in *Hogg* v. *Maxwell* (*ante*, p. 100).
(*b*) See *per* Wood, V.C., *Mayhew* v. *Maxwell* (1 John. & H. 315).
(*c*) *Ib.* See also *Murray* v. *Maxwell* (3 L. T. N. S. 466).

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The separate publication of an article contributed to the "Encyclopædia Metropolitana" was restrained by injunction in the case of the *Bishop of Hereford* v. *Griffin*.(*a*)

Meaning of publishing "separately."

What is a "separate publication" within the meaning of this section was considered in *Smith* v. *Johnson*.(*b*) In that case the plaintiff had composed certain tales for the *London Journal*, which were published in that periodical in the year 1849. In the year 1863 the proprietors proceeded to republish these tales in what they called a supplementary number of the *London Journal* published weekly, which might be had with or without the current number. The plaintiff had not given his consent to this republication, and filed a Bill praying for an injunction to restrain the proprietors of the *London Journal* from continuing the republication. It was contended on behalf of the proprietors that the act complained of was not a violation of the statute, because the author had no copyright and could not publish the stories himself; his only right was to prohibit any publication in a separate or single form of his contributions, *i.e.*, a publication out of and unconnected with the work in which they first appeared; the defendants were not attempting to do that; the republication was a republication of their own periodical, with a simple difference in the order, and this case was therefore distinguishable from the cases of the *Bishop of Hereford* v. *Griffin*, and *Mayhew* v. *Maxwell*. Sir John Stuart, V.C., was, however, of opinion that the republication was a "publication separately," within the meaning of sect. 18 of 5 & 6 Vict. c. 45, and granted the injunction prayed for. The Vice-Chancellor said—"Keeping in view the principle of construction that the Act of Parliament was intended to give a licence only to the proprietors of periodical works purchasing and paying for a literary composition to be published as a part or portion of a periodical work—the construction of the words in the proviso which prohibits them from publishing these parts or portions which 'alone' are the property of the author—from publishing these portions 'separately and singly' seems reasonably plain. 'Publishing separately' must mean publishing separately from something. What is that 'publishing' which the Act of Parliament says shall not be separately made? It must be the publishing of the part or portion separately from that which has been before published. That is the view which has been previously taken. . . . . The Act of Parliament says the publishers shall not publish these portions separately

(*a*) 16 Sim. 190. (*b*) 4 Giff. 632; 9 L. T. N. S. 437; 33 L. J. 137, Ch.

from those parts for the publication of which they have obtained a licence already. What they [the proprietors of the *London Journal*] have done is to print the portions, already published, of those antecedent parts, in what is called a supplementary number, and which may be purchased with or without the number in which the 'portions' were originally published. That is a separate publication, separate from the 'part' in which it was originally published. To reprint in numbers which may be had with or without the concurrent number of the work is an act not permitted by the legislature."

Effect of words "and paid for," &c.

The words "and paid for by such proprietor, projector," &c., in sect. 18 have received a very strict construction from the Courts of Equity, those courts having refused to recognise the proprietor's copyright in contributions where it is not clearly shown that he has paid the contributors for them. Thus, where the publishers of the *London Medical Gazette* employed and paid an editor, who employed persons to write articles for the *Gazette* (whether he paid them or not did not sufficiently appear), the Vice-Chancellor of England, Sir L. Shadwell, was of opinion that the publishers had not made out that sort of derivative copyright which, under the Act of Parliament, would enable them to prevent the publication by others of articles appearing in the *Gazette*. (*a*) "The meaning of the Act of Parliament," he said, "as I understand the language of it, is this, that if the publisher of a periodical work employs a person to write articles for him, and pays him for them upon the terms that the copyright shall be the proprietor's—*i.e.*, the proprietor of a periodical work—the proprietor shall have the copyright of the periodical work, containing all the articles, with certain subsequent limitations, upon which nothing turns as far as this case is concerned. . . . . If I find the fact to be on the face of the affidavit that A. B. and C. have composed articles which, by reason of some dealing between them and the editor, who alone has been paid by Messrs. Longman [the publishers], have by the editor been inserted in this *Medical Gazette*, which is published by the plaintiff, it appears to me, if that be the statement of the facts taken altogether, that then the Messrs. Longman have not entitled themselves to the copyright which is given under the terms of the 18th section as the publishers of the periodical work, who pay the composers of the articles inserted in the periodical work upon the terms that the copyright shall belong to them as the publishers."

(*a*) *Brown* v. *Cooke* (11 Jur. 77).

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The same doctrine was laid down by Lord Cranworth, V.C., in *Richardson* v. *Gilbert*.(*a*) He held that actual payment for an article originally published in the *Dublin Review* was made by the Act a necessary condition to the vesting of the copyright of that article in the proprietors of the *Review*. In this case, however, his lordship was of opinion, from the averments in the Bill, that the title of the proprietors was made sufficiently clear to entitle them to an injunction restraining the defend ..nt from publishing the article.

Contract may be implied.

The words of the 18th section, "on the terms that the copyright therein should belong to the proprietors," do not require that an *express* contract to that effect should be entered into between the proprietor of a periodical publication and the contributors to it. There may be an implied condition, understanding, or arrangement that the copyright in contributions should vest in the proprietor of the periodical to which they are furnished, and the terms of the arrangement may be inferred from the general nature and character of the employment. Thus, the publisher of a series of law reports, furnished by barristers without any express stipulation that the copyright should belong to the publisher, possesses the copyright in those reports, and is entitled to restrain their publication by any other person.(*b*) "I think," said Maule, J., "that where a man employs another to write an article, or to do anything else for him, unless there is something in the surrounding circumstances, or in the course of dealing between the parties, to require a different construction, in the absence of a special agreement to the contrary, it is to be understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer—subject, of course, to the limitation pointed out in the 18th section of the Act."(*c*)

CHAPTER IX.

ENGRAVINGS OR PRINTS.

8 Geo. 2, c. 13.

The first Act passed to secure a property in prints or engravings to the inventors and engravers was the 8 Geo. 2, c. 13. In the preamble it states that "whereas divers persons have by their own genius, industry, pains, and expense, invented and engraved, or worked in mezzotinto,

(*a*) 1 Sim. N. S. 336.
(*b*) *Sweet* v. *Benning* (16 C. B. 459, 481, 489). (*b*) *Ib.* 484.

or chiaro oscuro, sets of historical and other prints, in hopes to have reaped the sole benefit of their labours, printsellers and other persons have of late, without the consent of the inventors, designers, and proprietors of such prints, frequently taken the liberty of copying, engraving, and publishing, or causing to be copied, engraved, and published, base(*a*) copies of such works, designs and prints, to the very great prejudice and detriment of the inventors, designers, and proprietors thereof." To prevent this for the future, the statute enacted (sect. 1) that from and after the 24th June, 1735, every person who should *invent and design*, engrave, etch, or work in mezzotinto or chiaro oscuro, or *from his own works and inventions* should cause to be designed and engraved, &c., any historical or other print or prints, should have the sole right and liberty of printing and reprinting the same for the term of fourteen years [since extended to twenty-eight(*b*)] "to commence from the day of first publishing thereof, which should be truly engraved with the name of the proprietor, on each plate, and printed on every such print or prints." The section then inflicts a penalty on printsellers or other persons guilty of piracy.(*c*)

Date of publishing and proprietor's name to be affixed to each print.

Sect. 2 exempts from the penalties any person or persons who should, after the passing of the Act, purchase any plate or plates, for printing, from the original proprietors thereof.

This Act vested the property in prints only in those who should "invent and design, engrave, &c.," or who, "from his own works and inventions," should cause to be designed and engraved, &c., such prints. No provision was made for the protection of the property in prints which were not designed by the person who engraved them.

This defect was, however, supplied by 7 Geo. 3, c. 38, the first section of which enacted that the benefit and protection of the preceding Act of Geo. 2 should be extended to all

7 Geo. 3, c. 38.

(*a*) The meaning of the expression "base copy" in this statute is "anything which is not the genuine work of the author:" (*Per* Kelly, C.B., delivering the judgment of the Court of Exchequer Chamber in *Graves* v. *Ashford*, L. Rep. 2 C. P. 419; 16 L. T. N. S. 98; 36 L. J. 139, C. P.) In that case it had been suggested in argument that a thing would not be a "base copy" which was avowed to be a copy, and did not profess to be the original from which it was taken. "It seems to us," said the Chief Baron, "that to put that construction upon the word 'base' would be cutting down the meaning of the legislature to a most mischievous extent, and working great injustice to the author."

Meaning of "base copy."

(*b*) By 7 Geo. 3, c. 38, s. 7, *post*, p. 108.

(*c*) See the chapters on "Piracy" and the "Remedies for Infringement," *post*.

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and every person who should "engrave, etch, or work in mezzotinto or chiaro oscuro, or cause to be engraved, etched, or worked, any print *taken from any picture, drawing, model or sculpture, either ancient or modern* . . . . in like manner as if such print had been graved or drawn from the original design of such graver, etcher, or draftsman."

Duration of copyright.

This Act also enlarged the term of enjoyment of the right from fourteen to twenty-eight years. Sect. 7 enacts, "that the sole right and liberty of printing and reprinting, intended to be secured and protected by the said former Act [8 Geo. 2, c. 13] and this Act, shall be extended, continued, and be vested in the respective proprietors, for the space of twenty-eight years, to commence from the day of the first publishing of any of the works respectively hereinbefore and in the said former Act mentioned."

17 Geo. 3 c. 57.

The last Act on the subject, 17 Geo. 3, c. 57, was passed, as the title indicates, "for more effectually securing the property of prints to inventors and engravers by enabling them to sue for and recover penalties in certain cases." It recites the two former Acts and proceeds: "Whereas the said Acts have not effectually answered the purposes for which they were intended, and it is necessary for the encouragement of artists, and for securing to them the property of and in their works, and for the advancement and improvement of the aforesaid arts, that such further provisions should be made as are hereinafter mentioned and contained." It then gives to the proprietor of prints an action on the case against any offender by piracy, in which damages and double costs may be obtained. (*a*)

Ireland.

The provisions of 17 Geo. 3, c. 57, were extended to Ireland by 6 & 7 Will. 4, c. 59; sect. 2 of which refers to engravings or prints "of any description whatever published in any part of Great Britain or Ireland." The action on the case may be brought against the person offending "in any court of law in Great Britain or Ireland."

Lithographs, &c.

Doubts having been entertained whether the provisions of the preceding statutes extended to lithographs and other impressions taken by mechanical processes, sect. 14 of 15 & 16 Vict. c. 12, declares "that the provisions of the said Acts are intended to include prints taken by lithography or any other process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely, and the said Acts shall be construed accordingly."

Prints accompanying letterpress.

The protection given by the statutes has been applied to the case of prints not published alone, but appearing along

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

with letter-press which they illustrate.(*a*) Lord Ellenborough, however, was of opinion that if an artist should, merely from reading the letter-press of another's work, sketch designs similar to illustrations appearing in that work, this would not be a piracy of such illustrations.(*b*)

Maps, charts, and plans are now brought expressly within the protection of the statutes.(*c*)

Maps, Charts, and Plans.

Where the subject from which an engraving is taken is common and open to all, the first engraver of a print of it is not entitled to restrain any one else from making an engraving of the same subject, provided it be made from the original subject and is not a copy of the first engraving; but he is entitled to prevent another from copying his own engraving. Thus before the Act 25 & 26 Vict. c. 68, gave a copyright in paintings, drawings, and photographs, the engraver of a print of any such painting, drawing, or photograph, though he could not claim a monopoly of the *use of the picture*, &c., from which the engraving was made, was entitled to say to any other person wishing to copy the picture, "Take the trouble of going to the picture yourself, but do not avail yourself of my labour, who have been to the picture, and have executed the engraving."(*d*)

Where subject is common.

In *Wyatt* v. *Barnard*,(*e*) Lord Eldon said, with reference to specifications of patents, that a person who chose to go to the office, copy a specification and publish it, could not by so doing acquire a right to restrain another from copying it. It is not clear from the meagre report whether Lord Eldon intended merely to assert the right of every one to copy the original specification, or to deny altogether the existence of copyright in productions copied from specifications. The reporters, judging from their marginal note, seem to have understood him in the latter sense, but the former was most probably what he intended.

At any rate, if an engraving is made from a drawing taken from the specification of a patent, the engraver has a right to prevent any other person from pirating his engraving. "The engraver," said Best, C.J., in *Newton* v. *Cowie*,(*f*) "although a copyist, produces the resemblance by means very different from those employed by the painter or draftsman from whom he copies—means which require great labour and talent. The engraver produces his effects by

(*a*) *Roworth* v. *Wilkes* (1 Camp. N. P. 94); *Wilkins* v. *Aikin* (17 Ves. 422).
(*b*) See *Roworth* v. *Wilkes* (1 Camp. 99).
(*c*) See 7 Geo. 3, c. 38, s. 1, and 17 Geo. 3, c. 57.
(*d*) See *per* Best, C.J., in *Newton* v. *Cowie* (4 Bing. 246).
(*e*) 3 Ves. & B. 78.
(*f*) 4 Bing. 246.

the management of light and shade, or as the term of his art expresses it, the *chiaro oscuro*. The due degrees of light and shade are produced by different lines and dots: he who is the engraver must decide on the choice of the different lines or dots for himself, and on his choice depends the success of his print. If he copies from another engraving, he may see how the person who engraved that has produced the desired effect, and so without skill or attention, become a successful rival. . . . . Without the introduction of express words, I should have thought, therefore, that a case of this kind fell within the spirit of the Act. But the 7 Geo. 3, c. 38, extends the protection of the first statute to any print of any 'map, chart, or *plan, or any other print or prints whatsoever*.' The same words are used in 17 Geo. 3, c. 57, and nothing is said as to the place in which the original is to be found." In this case the engraving had been executed from a drawing made by an apprentice of the engraver's, from a patent specification.

Requisites to copyright in engravings.

The words in sect. 1 of 8 Geo. 2, c. 13, requiring the proprietor's name to be affixed to each print, have given rise to considerable discussion, and to some diversity of opinion, among the judges. That Act confers a copyright, and inflicts a penalty for the infringement of it, in historical and other prints—to commence from the day of the first publishing thereof—which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints." This would seem to confer a copyright property only in prints so marked with the proprietor's name, and since the decision of *Donaldson* v. *Beckett* [in the year 1774] put an end to the notion of a copyright at common law, independent of statutory enactment, it should seem that no property can now exist in published engravings other than what springs from a strict compliance with the requisites of the statute.

A different opinion, indeed, appears to have been entertained by Lord Hardwicke in the case of *Blackwell* v. *Harper*.(*a*) That eminent judge expressed an opinion, but somewhat doubtfully, that the words of the Act requiring the insertion of the date of publication on prints were directory only, and not descriptive; and, therefore, that the day was necessary to be inserted on prints only where the penalty of the Act was intended to be taken advantage of. The injunction prayed for by the plaintiff in that case was granted, though the date of publication did not appear on the engravings. And Lord Ellenborough, in *Rouworth* v.

(*a*) 2 Atk. 95; Barn. Chanc. Rep. 210.

Wilkes,(*a*) was of opinion that a plaintiff could recover for piracy of his prints, though his name was not engraved upon them; that the interest being vested, the common law gave the remedy. His lordship, however, reserved the point for the consideration of the full court, but it was not brought before them.

Lord Alvanley was of a contrary opinion in *Harrison* v. *Hogg*.(*b*) He considered it "essential to the plaintiff's right to insert the date, &c., many good reasons requiring that the date should be upon the plate."

The reason for requiring the name and the date to appear on the print is, according to Lord Kenyon, "that they might convey some useful intelligence to the public. The date is of importance, that the public may know the period of the monopoly. The name of the proprietor should appear, in order that those who wish to copy it might know to whom to apply for consent. It seems, therefore, necessary that the date should remain, but that the name of the proprietor should be altered as often as the property is changed."(*c*)

The view taken by Lord Alvanley, in *Harrison* v. *Hogg*, was adopted by the Court of Common Pleas in *Newton* v. *Cowie*,(*d*) after a review of all the cases. They held that in order to maintain an action for pirating prints, the proprietor's name and the date of publication must both appear on the original print, pursuant to 8 Geo. 2, c. 13. Speaking of the statutes 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57, Best, C.J., delivering the judgment of the court, said, "Neither of these two Acts repeats the qualifications of name and date [contained in 8 Geo. 2, c. 7], and the last has, after enumerating different sorts of prints, the words 'any print or prints whatsoever.' But these Acts are in *pari materiâ*, and must be taken together, and it was not necessary to repeat in the last the qualifications contained in the first. The right of action given in 17 Geo. 3 is for the piracy of plates, the monopoly of which is secured by the 8 Geo. 2. It is impossible to suppose the legislature intended that the public should not have the protection afforded them by the first Act against a fraudulent continuance of the monopoly beyond the term prescribed by that Act." This case was followed by the Court of King's Bench in *Brooks* v. *Cock*,(*e*) Littledale, J., remarking, that the words "which shall be truly engraved

(*a*) 1 Camp. N. P. 97.
(*b*) 2 Ves. 327. See also *Bonner* v. *Field* (cited 5 T. R. 44).
(*c*) *Thompson* v. *Symonds* (5 T. R. 45).
(*d*) 4 Bing. 234. (*e*) 3 Ad. & El. 138.

on each plate" are not merely directory, but make such engraving part of the thing to be protected. And in reply to an argument of counsel that 17 Geo. 3, c. 57, passed for the purpose of enlarging the privileges of the artist, gave him a right of action for injuries to his copyright, without any such restriction or condition as is supposed to attach under the previous statute of Geo. 2, Lord Denman, C.J., remarked: "The statutes are evidently connected with each other;" and Littledale, J. added: "the Stat. 17 Geo. 3, c. 57, was intended only to give the proprietors of plates a further remedy. Before that Act, the person infringing the copyright was liable only to forfeit his plate and prints, and five shillings for each print. As many engravings are published at a great expense, this was an insufficient remedy for their being pirated, and, therefore, the Act of 17 Geo. 3, c. 57, was passed enabling the proprietor to recover damages in an action on the case."(*a*)

All the cases agree that the penalties at least cannot be recovered, unless the conditions laid down in the Act of Geo. 2 are complied with.

Publication line. What is sufficient disclosure of proprietorship.

The statute requires that the "name of the proprietor" shall be truly engraved on each plate, as well as "the day of the first publishing thereof." The name of the publisher is not required, but only that of the proprietor. The Act does not, however, say that he shall be called the proprietor on the plate; he may even be described on the plate as the publisher, provided he be in fact the proprietor. Thus, where the publication line contained the words—"London: Published by Henry Graves & Co., May 1, 1861, Printsellers to the Queen, 6, Pall Mall," Henry Graves & Co. being the actual proprietors of the engraving, it was held to be a sufficient compliance with the requisites of the Act. In that case (*b*) Kelly, C.B., delivering the judgment of the Court of Exchequer Chamber, said, "The question is, whether the Legislature, when they required the name of the proprietor to appear, required that he should be expressly described as being the proprietor. They certainly have not said so in terms, and we must put a reasonable construction upon the words they have used. Every one who is at all conversant with these things looks at what is called the 'publication line' for the name of the proprietor. The name which appears on the face of the print must be assumed to be that of the proprietor, and it cannot alter the effect or be less a compliance

(*a*) Cf. *Colnaghi* v. *Ward* (6 Jur. 970).
(*b*) *Graves* v. *Ashford* (L. Rep. 2 C. P. 421; 16 L. T. N. S. 98 36 L. J. 139, C. P.).

with the Act because he is called the publisher. I think the statute has been substantially and literally complied with."

A further objection was urged in the case last referred to —that the words "Henry Graves and Company" imported that Henry Graves had a partner, who *primâ facie* would be a part proprietor of the engraving, and that, as his name was not given the Act was not complied with. It appeared, however, from the evidence, that the person indicated by the words "and company" was a person to whom Mr. Graves paid a fixed sum per month out of his business; and the court held that the payment to a person of a fixed sum periodically did not constitute that person a partner or part proprietor; that Henry Graves, therefore, was the sole proprietor of the engravings in question, and that as his name appeared thereon, the requirement of the statute had been sufficiently complied with.

In *Blackwell* v. *Harper* (*a*) Lord Hardwicke held the words "Elizabeth Blackwell, sculpsit et delineavit" to be a sufficient disclosure of proprietorship.

In the case just referred to only one name appeared on the print, and so no mistake could arise. But even where more than one name appears on the engraving, if one of them is the name of the proprietor, the requirement of the statute is sufficiently complied with. Thus, where the publication line ran "Newton, del., 1st May, 1826; Gladwin, sculp.," the Court of Common Pleas held it to be sufficient. (*b*) "The words on these prints," said Best, C.J., "do not directly designate that the plaintiff is the proprietor, nor do I believe that it has ever been stated on any print that was ever published who was the proprietor. Nor in any one of the cases which have been decided in favour of engravers has the word proprietor ever appeared upon the print. . . . . The words of the Act are satisfied by the disclosure o : the proprietor's name; this is a sufficient indication of the person who is to be applied to for leave to copy the print; coupled with the date, it shows how long the designer has had the monopoly, and fully accomplishes the two objects of the Act." (*c*)

It is not necessary to register engravings or prints under the Act of 5 & 6 Vict. c. 45, in order to sue for piracy. Registration is not required even in the case of lithographic prints of a map. (*d*)

(*a*) 2 Atk. 93; Barn. 210, s. c.
(*b*) *Newton* v. *Cowie* (4 Bing. 234). See also *Stannard* v *Lee* (23 L. T. N. S. 306). (*c*) *Ib.* 240. (*d*) *Stannard* v. *Lee* (*ubi supra*).

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Prints engraved and struck off abroad, but published here, are not within the protection of the Copyright Acts.(*a*)

For the law relating to the assignment of copyright in prints see the chapter on the "Transfer of Copyright," *post*; and as to the piracy of prints, and the remedies for piracy, see the chapters on "Piracy," and "Remedies for Infringement," *post*.

CHAPTER X.

DRAMATIC AND MUSICAL COMPOSITIONS.

Property twofold.

THE property in a dramatic or musical composition is of a twofold nature. It embraces the copyright in the composition itself, considered simply as a literary production, and also the right of representing the drama or performing the musical composition at any place of dramatic entertainment in the British dominions. Of the two rights the latter, which is the more valuable, was secured to authors and composers at a later period than the former.

From the passing of the Copyright Act of Anne, the authors of dramatic, as well as other literary productions, have enjoyed a copyright in their works; but it was not till the statute of 3 & 4 Will. 4, c. 15, that the right of controlling the representation of their dramas in any part of the British dominions was conferred on the authors of dramatic compositions. Before the passing of that Act the author could not prevent anyone that liked to do so from publicly performing on the stage any drama in which the author possessed the copyright. He could only prevent the publication of his work by multiplication of copies of it; and it was held that repeating the piece from memory on the stage was no publication of it.(*b*) The author's composition might also be altered and abridged to make it more suitable for theatrical representation, and might be so represented for profit by whoever pleased.(*c*)

3 & 4 Will. 4, c. 15.

The Legislature at length intervened to remedy this defect in the law. 3 & 4 Will. 4, c. 15, commonly called Sir Bulwer Lytton's Act, gave to the author or his assignee of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment composed, and not printed

(*a*) *Page* v *Townsend* (5 Sim. 395).
(*b*) *Coleman* v. *Wathen* (5 T. R. 245); *Macklin* v. *Richardson* (Amb. 694).
(*c*) *Murray* v. *Elliston* (5 Bar. and Ald. 657).

and published, the sole right of having it represented in any part of the British dominions, and to the author or his assignee of any such dramatic production, printed and published within ten years before the passing of the Act, or which might be printed and published after the passing of the Act, the sole liberty of representing or causing to be represented the same at any place of dramatic entertainment in the British dominions during the same period of time that copyright then subsisted in books. A proviso was added saving the rights of parties to whom before the passing of the Act the author or his assignee had given authority to represent his piece.(*a*)

Sect. 2.

The right of the author is further secured by sect. 2, which inflicts a penalty on persons performing pieces contrary to the Act.

The foregoing provisions were extended to musical compositions by sect. 20 of 5 & 6 Vict. c. 45.

Duration of the right.

The duration of the author's right to restrain or authorise the performance of his dramatic or musical compositions is by sect. 20 of 5 & 6 Vict. c. 45, made of equal length with the term of an author's copyright in books, *i.e.*, the author's lifetime, and seven years more if they together amount to or exceed forty-two years: if they do not, the right endures for the term of forty-two years from the period of first publication in the case of books, or of first public representation or performance in the case of dramatic pieces or musical compositions.

The section enacts that "the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns, for the term in this Act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this Act, to the first publication of any book."

Mode of registration.

As to the manner of registration, the same section provides "that in case of any dramatic piece or musical composition in manuscript, it shall be sufficient for the person having

(*a*) Sect. 1.

the sole liberty of representing or performing, or causing to be represented or performed the same, to register only the title thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor thereof, and the time and place of its first representation or performance."

Remedies for infringement.

As to remedies for infringement of the rights, sect. 21 enacts "that the person who shall at any time have the sole liberty of representing such dramatic piece or musical composition shall have and enjoy the remedies given and provided in the said Act of the third and fourth years of the reign of his late Majesty King William the Fourth, passed to amend the laws relating to dramatic literary property, during the whole of his interest therein, as fully as if the same were re-enacted in this Act." See the chapter on "Remedies for Infringement," *post*.

Assignment of copyright does not convey right to represent or perform.

The right of representation is now so distinct from the copyright in a dramatic or musical piece, that the assignment of the latter does not convey the former without an express assertion on the register of an intention to do so.

Sect. 22 enacts "that no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment."

Definition of "dramatic piece"

A "dramatic piece" is defined by sect. 2 "to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment."

Musical compositions.

From the preceding statutory definition of "dramatic piece," it will be seen that musical compositions are embraced under that head, and that the statutory provisions relating to the performance of ordinary plays apply also to musical entertainments. Sect. 20, indeed, after reciting that it is expedient to extend to musical compositions the benefits of the Act 3 & 4 Will. 4, c. 15, enacts that the provisions of the said Act, as well as of the Act of 5 & 6 Vict. c. 45, shall apply to musical compositions, and then proceeds to confer on the authors the sole right of representing or performing them in the terms already cited, p. 115.

Long before this enactment it had been held that written music was within the Copyright Act of Anne;(*a*) but up to the time of the passing of 5 & 6 Vict. c. 45, the author was

(*a*) *Bach* v. *Longman* (Cowp. 623).

unable to restrain the unauthorised public performance of his compositions by others. Lord Mansfield, in the very case which decided that music was within the Act of Anne, said: "A person may use the copy by playing it; but he has no right to rob the author of the profit by multiplying copies, and disposing of them to his own use." The author is now placed on a level, in this respect, with the author of dramatic pieces commonly so called.

An introduction to a pantomime, which is the only *written* part of such an entertainment, is a dramatic piece within the protection of this Act.(*a*) It is not correct to say that such an introduction is not an entire and complete piece.(*b*)

Authorship of musical composition accessory to a play.

Where a person is employed by another to write for reward paid to him a musical composition, to be used as part of the representation of a dramatic piece, and as a mere accessory to such dramatic piece, the composer of the musical accessory has no copyright therein. The property in music so composed becomes vested in the employer, and he does not require the consent of the composer in order to represent it. This was decided by the Court of Common Pleas in the case of *Hatton* v. *Kean*,(*c*) where the plaintiff had been employed by the defendant to compose certain music to be performed during and as part of the representation of three of Shakespeare's plays. The musical composition was held to have become the property of Mr Kean, and the plaintiff was held never to have been, within the language of the statute, the owner or proprietor thereof. This case was followed and approved in *Wallerstein* v. *Herbert*,(*d*) where the composer of the musical accessories was employed to find an orchestral band, to procure and pay all the musical performers, and furnish all the musical instruments, to provide, lead, and perform overtures and *entr'acte* music, and the music incidental to the dramatic performances. In performance of his duties under this engagement he composed

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

(*b*) 3 C. B. 881, 882. As to what is a dramatic entertainment within 6 & 7 Vict. c. 68, see *Day* v. *Simpson* (18 C. B. N. S. 680).

(*c*) 7 C. B. N. S. 268; 29 L. J. 20, C. P.; 1 L. T. N. S. 10.

(*d*) 16 L. T. N. S. 453; 15 W. R. 838. See *Keene* v. *Wheatley* (9 Amer. Law Reg. 47), where A., in the general theatrical employment of B., was engaged in the office of assisting in the adaptation of a play for representation, and B. was held to be the proprietor of the additions so made, as products of his intellectual exertions in a particular service in his employment; on the principle that where an inventor in the course of his experimental essays employs an assistant, who suggests and adapts a subordinate improvement, it is in law an incident or part of the employer's main invention.

the music for a drama called "Lady Audley's Secret," and it was held that he had no copyright in such music.

A pianoforte score of an opera is an independent musical composition separate and distinct from the opera itself; and where such pianoforte score has been arranged by a person other than the composer of the opera, it is incorrect to register the score as the composition of the composer of the opera.(*a*) "It seems impossible," says Cockburn, C.J., "to believe that any musician, however great his talent, whether as a composer or as an executant, from the mere circumstance of having the opera in its entirety before him, that is to say, with all the score for all the instruments, which neither eye nor mind could take in at the same time, could be able to play the accompaniment while singing the music of the opera at the piano. It requires time, reflection, skill and mind so to condense the opera score as to compose the pianoforte accompaniment. I cannot therefore bring myself to think that the pianoforte arrangement of the music of an opera, which originally consisted of vocal music and instrumentation to be executed by some half hundred instruments can be said to be anything else than a specific, separate, and distinct work from the opera itself."(*b*)

Whether a pianoforte arrangement of the score of an opera executed without the consent of the composer of the opera would be an infringement of his copyright therein, has not been expressly decided. In *Wood* v. *Boosey*,(*c*) Cockburn, C.J., carefully guarded himself against being understood to decide that it would not, and Blackburn, J., was of opinion that it would. Kelly, C.B., on appeal(*d*) says, "No doubt it is a piracy of the opera, and the composer may maintain an action against the adapter or the publisher of the adaptation;" but it was not necessary to decide the point in that case.

As to the assignment of the rights treated of in this chapter, the infringement thereof, and the remedies for infringement, see the chapters on "Transfer," "Piracy," and "Remedies for Infringement," *post*.

(*a*) *Wood* v. *Boosey* (L. Rep. 2 Q. B. 340; 7 B. & S. 869; 15 L. T. N. S. 530; 36 L. J. 103, Q. B.: affirmed on appeal, L. Rep. 3 Q.B. 223; 9 B. & S. 175; 37 L. J. 84, Q. B.; 18 L. T. N. S. 105.)

(*b*) L. Rep. 2 Q. B. 350; 15 L. T. N. S. 530; 36 L. J. 103, Q.B.; 15 W. R. 309.

(*c*) L. Rep. 2 Q. B. 350, 354. See the remarks of Lord Abinger, C.B., in *D'Almaine* v. *Boosey* (1 Y. & C. 288).

(*d*) 18 L. T. N. S 108; L. Rep. 3 Q. B. 223; 37 L. J. 84, Q. B: 16 W. R. 485.

CHAPTER XI.

PAINTINGS, DRAWINGS, AND PHOTOGRAPHS.

THE copyright in paintings, drawings, and photographs dates from, and is altogether dependent on, the statute 25 & 26 Vict. c. 68. The preamble to that Act states that "the authors of paintings, drawings, and photographs have no copyright in such their works,(*a*) and it is expedient that the law should in that respect be amended."

Nature and duration of the right.

Sect. 1 enacts that "the author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns shall have the *sole and exclusive right of copying, engraving, reproducing and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof, by any means and of any size*, for the term of the natural life of such author and seven years after his death."

A photograph of an engraving or picture is a photograph in which copyright is given by this section. In a recent case,(*b*) it was contended in argument that photographs taken from engravings or pictures are not "original" photographs within the meaning of the statute, and therefore that no copyright existed in them, to which Blackburn, J., replied: "It does not appear from the language of the Act that the word 'original' was intended to apply at all to photographs; but if it does, what photograph can be original if a photograph from a picture of an artist is not so?"

Where work is sold to or made for another.

Sect. 1 contains a proviso "that when any painting or drawing, or the negative of any photograph, shall for the first time after the passing of this Act [29th July, 1862] be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright thereof, unless it be expressly reserved to him by agreement in writing, signed, at or before the time of such sale or disposition, by the vendee or assignee of such painting or drawing, or of such negative of a photograph, or by the person for or on whose

(*a*) See the opinion of Abbott, C.J., in *De Berenger* v. *Wheble* (2 St. N. P. 549).

(*b*) *Graves's case* (20 L. T. N. S. 877; L. Rep. 4 Q. B. 715).

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behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such painting or drawing, or of such negative of a photograph, or to the person for or on whose behalf the same shall have been made or executed; nor shall the vendee or assignee thereof be entitled to any such copyright, unless, at or before the time of such sale or disposition, an agreement in writing, signed by the person so selling or disposing of the same, or by his agent duly authorised, shall have been made to that effect."

By force of this section the copyright in a painting, drawing, or photograph made for or on behalf of any other person for a good or valuable consideration, is altogether gone, unless (1) it be either expressly reserved to the author by the vendee or assignee "by agreement in writing signed at or before the time" of sale or disposition, or (2) it be conferred on the vendee or assignee "at or before the time of sale or disposition" by "an agreement in writing by the person so selling or disposing, or by his agent duly authorised."

Sect. 2 provides that nothing contained in the Act "shall prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object." This means that, though the owner of a particular photograph, &c., may have the sole right of multiplying copies of it, nobody else shall be prevented from taking a fresh photograph, &c., of the same object or place. (*a*)

Registration.

Sect. 4 provides as to registration that "there shall be kept at the Hall of the Stationers' Company, by the officer appointed by the said company for the purposes of the Act 5 & 6 Vict. c. 45, a book or books called "The Register of Proprietors of Copyright in Paintings, Drawings, and Photographs," wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description

(*a*) *Per* Blackburn, J., *Graves's case* (20 L. T. N. S. 881; L. Rep. 4 Q. B. 722).

of the nature and subject of such work, and in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph of the said works."

This section also provides that "no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration."

This renders registration necessary on the part of an assignee before he can sue for the penalties imposed by the Act in case of infringement; but it does not make it necessary that all or any previous assignments should also be registered, or that the copyright of the original author should be registered. It is enough that the assignment to the person suing has been registered.(*a*)

Sufficiency of description.

The Act requires that the memorandum of registration should contain amongst other things "a short description of the nature and subject of the work, and in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph" of the work. The question has been raised in two cases, what is a sufficient "description of the nature and subject" of the work within the meaning of this section?

In *Ex parte Beal* (*b*) it was contended that the entry of the name "Ordered on Foreign Service" was not a sufficient description of a picture of a young officer in a railway carriage taking leave of a lady, nor the entry of the names "My First Sermon" and "My Second Sermon" a sufficient description of a picture and a photograph representing respectively a child looking with eyes wide open at its first sermon, and fast asleep at its second. The Court of Queen's Bench, however, thought that the requirements of the statute had been sufficiently complied with.

"Is not the object of the Legislature," said Blackburn, J., "that enough be stated to identify the production, and that the registration must be *bonâ fide*? that a man shall not first claim one thing, and then sue for another? The description must be such as shall earmark the subject." In answer to an argument that the object of the registration was like that of the registration of a patent, viz., to give notice to everyone of certain things which he is not to do, Blackburn, J., said, "That is not the object. Penalties are imposed on persons who copy the work of others. The person who does so must in most cases know that he is

(*a*) *Graves's case* (20 L. T. N. S. 881; L. Rep. 4 Q. B. 722).
(*b*) 9 B. & S. 395; L. Rep. 3 Q. B. 387; 18 L. T. N. S. 285; 37 L. J. 161, Q. B.

pirating from someone. No doubt there is the conceivable case where he does this because he is told by another person who has no authority that he may do so; and if he does this with *bona fides* the penalty should be reduced to a nominal sum. Then, in the case where a man sells copies of a work not made by himself but by others, the statute says this must be done *knowingly*. The object of the Legislature was that there should be such a description of the subject as will be sufficient to *identify* it. For this purpose the conventional name applied to it will in general hardly be sufficient; there should be description of the subject; and whether there is or not is a question of fact for the tribunal. Taking that as the question which was before the justice in this case, and importing our own knowledge of these pictures, which we have all seen, the description of the subject of the first is evidently that of an officer ordered abroad, and taking leave of his friends. So of the second and third: who could reasonably doubt that what was intended to be represented was a child looking with eyes wide open at its first sermon and fast asleep at the second? Some cases were suggested in the argument in which I do not say there might not be some difficulty, as, for instance, the figure of a dog described as 'A distinguished Member of the Humane Society.' So also a bullfinch and a couple of squirrels, described as 'A Piper and a Pair of Nutcrackers.' There it would be right to put a short description of the subject, or at all events wise to give more than the name. But the question here is, does what is given carmark the picture?"

In *Re Walker and Graves* (*a*) the sufficiency of the description of the picture last referred to, "A Piper and a Pair of Nutcrackers," was questioned, but the Court did not find it necessary to pronounce an opinion on the subject.

Registration, &c.

The several enactments in the Act 5 & 6 Vict. c. 45, (*b*) with relation to keeping the register book thereby required, and the inspection thereof, the searches therein, and the delivery of certified and stamped copies thereof, the reception of such copies in evidence, the making of false entries in the said book, and the production in evidence of papers falsely purporting to be copies of such entries, the application to the courts and judges by persons aggrieved by entries in the said book, and the expunging and varying such entries, are to apply to the book or books to be kept by virtue of the present Act, and to the entries and assignments

(*a*) 20 L. T. N. S. 877; L. Rep. 4 Q. B. 715.
(*b*) *Vide ante*, pp. 56-59.

of copyright and proprietorship therein under this Act, except that the forms of entry prescribed by 5 & 6 Vict. c. 45, may be varied to meet the circumstances of the case, and that the sum to be demanded by the officer of the Company of Stationers for making any entry required by this Act shall be one shilling only.(*a*)

Person "aggrieved"

A person who has been convicted of infringing the copyright in certain paintings and photographs of the registered proprietor, but who sets up no title in himself or adduces any evidence to rebut the *primâ facie* evidence of proprietorship afforded by the book of registry, is not a person "aggrieved" within the meaning of this section or of sect. 14 of 5 & 6 Vict. c. 45.

"A person," said Hannen, J.,(*b*) "to be 'aggrieved' within the meaning of the statute must show that the entry is inconsistent with some right that he sets up in himself or in some other person, or that the entry would really interfere with some intended action on the part of the person making the application." "It seems," said Blackburn, J., in the same case,(*c*) "that to make a person aggrieved within the meaning of the statute, the applicant must have some substantial objection, and one going to the merits of the registered proprietor's title; then the court may direct an issue, or have the question otherwise disposed of, or, if they think this the proper course, may set aside or expunge the entry. But I do not think it is enough to entitle a person to say that he is aggrieved and that the entry ought to be expunged, that although the registered proprietor has a complete title in equity and in good sense, yet there is some slip either in the signing of the memorandum or in the spelling of a name; this would be my view if it were necessary to decide this question." Compare the language of Willes, J., in *Ex parte Davidson*, cited *ante*, p. 94.

Copyright in paintings, drawings, and photographs is personal property, and assignable as such.(*d*)

As to the infringement of this copyright and the remedies for infringement see the chapters on "Piracy," and the "Remedies for Infringement," *post*.

(*a*) 25 & 26 Vict. c. 68, s. 5.
(*b*) *Graves's case* (L. Rep. 4 Q. B. 724; 20 L. T. N. S. 877). (*c*) *Ib.*
(*d*) 25 & 26 Vict. c. 68, s. 3. See the chapter on "Transfer of Copyright," *post*.

CHAPTER XII.

SCULPTURE, MODELS, AND BUSTS.

THE copyright in sculpture, models, and casts is dependant solely on the Act 54 Geo. 3, c. 56; the former Act on the subject (38 Geo. 3, c. 71),(*a*) being now repealed.(*b*)

Subjects in which copyright exists.

Sect. 1 of 54 Geo. 3, c. 56, enacts "that from and after the passing of this Act every person or persons who shall make or cause to be made any new and original sculpture, or model, or copy or cast of the human figure or human figures, or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals, or of any part or parts of any animal combined with the human figure or otherwise, or of any subject being matter of invention in sculpture, or of any alto or basso relievo representing any of the matters or things hereinbefore mentioned, or any cast from nature of the human figure, or of any part or parts of the human figure, or of any cast from nature of any animal, or of any part or parts of any animal, or of any such subject containing or representing any of the matters and things hereinbefore mentioned, whether separate or combined, shall have the sole right and property of all and in every such new and original sculpture, model, copy, and cast of the human figure or human figures, and of all and in every such bust or busts, and of all and in every such part or parts of the human figure, clothed in drapery or otherwise, and of all and in every such new and original sculpture, model, copy and cast, representing any animal or animals, and of all and in every such work representing any part or parts of any animal combined with the human figure or otherwise, and of all and in every such new and original sculpture, model, copy and cast of any subject, being matter of invention in sculpture, and of all and in every such new and original sculpture, model, copy and cast in alto or basso relievo, representing any of the matters or things hereinbefore mentioned, and of every such cast from nature, for the term of fourteen years from first putting forth or publishing the same; provided, in all and in every case, the proprietor or proprietors do cause his, her, or their name or names, with the date, to be put on all and every such new and original

Condition to be observed.

(*a*) For the opinion of Lord Ellenborough on the inefficient character of this Act, see *Gahagan* v. *Cooper* (3 Camp. 111, 114).

(*b*) By 24 & 25 Vict. c. 101.

sculpture, model, copy or cast, and on every such cast from nature, before the same shall be put forth or published."

Duration.

The term of enjoyment is, by the above section, to be "fourteen years from first putting forth or publishing" the work; but an additional term of copyright is granted if the maker of the original sculpture, &c., is living at the expiration of the former term, and has not divested himself of the right. Sect. 6 provides "that from and immediately after the expiration of the said term of fourteen years, the sole right of making and disposing of such new and original sculpture, or model, or copy, or cast of any of the matters or things hereinbefore mentioned, shall return to the person or persons who originally made or caused to be made the same, if he or they shall be then living, for the further term of fourteen years, excepting in the case or cases where such person or persons shall by sale or otherwise have divested himself, herself, or themselves, of such right of making or disposing of any new and original sculpture, or model, or copy, or cast of any of the matters or things hereinbefore mentioned, previous to the passing of this Act."

Registration.

Any of the works in which copyright is given by the foregoing enactments may be registered under the Designs Act, 1850 (13 & 14 Vict. c. 104). Sect. 6 of that Act provides "that the registrar of designs upon application by or on behalf of the proprietor of any sculpture, model, copy, or cast within the protection of the Sculpture Copyright Acts,(*a*) and upon being furnished with such copy, drawing, print, or description in writing or in print, as in the judgment of the said registrar shall be sufficient to identify the particular sculpture, model, copy, or cast in respect of which registration is desired, and the name of the person claiming to be proprietor, together with his place of abode or business, or other place of address, or the name, style, or title of the firm under which he may be trading, shall register such sculpture, model, copy, or cast in such manner and form as shall from time to time be prescribed or approved by the Board of Trade for the whole or any part of the term during which copyright in such sculpture, model, copy, or cast may or shall exist under the Sculpture Copyright Acts, and whenever any such registration shall be made, the said registrar shall certify under his hand and seal of office, in such form as the said board shall direct or approve, the fact of such registration, and the date of the same, and the name of the registered proprietor, or the style or title of

(*a*) The "Sculpture Copyright Acts" is the name given to the Acts of 38 Geo. 3, c. 71, and 54 Geo. 3, c. 56.

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the firm under which such proprietor may be trading, together with his place of abode or business or other place of address."

Copies to be marked "registered," and with date of registration.

Sect. 7 inflicts a penalty on persons making, importing, &c., pirated copies or casts (*a*) of registered works; but it is provided by the same section that no proprietor of any sculpture, model, copy, or cast which shall be registered under the Act shall be entitled to the benefit of the Act, "unless every copy or cast of such sculpture, model, copy, or cast which shall be published by him after such registration shall be marked with the word 'registered,' and with the date of registration."

If the article of sculpture, model copy, or cast is first published out of Her Majesty's dominions, the maker has no copyright in it other than such copyright as may be obtained under the International Copyright Acts. (*b*)

CHAPTER XIII.

COLONIAL COPYRIGHT.

THE provisions of the General Copyright Act of 5 & 6 Vict. c. 45, apply to "every part of the British dominions," a term which includes "all the colonies, settlements, and possessions of the Crown which now are or hereafter may be acquired." (*c*) The Acts relating to copyright in works of the fine arts also apply to all the British dominions.

The only enactment peculiarly relating to the colonies is the Act of 10 & 11 Vict. c. 95, passed to amend the law relating to the protection in the colonies of works entitled to copyright in the United Kingdom. Previously to the passing of that Act it was absolutely prohibited to import into any part of the British dominions books in which copyright subsisted, first composed, written, or printed in the United Kingdom and printed or reprinted in any other country. (*d*)

Power to suspend, in certain cases, prohibitions against admission of pirated books into colonies.

But the first section of that Act provides "that in case the Legislature or proper legislative authorities in any British possession shall be disposed to make due provision for securing or protecting the rights of British authors in such possession, and shall pass an Act or make an ordinance for

(*a*) See the chapters on "Piracy" and "Remedies for Infringement," *post*.
(*b*) See 7 Vict. c. 12, s. 19.
(*c*) Sects. 2 and 29.
(*d*) See 5 & 6 Vict. c. 45, s. 17, and 8 & 9 Vict. c. 93.

that purpose, and shall transmit the same in the proper manner to the Secretary of State, in order that it may be submitted to Her Majesty, and in case Her Majesty shall be of opinion that such Act or ordinance is sufficient for the purpose of securing to British authors reasonable protection within such possession, it shall be lawful for Her Majesty, if she think fit so to do, to express her royal approval of such Act or ordinance, and thereupon to issue an Order in Council declaring that so long as the provisions of such Act or ordinance continue in force within such colony the prohibitions contained in the aforesaid Acts, and hereinbefore recited, and any prohibitions contained in the said Acts or in any other Acts against the importing, selling, letting out to hire, exposing for sale or hire, or possessing foreign reprints of books first composed, written, printed, or published in the United Kingdom, and entitled to copyright therein, shall be suspended so far as regards such colony; and thereupon such Act or ordinance shall come into operation, except so far as may be otherwise provided therein, or as may be otherwise directed by such Order in Council, anything in the said last-recited Act or in any other Act to the contrary notwithstanding.

The Orders in Council are to be published in the *Gazette*, and laid before Parliament, as well as the Colonial Acts or Ordinances. Sect. 2 enacts "that every such Order in Council shall, within one week after the issuing thereof, be published in the *London Gazette*, and that a copy thereof, and of every such Colonial Act or ordinance so approved as aforesaid by Her Majesty, shall be laid before both Houses of Parliament within six weeks after the issuing of such Order, if Parliament be then sitting, or if Parliament be not then sitting, then within six weeks after the opening of the next Session of Parliament."

Colonies within the Act.

The following colonies have brought themselves within the provisions of this Act: New Brunswick, Nova Scotia, Prince Edward's Island, Bermuda, Bahamas, Barbadoes, Canada, St. Lucia, St. Vincent, British Guiana, Mauritius, Jamaica, Newfoundland, Grenada, St. Christopher, Antigua, Nevis, Cape of Good Hope, and Natal.

By sect. 91 of the Act 30 Vict. c. 3, which joins Canada, Nova Scotia, and New Brunswick into one dominion, under the name of Canada, all matters coming under the head of copyrights in those three provinces are to be within the exclusive legislative authority of the Parliament of Canada, and not within that of the legislatures of the provinces.

India.

An Act of the Legislative Council of India was passed on

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the subject of copyright in the year 1847. After reciting in the preamble that doubts might exist whether copyright could be enforced by the common law, or by virtue of the principles of equity, in the territories subject to the government of the East India Company, and whether the Act of 5 & 6 Vict. c. 45, had made provision for the enforcement of the right against persons not being British subjects, it enacts that copyright in every book published in India in the author's lifetime, after the 28th August, 1833, shall endure for the natural life of the author, and seven years after, or for forty-two years, if the seven years sooner expire; and copyright in any book published after the death of the author shall endure for forty-two years, and shall be the property of the proprietor of the author's manuscript.(*a*)

A book of registry is to be kept in the office of the Secretary to the Government of India for the Home Department, and to be open at all convenient times to the inspection of any person on payment of eight annas for every entry searched for or inspected; and certified copies are to be given on payment of two rupees, such copies to be received in evidence in all Courts, and to be *primâ facie* proof of proprietorship.(*b*) The wilful making of a false entry, or producing a false copy in evidence, was made a misdemeanor punishable with imprisonment to the extent of three years;(*c*) but this enactment has since been repealed.(*d*)

In order to sue for an infringement of copyright an entry must be made in the registry book of the title of the book, the time of the first publication, the name and place of abode of the publisher and of the proprietor either of the whole or any part of the copyright, in a form given in a schedule to the Act. A sum of two rupees is to be paid on registering.(*e*)

Every registered proprietor may assign his interest, or a part of it, by making entry in the registry book of the assignment, and of the name and place of abode of the assignee, in a form given in a schedule to the Act.(*f*) A like sum is to be paid on making an entry of assignment.(*g*) Any person deeming himself aggrieved by any entry in the registry book may apply to the supreme court or any judge of it; and the judge may make such order for expunging, varying, or confirming it as he may consider just, with or

(*a*) Sect. 1. (*b*) Sect. 3.
(*c*) Sect. 4. (*d*) By Act xvii. of 1862.
(*e*) Sect. 5. The form of entry is exactly the same as that given in the schedule to 5 & 6 Vict. c. 45. *Vide ante*, p. 88.
(*f*) Sect. 5. The form is the same as that given in the schedule to 5 & 6 Vict. c. 45. (*g*) *Ib.*

without costs, and the secretary of the government shall carry out such order.(*a*)

The enactment as to the copyright in encyclopædias, reviews, magazines, and other periodical works is in all respects the same as that contained in sect. 18 of 5 & 6 Vict. c. 45.(*b*) The proprietor is entitled to all the benefits of registration by making entry in the registry book of the title, the time of first publication of the first volume, number, or part, and the name and place of abode of the proprietor and publisher.(*c*)

A special action on the case lies for infringements of copyright by printing or causing to be printed for sale or exportation without the proprietor's consent in writing, or by having in one's possession for sale or hire without such consent, any book so unlawfully printed.(*d*) The defendant in such an action, if it be tried in the superior courts, must give notice in writing of the objections to the plaintiff's title on which he means to rely,(*e*) and if it be tried in a local court, he must state the same matters in his answer.(*f*) In actions in the superior courts the defendant may plead the general issue and give the special matter in evidence.(*g*)

All copies of registered books which have been unlawfully printed are to belong to the registered proprietor, who, after demand in writing, may sue for them in detinue or trover.(*h*)

All proceedings under the Act for offences committed against it, must be commenced within twelve calendar months after the offence has been committed.(*i*)

A provision is made against the possible suppression of books of importance to the public. Sect. 2 enacts that it shall be lawful for the Governor-General in Council, on complaint made to them that the proprietor of the copyright in any book published after the passing of the Act has, after the death of its author, refused to republish it, or allow the republication of it, and that by reason of such refusal, such book may be withheld from the public, to grant a licence to such complainant to publish the book in such manner and subject to such conditions as they may think fit, and it shall be lawful for such complainant to publish such book according to such licence.

Works published in a colony are foreign works.

If a work of any sort is published in a colony, no copyright can be acquired in it under the Copyright Act of 5 & 6 Vict. c. 45. It stands in all respects on the same footing as any other foreign work; and the only rights

(*a*) Sect. 6. (*b*) *Vide ante*, pp. 97, 98.
(*c*) Sect. 11. (*d*) Sect. 7. (*e*) Sect. 8. (*f*) Sect. 9.
(*g*) Sect. 15. (*h*) Sects. 12, 13. (*i*) Sect. 16.

which can be acquired here in respect of it are those which may be acquired by the author of any other work published abroad, under the International Copyright Acts.

We have already seen (*ante*, p. 33) that the residence of the author in any British colony at the time of the publication of his work in the United Kingdom, is sufficient to entitle him to a copyright in it under 5 & 6 Vict. c. 45.

CHAPTER XIV.

INTERNATIONAL COPYRIGHT.

COPYRIGHT of an international character is altogether dependent on statutory enactments of the present reign.

Since the decision of the House of Lords in *Jeffreys* v. *Boosey*, (*a*) it has been a settled rule of law that no foreigner can enjoy copyright in his published work unless he be present in England at the time of its publication here. The statutes which do not deal expressly with the literary property of aliens are interpreted as having reference solely to those who owe allegiance, natural or temporary, to the sovereign of these realms, and as conferring on them alone a copyright in their works. Such Acts, it has been said, have a municipal and territorial operation, and aliens, as such, are excluded from all the benefits secured by them; the copyright enjoyed by British authors being a monopoly conferred on them, at the expense of other British subjects, as an encouragement to the composition of literary works; and it would transcend the legitimate province of municipal law to confer a monopoly on foreigners at the expense of its own subjects. But a reciprocity of protection for their literary and dramatic productions may with advantage be secured to the authors of different countries; and this is the object aimed at by the International Copyright Acts. Three have at different times been passed, of which the first (1 & 2 Vict. c. 59), relating to books only, was repealed by the second (7 & 8 Vict. c. 12), the latter being amended and partly repealed by 15 Vict. c. 12.

Reciprocal protection to be secured.

In order to secure the rights of home authors, it is enacted by the same statute which empowers Her Majesty by Order in Council to grant copyright to foreigners, "that no such Order in Council shall have any effect unless it shall be therein stated, as the ground for issuing the same, that due

(*a*) 4 H. L. Cas. 977; see, however, the opinions of Lords Cairns and Westbury in *Routledge* v. *Low*, cited *ante*, p. 31, and the observations in pp. 31, 32, *ante*.

protection has been secured by the foreign Power so named in such Order in Council for the benefit of parties interested in works first published in the dominions of Her Majesty similar to those comprised in such order." (*a*)

Sect. 2 of 7 & 8 Vict. c. 12, gives a general power to Her Majesty to grant copyright to foreigners by such Order in Council as has been named. It enacts "that it shall be lawful for Her Majesty, by any Order of Her Majesty in Council, to direct that, as respects all or any particular class or classes of the following works, namely, books, prints, articles of sculpture, and other works of art, to be defined in such order, which shall after a future time, to be specified in such order, be first published in any foreign country to be named in such order, the authors, inventors, designers, engravers, and makers thereof respectively, their respective executors, administrators, and assigns, shall have the privilege of copyright therein during such period or respective periods as shall be defined in such order, not exceeding, however, as to any of the above-mentioned works, the term of copyright which authors, inventors, designers, engravers, and makers of the like works respectively first published in the United Kingdom may be then entitled to under the hereinbefore recited Acts respectively, or under any Acts which may hereafter be passed in that behalf."

General power to grant copyright to foreigners.

In what works.

Duration.

The Orders in Council are to be published in the *London Gazette*, and to take effect from the date of such publication. (*b*) They are, further, to be laid before both Houses of Parliament within six weeks after issuing them if Parliament is then sitting, and if it is not sitting, then within six weeks after the commencement of the next session. (*c*)

Orders to be published in *Gazette* and laid before Parliament.

Different periods of duration for foreign copyright, and different times for registration may be specified by the Order in Council for different countries and classes of works. By sect. 13 it is enacted that the respective terms to be specified by such Orders in Council respectively for the continuance of the privilege to be granted in respect of works to be first published in foreign countries may be different for works first published in different foreign countries, and for different classes of such works; and that the times to be prescribed for the entries to be made in the register book of the Stationers' Company, and for the deliveries of the books and other articles to the said officer of the Stationers' Company, as hereinbefore is mentioned, may be different for different foreign countries, and for different classes of books or other articles.

Term of enjoyment and time for registration may vary.

(*a*) 7 & 8 Vict. c. 12, s. 14. (*b*) Sect. 15. (*c*) Sect. 16.

No right to exist independently of the Act.

No right of property is recognised in any of the above-mentioned works except what this Act confers. Sect. 19 enacts "that neither the author of any book, nor the author or composer of any dramatic piece or musical composition, nor the inventor, designer, or engraver of any print, nor the maker of any article of sculpture, or of such other work of art as aforesaid, which shall after the passing of this Act be first published out of Her Majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act."

British authors first publishing abroad.

This enactment applies equally to British and to foreign authors who first publish their books or publicly represent their dramatic compositions abroad. And though no convention has been made with the foreign country in which a dramatic piece has been performed, and so a compliance with the requisites of 7 & 8 Vict. c. 12, is impossible, the author, though a British subject, is not entitled in this country to any copyright in his drama if it has been first represented abroad.

In *Boucicault* v. *Delafield*, (*a*) where the plaintiff sought to restrain the unauthorised representation of a dramatic piece—"The Colleen Bawn"—composed by him, and first performed in New York, but duly registered at Stationers' Hall on the day of its first representation in England, it was contended, in support of his alleged exclusive right of representation, that the former Copyright Acts were intended to confer a right upon British subjects at all events, and that the International Copyright Act of 7 & 8 Vict. c. 12, being intended to extend to foreigners, under certain circumstances mentioned in it, the advantages which British authors had in this country with regard to literary works and dramatic performances could not be construed to take away the privilege already conferred upon British subjects; and that *Jeffreys* v. *Boosey* (*ante*, pp. 25–30), not having been determined when the 7 & 8 Vict. c. 12, passed, could not be presumed to have been in the purview of the Legislature. The Vice-Chancellor (Wood) was of a different opinion. After pointing out that a foreigner residing here, and first publishing his work here, is entitled, just as much as any British subject, to the benefit of the copyright which applies to dramatic performances, but not if he first published his work abroad, his Honour proceeded: "Now, that being so, how would the law stand when the Act 7 & 8 Vict. c. 12, was passed? If Mr. Boucicault had been

(*a*) 9 Jur. N. S. 1282; 33 L. J. 38, Ch.; 12 W. R. 101.