LAW RELATING TO LITERARY

COPYRIGHT AND THE AUTHORSHIP AND

PUBLICATION OF BOOKS

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LAW

RELATING TO

LITERARY COPYRIGHT

AND

THE AUTHORSHIP AND PUBLICATION OF BOOKS

BY

DANIEL CHAMIER

OF THE INNER TEMPLE, BARRISTER AT LAW

AUTHOR OF "A MANUAL OF ROMAN LAW," "LAW OF LUNACY IN RELATION TO CUSTODY OF THE PERSON"

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PREFACE.

THE Law of Copyright has reference to the various subjects of Literature, Art, Music, and the Drama. It was assumed, when deciding upon the scope of the present work, that of the branches referred to the greater number of questions or matters that come before either the Courts or the profession relate to Copyright in Literature.

It was thought, moreover, that other subjects, being closely allied to it (inasmuch as they relate generally to the authorship and publication of books), might conveniently be treated in conjunction with the subject of Literary Copyright.

The primary object of this volume has therefore been to collect the law generally relating to the authorship and publication of books, Literary Copyright being treated fully (to the exclusion of other branches of copyright law), but at the same time rather as a portion of the wider general subject than as a main and particular theme.

2 GARDEN COURT,
TEMPLE, E.C.,
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CHAPTER I.

AUTHORSHIP.

THE author, or the joint author, of a literary work may Who is author be:—

1. He who wholly conceives and gives effect to it.
2. He who is, as nearly as can be, its effective cause, though in fact he is assisted by another or others whom he directs in its production.[1]

The superintendence of the arrangement of details, even if they are actually carried out by others, constitutes the person who does this the author. Who the person is must be a question to be decided on the evidence in every case.[2]

So the mere writing to dictation will not constitute the person who writes the author of what is written. Nor will the mere removal of the cap from a photographic lens constitute him who removes it the author of the photograph. For neither of these acts is the effective cause of what is produced.

For the subject of property, which undoubtedly exists in a literary work, is not the words themselves, nor the ideas expressed in them; but their order[3] and the expression of which it is the cause.

In the opinion of the late Lord Justice Cotton,[4] author-

[1] See Nottage *v.* Jackson, 1883; 11 Q. B. D. 627; 52 L. J., Q. B. 760.

[2] *Ibid.*, per Brett, M. R., p. 632.

[3] Per Erle, J., in Jeffereys *v.* Boosey, 1854; 4 L. H. C. 867; 24 L. J., Ex. 81; 1 Jur., n. s., 615; 3 C. L. R. 625.

[4] Nottage *v.* Jackson, *ubi sup.*, p. 635.

ship involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph.

So it has been held that a tradesman who employed another person for remuneration to compile a book of designs for him, was himself entitled to copyright in the book.[1] And (under the Statute of Anne) that he who forms the plan of a work, to be composed by the labour of various writers, and who pays them for their contributions, is the author and proprietor of the work so formed.[2]

Lord Deas held that the employment of assistants to effect the arrangement and carrying out of the details of a work does not make those assistants authors in the sense of section 18 of the statute, or in any reasonable sense whatever.[3]

So Vice-Chancellor Bacon recognised that a person can be the author, that is the designer and inventor of a plan, though he may not be able to execute it, and employs another to make the drawing for him.[4]

3. He who though specially employed by another to compose a work and given suggestions and directions, is in fact its author, since such character or originality as the work contains flows from his mind.

The mere suggestion by one person of a subject upon which, without sharing in its design or execution, he employs another to write, will not vest in the employer the copyright of a work the whole of which, so far as any

[1] Per Sir Chas. Hall, V. C., in Grace *v.* Newman, 1875; L. R. 19 Eq. 623.

[2] Per Sir John Leach, V. C., in Barfield *v.* Nicholson, 1824; 2 L. J., Ch. 90; 2 Sim and Stu. 1.

[3] Maclean *v.* Moody, 1858; 20 Sc. Sess. Cases, 2nd Ser. 1161.

[4] Stannard *v.* Harrison, 1871; 24 L. T., n. s., 571. See also Hatton *v.* Kean, 1859, *infra*, where the incidental music for a dramatic piece composed by a musician was held to belong to the proprietor of the drama to which it was an accessory.

character or originality belongs to it, flows from the mind of the person employed. It appeared to Sir William Jervis, C. J., to be an abuse of terms to say that in such a case the employer is the author of the 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.[1]

And the employment of another to write a play will not vest the copyright in the employer, even if he suggests the subject.[2]

Joint author.

4. He whose co-operation with another in the carrying out of an original joint design is sufficient to result in a joint authorship, and to constitute him a joint author.

If a work has been written by two persons in prosecution of a preconcerted joint design, they may be said to be co-authors of the whole work, notwithstanding that different portions were respectively the sole productions of either.[3]

It is not necessary that each writer shall contribute the same amount of labour, but there must be a joint labouring in furtherance of a common design. Mere additions or variations will not constitute joint authorship. There must be co-operation in the design of the work, or in its execution, or in re-arrangements or improvements in its general structure.[4]

[1] Shepherd *v.* Conquest, 1856; 17 C. B. 427.
[2] Levy *v.* Rutley, 1871; L. R. 6 C. P. 523.
[3] Levy *v.* Rutley, 1871; L. R. 6 C. P. 528; per Byles, J.
[4] *Ibid.*, per Keating, J.; at p. 528.

Chapter II.

NATURE OF COPYRIGHT.

Previous to 8 Anne, c. 19.

Until the passing of an Act for the encouragement of learning by vesting the copies of printed books in the authors or purchasers of such copies during the time mentioned [1] the rights of proprietors of published literary works depended wholly upon their title at common law.[2]

Millar *v.* Taylor.

In the course of an elaborate discussion on the history of copyright, Mr. Justice Willes said: "The author's title . . . depends upon two questions: 1. Whether the copy of a book or literary composition belongs to the author by common law. 2. Whether the common law right of authors to the copies of their own works is taken away by 8 Anne, c. 19"; and he held (1) that the right did exist at common law, and (2) that it was not taken away by the Statute of Anne.

The decision in *Millar v. Taylor* soon began to be doubted. The first section of the Statute of Anne seems to indicate an intention to specifically curtail the period during which statutory protection over published literary works should be enjoyed under that Act.[3]

Donaldson *v.* Beckett.

And when the point was raised on appeal to the House of Lords,[4] a majority of the Judges held that after the

[1] 8 Anne, c. 19.

[2] Millar *v.* Taylor, 1769; 4 Burr. 2303.

[3] The section is as follows: "From the 10th of April, 1710, the author of any book already printed who shall not have transferred the right shall have the sole right and liberty of printing such book for the term of twenty-one years, to commence from the said 10th day of April, and no longer; and the author of any book not yet printed and his assigns shall have a similar right for fourteen years from first publication, and no longer".

[4] Donaldson *v.* Beckett, 1774; 2 Bro., P. C. 129.

passing of the Statute of Anne such remedies as an author might previously have possessed at common law no longer existed, and that his rights and remedies were thenceforward governed entirely by the Act of Parliament.

Ever since that decision "copyright" has been properly described as the creature of statute.[1] Copyright depends upon statute.

For a literary work to be entitled to the enjoyment of statutory protection it is necessary:— Elements essential to works to entitle them to copyright.

1. That it be published.
2. That it be original, in fact or in law.
3. That it be of value as literature.
4. That it be inoffensive in law.

1. Copyright only vests on publication, and no statutory protection can be secured for a prospective publication,[2] or for an unpublished work. Publication.

2. (*a*) A work may be of an entirely original character, as when it is one of imagination or invention on the part of its author.[3] Originality.

(*b*) Or it may be original in respect of its treatment of a subject common to mankind, such as history or other branches of knowledge, but in which treatment the hand of the artist is readily discernible.[4]

(*c*) Or it may be original in law, inasmuch as though treating of a subject common to mankind, and respecting which all writers must to a very great extent, if not entirely, express themselves in identical terms, the author of it has gone faithfully to the proper source for his information.[5]

3. For a work to be of value as literature its produc- Value as literature.

[1] Per Lord Brougham and Lord St. Leonards in Jeffereys *v.* Boosey, 1854; 4 H. L. C. 815.

[2] Per Lord Chelmsford, in Platt *v.* Walter, 1867; 17 L. T., n. s., 158. See also Hervey *v.* Smith, 1855; 1 K. & J. 389. De Mattos *v.* Gibson, 1859; 32 L. T. 241; 4 De G. & J. 276. Bradbury *v.* Dickens, 28 L. J. Ch. 54; 27 Beav., 53. Longman *v.* Tripp, 2 N. R. 67; *ex parte* Foss, 30 L. T. 354; 2 De G. & J. 230.

[3] Spiers *v.* Brown, 1858; 6 W. R. 352; per Sir William Page-Wood, V. C.

[4] *Ibid.*, *sup.*, p. 352.

[5] *Ibid.*, *sup.*

tion must have entailed the fair exercise of a sufficient mental operation [1] upon which some value can be set in the nature of property.[2] There must be some evidence of brain work having been bestowed upon it.[3]

So, where the face of a barometer was published separately, the Court refused to recognise it as entitled to copyright, on the ground that it was a necessary part of the instrument, and if separated therefrom was without use or meaning, and the whole barometer could not possibly be considered to be a book.[4]

Prints, published separately, are not within the definition of the Copyright Act, 1842, nor are they protected by it.[5]

A heading to a column in a sheet printed for scoring purposes at cricket was held not to be a fit subject of copyright.[6]

The specifications of a patent were refused protection by Lord Eldon, L. C.,[7] who held that a person who may go to the Patent Office and copy a specification and then publish it, cannot by so doing acquire a right to restrain another from doing the same.

Until the reign of George III. it was supposed that the Crown had a prerogative or power to grant the printing of almanacs to any person or company

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

[2] Bell *v.* Whitehead, 1839; 3 Jur. 68, 8 L. J., Ch., 141.

[3] Per Lindley, L. J., in Trade etc., Co., *v.* Middlesbro', etc., Association, 1889; 40 Ch. Div. 435.

[4] Davis *v.* Comitti, 1885; 52 L. T., n. s., 539.
The plaintiff in the case cited had not obtained a patent for this meteorological instrument, but had registered it at Stationers' Hall in accordance with the Copyright Act, 1842 (5 & 6 Vict., c. 45), the entry being as follows: "Title of book, *Joseph Davis & Co.'s Forecast Barometer*".
Mr. Justice Chitty, in refusing an injunction, said that the invention of an inventor and the literary work of an author are regarded in the statute law as distinct things, and as carrying, where they are protected, distinct rights for different periods of time. (Davis *v.* Comitti, *ubi sup.*, 540.)

[5] Per Jessel, M. R., in Maple *v.* Jun. A. & N. Stores, 1882; 21 Ch. D. 379.

[6] Per Malins V. C. in Page *v.* Wisden, 1869; 20 L. T., n. s., 436.

[7] In Wyatt *v.* Barnard, 1814; 3 Ves. & Bea. 78.

exclusively.[1] And such a right was conferred upon the Stationers' Company, who seemed to have paid an annual sum of £1000 in consideration of it, this being divided between the two Universities.[2]

But it was held in the fifteenth year of the reign of George III., that the Crown did not possess this exclusive prerogative or power; and the right to print almanacs has since then existed without limitation.[3]

A device for throwing the form of a cross upon a screen, by means of a perforated card, with verses printed upon it, and known as a "christograph," was held by Vice-Chancellor Bacon not to be a literary production in any sense of the words;[4] nor was a photograph album recognised as a book which (besides containing the usual places for photographs) was illustrated with pictures and letterpress descriptive of them.[5]

An apparatus for cutting out the sleeves of ladies' dresses on scientific principles was held not to be a literary production, being merely for purposes of measurement, and not a "chart or plan" within the statute.[6]

So it has for long been agreed that there cannot be property in a single word;[7] and in a recent case Mr. Justice Kekewich held that the names of probable winners of horse-races were not in law the subject of copyright, and refused an injunction to restrain a rival paper from copying such names from another paper, the proprietors of which had been at some labour and expense in ascertaining probable winners.[8]

[1] Stationers' Co. *v.* Seymour, 1689; 1 Mod. Rep. 257; and the same *v.* Partridge, 1713; 10 Mod. Rep. 105.

[2] See note in Blackstone's Reports, vol. ii., p. 1009.

[3] Stationers' Co. *v.* Carnan, 1775; 2 W. Blackstone 1003.

[4] Cable *v* Marks, 1882; 47 L. T., n. s., 431.

[5] Schove *v.* Schmincké, 1886; 33 Ch. D. 546.

[6] Hollinrake *v.* Truswell, 1894; 71 L. T., n. s., 419; per Lord Herschell, L. C., Lindley and Davy, L. J. J.

[7] See pp. 132, 133.

[8] Chilton *v.* The Progress Printing Co., 1895, 71 L. T., 664; 11 T. L. R. 64. Affd. on appeal, 11 T. L. R. 329: see also Miller *v*, Wane, 1895, 11 T. L. R. 136.

Inoffensiveness in law.

4. A work to be inoffensive in law must be neither libellous nor immoral nor otherwise illegal. The Courts will not act either by granting an injunction or an account of profits upon a publication of such a nature that an action could not be maintained owing to its libellous, immoral, or otherwise illegal nature.[1]

Libellous works.

"The ground of this action," said Mr. Justice Holroyd,[2] "if any, must be that the defendant has worked an injury to the plaintiff's exclusive right of publishing the book in question.[3] Now, if it is criminal in him to publish such 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." To which Chief Justice Abbott added:[4] "It is not to be imagined that we, the judges of a court of law, can recognise that as a right in one form which we know to be punishable as a violation of the law in another".

And, again, "the Court ought not to give an account of the unhallowed profit of libellous publications," said Lord Eldon.[5]

Immoral works.

There can be no legal property in a work of an immoral tendency, and consequently the author or publisher of it cannot maintain an action in respect of its infringement.[6]

Blasphemous works.

Protection has been withheld from a work on the ground of its disrespect to the Scriptures.[7] Blasphemy is illegal, and will not receive assistance from the courts.[8]

Lord Eldon refused to extend protection to Lord Byron's "Cain,"[9] and an injunction to restrain the in-

[1] Walcot *v.* Walker, 1802; 7 Ves. 1.

[2] In Stockdale *v.* Onwhyn, 1802; 7 Dow & Ry. 625, *et seq.*

[3] It consisted of the memoirs of a courtesan libelling persons she had come in contact with.

[4] At p. 631.

[5] In Walcot *v.* Walker, 1802; 7 Ves. 1.

[6] Stockdale *v.* Onwhyn, 1802; 7 Dow. & Ry. 625, *et seq.*

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

[8] Cowan *v.* Milbourn, 1867; L. R., 2 Ex., 230.

[9] Murray *v.* Benbow, *sup.*

fringement of Laurence's *Lectures on Physiology, Zoology, and the Natural History of Man*, was refused on the ground that "it appeared doubtful whether it did not impugn the doctrines of the Scriptures".[1]

But the standard of measurement by which blasphemy must be defined expands with the development of modern ideas.[2]

What is illegality.

Illegality generally includes anything that the Court reprobates. As where a work was published purporting to be a translation of a work by a well-known German author, and it was discovered that no such German work existed, and that the book was in fact the production of an Englishman, it was held that the publisher's conduct in so publishing it was in the nature of a *crimen falsi*, and that therefore no copyright in such work could be claimed.[3]

And again, where a doctor sued for the loss of a book which had been burned by a mob, Chief Justice Eyre said that if evidence had been produced that the defendant, as alleged, was accustomed to publish works injurious to the Government, he would have held that he could not have recovered.[4]

[1] Laurence *v.* Smith, 1822; 1 Jacob. 471.

Mr. Justice Story on blasphemy.

[2] Mr. Justice Story thus comments on this question (Story's Eq. Jur., 12th ed. § 938): "If a Court of Equity, under colour of its general authority, is to enter upon all the moral, theological, motaphysical, and political inquiries which in past times have given rise to so many controversies, and in the future may well be supposed to provoke many heated discussions; and if it is to decide dogmatically upon the character and bearing of such discussions and the rights of authors growing out of them; it is obvious that an absolute power is conferred over the subject of literary property which may sap the very foundations on which it rests, and retard, if not entirely suppress, the means of arriving at physical as well as metaphysical truths. Thus, for example, a Judge who should happen to believe that the immateriality of the soul, as well as its immortality, was a doctrine clearly revealed in the Scriptures (a point upon which very learned and pious minds have been greatly divided), would deem any work anti-Christian which should profess to deny that point, and would refuse an injunction to protect it. So, a Judge who should be a Trinitarian might most conscientiously decide against granting an injunction in favour of an author enforcing Unitarian views; when another Judge, of opposite views, might not hesitate to grant it" (and he refers to Laurence *v.* Smith; Jacob. 471).

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

[4] Priestley's case, cited in Southey *v.* Sherwood, 1817; 2 Mer. 437; 7 Ves. 1.

Chapter III.

PUBLICATION.

Effect of publication.

PUBLICATION is the divestitive fact of an author's right at common law and the investitive fact of his statutory right.

From its occurrence the period of statutory protection commences to run. The date of first publication is a particular which, with others, the statute requires to be entered in the register book at Stationers' Hall before action can be brought in respect of infringements.[1] What constitutes or amounts to publication is therefore a question of importance.

Definition of publication.

It may be said that publication occurs when the person entitled so to do by reason of his being vested with entire and unrestricted dominion over an unpublished work expressly, as by some positive act, or impliedly, as by his conduct or that of persons duly acting on his behalf, communicates that work to the public in any manner in which it is capable of being communicated, without limitation or restriction, and not necessarily in numbers or for sale, or in a printed form.

What does and does not constitute.

The mere lending a manuscript to others, or the mere printing it, is not a publication.[2] A man may write without any intention to publish. The act of publication is a voluntary one, and its result is a dedication to the public.[3] And the use of a manuscript by pupils

[1] 5 & 6 Vict., c. 45, s.s. 3 and 24.

[2] Per Yates, J., in Millar *v.* Taylor, 1769; 4 Burr. 2379. Erle, J., in Jeffereys *v.* Boosey, 1854; 4 H. L. C. 867.

[3] Bartlett *v.* Crittenden, 1849; 5 McLean, 1849, Amer. 37.

of a school of which the author was a master has been held not to amount to a publication of the manuscript.[1]

The sale of manuscript copies of a work was held, under the former statute, not to divest the author of it of his right to secure statutory protection, that is, copyright, on his subsequently printing and publishing the work.[2]

The mere showing a design to a person having an interest in placing goods of the kind on the market, with the object of obtaining his advice, is not a publication. But the entrusting another with the duty of soliciting orders, after showing the design to persons in the trade, constitutes publication.[3]

In the case of a picture, which is so far as possible analogous to a manuscript,[4] none of the following acts amounts to publication of the original:—

1. The publication of a wood engraving in a magazine, with an article describing the picture.
2. The exhibition of the picture at a public exhibition or gallery, copying being prohibited.
3. The exhibition of the picture for the purpose of obtaining subscribers to an engraving of it.[5]

Partial and limited communications not made with a view to general publication do not amount to "publication"[6] in the sense in which it is applied to an act capable of divesting an author of his right at common law.

Where a work is issued in parts, publication of the

[1] Bartlett *v.* Crittenden, 1849; 5 McLean, 1849, Amer. p. 42.

[2] White *v.* Gerock, 1819; 1 Chitty 24. But in the Statute of Anne protection is only given to works that are printed. A multiplication of manuscript copies would not necessarily fall short of publication under the Statute 5 & 6 Vict., c. 45. See *infra*.

[3] Per Kekewich, J., in Blank *v.* Footman, 1888; 39 Ch. D. 680.

[4] See opinion of Lord Cranworth in Jeffereys *v.* Boosey, 1854; 4 H. L. Cases, 833.

[5] Turner *v.* Robinson, 1859; 10 Ir. Ch. R. 121.

[6] Per Knight-Bruce, V. C., in Prince Albert *v.* Strange, 1849; 2 De Gex. & Sm., 692.

whole takes place in law at (that is, dates back to) the time of the production of the first part.[1]

In the case cited a serial tale was commenced in this country, and the first number of it duly published and registered. After several chapters had appeared serial publication was also commenced in America. The American issues overtook and passed the English ones, and so publication of the later chapters of the tale actually took place first abroad. The question then arose as to whether the author had by this prior publication abroad lost his right to obtain copyright in the later chapters; and it was held not to be so, but that the date to be looked to was that at which publication of the first part took place, this being in law the date of the first publication of the whole serial work.[2]

Conditions of publication.

The right to the statutory protection given by the English copyright law will be obtained on the first publication of a work in the British Dominions:—[3]

1. By a natural born or naturalised subject of the Queen, no matter where his residence may be at the time.
2. By any person who owes a temporary allegiance by residing in some part of the British Dominions at the time;[4] and probably, though not certainly, even without such residence.[5]

The probability of the place of residence being immaterial has been increased by the passing of the Naturalisation Act,[6] which enacts that personal property of every

[1] 5 & 6 Vict., c. 45, s. 19; Reid *v.* Maxwell, 1886; 2 T. L. R., 790.

[2] Per Cotton, Lindley, & Lopes, L. J. J., in Reid *v.* Maxwell, *sup.*, pp. 791, 792. See also Johnson *v.* Newnes; 1894, 3 Ch. 663; W. N. 129.

[3] Routledge *v.* Low, 1868; L. R. 3 H. L. C. 108; 37 L. J., Ch. 454; and the International Copyright Act, 1886, 49 & 50 Vict., c. 33, which applies the Copyright Acts (subject to the provisions of the International Copyright Act, 1886, itself) to literary and artistic works first produced in a British possession, in like manner as they apply to works first produced in the United Kingdom.

[4] *Ibid.*, per Lord Cairns, L. C., and Lord Westbury, at p. 110.

[5] *Ibid.*

[6] 33 Vict., c. 14, s. 2.

description may be taken, acquired, held, and disposed of in every respect by an alien, in the same manner in all respects as by a natural born British subject.[1]

Effect of prior publication abroad.

Prior publication in a foreign country must necessarily be inconsistent with first publication in the British Dominions. Its effect, therefore, must be to destroy the protection which would otherwise have arisen under the English Copyright Act of 1842, though a work first published in a country subscribing to the Berne Convention will receive protection under the International Copyright Act of 1886 and the Order in Council issued under its authority adopting that Convention.[2]

Prior publication in countries to which the Berne Convention does not apply, precludes copyright here.

So a work first published in America, a country which has not joined the union of subscribers to the Berne Convention, will not be entitled to protection in the British Dominions by subsequent publication in the latter. Nor can persons be prevented from infringing or reproducing copies of the work so first published abroad.

Simultaneous publication is in effect the same as first publication.

Simultaneous publication abroad does not prevent the publication here from being first publication, since no publication precedes or is prior to it.

[1] 33 Vict., c. 14, s. 2; see also 5 & 6 Vict., c. 45, s. 25, which makes copyright personalty.

[2] See the opinion of the late Mr. Justice Stephen, in his *Digest of the Law of Copyright*, presented with the Report of the Copyright Commission, 1878, p. lxix., art. 7; and see also p. 140, *infra*, where the subject of International Copyright is fully discussed.

The late Lord Justice Cotton expressed some doubt as to whether an English author, who first published his work abroad, would for that reason be deprived of his right to copyright here (Reid *v.* Maxwell, 1886; 2 T. L. R. 791). The judgment is, however, based somewhat upon the facts of the case, which were peculiar, and is apparently inconsistent with Lord Westbury's judgment in Routledge *v.* Low (*ubi sup.*, p. 118), to the effect that: "The real condition of obtaining this advantage is the first publication by the author of his work in the United Kingdom". Lord Cranworth agrees (p. 112) that "copyright . . . must be taken to be confined to what it was at the passing of the Act, that is, to works first published in the United Kingdom"; and Lord Chelmsford (p. 117), professing to quote Lord Cairns' opinion, describes it as having reference to "first publication".

Chapter IV.

WORKS THAT ARE PROPER SUBJECTS FOR COPYRIGHT.

Subjects of copyright.

ALL works possessing the necessary qualifications, as already described, will be entitled to statutory protection. Amongst others may be mentioned the following:—

Book. *A book or volume.*[1]

Portion of a book. *A part or division of a book or volume.*[2]

Pamphlet. *A pamphlet.*[3]

Sheet of letterpress. *A sheet of letterpress.*[4]

Chart. *A chart.*[5]

Plan. *A plan, separately published.*[6]

Music. *A sheet of music.*[7]

Illustrations published with letterpress. *Illustrations published in a book with letterpress.*[8]

A book of pictures. *A book entirely or in part composed of pictures.*[9] "It is a book," Sir George Jessel, M. R., said, "and so clearly comes within the words of the Copyright Act of 1842.[10] There may be such things as picture books for those who cannot read letterpress. . . . I can see nothing in the Act to exclude a book which consists of pictures only, or to restrict the Act to books containing letterpress;" and he cited the Vice-Chancellor in *Bogue v. Houlston*,[11] in which he said: "This definition[12] does not extend to prints or designs separately published, but only to the prints and designs forming part of a book, and the

[1] 5 & 6 Vict., c. 45, s. 2. [2] *Ibid.*
[3] *Ibid.* [4] *Ibid.* [5] *Ibid.*
[6] *Ibid.* [7] *Ibid.* D'Almaine *v.* Boosey, 1835; 1 Y. & C. 289.
[8] Bogue *v.* Houlston; 1882; 5 De G. & Sm. 274.
[9] Maple *v.* Jr. A. & N. Stores, 1882; 21 Ch. D. 377.
[10] 5 & 6 Vict., c. 45, s. 2.
[11] 1852, 5 De G. & Sm. 274.
[12] *i.e.*, that given in the statute 5 & 6 Vict., c. 45, s. 2.

book is not less a book because it contains prints or designs or other illustrations of the letterpress . . . 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 letterpress therein, which is another part of it."

Prints forming part of book.

"It had been contended," continued the late Master of the Rolls,[1] "before the Vice-Chancellor that there could only be copyright when there was letterpress; and I think that what he meant to say was that prints forming a book were within the Act, though prints published separately were not, and that if published together in a volume they formed a book whether there was letterpress or not."

Map.

A map.[2]—Formerly, maps had been considered artistic works, but by the Copyright Act, 1842, they are classed as "literary works". "And rightly so," Lord Justice James considered,[3] "for maps are intended to give information in the same way as a book does. . . . Maps give instruction as to the statistics and history of the country portrayed: they point out the amount of population, the places where battles were fought, the dates when provinces were annexed, as in maps of India, and give other geographical and historical details. It was quite reasonable, therefore, to take them out of the law of artistic works and to give them greater protection by bringing them under the law of copyright of literary works."

Newspaper.

A newspaper.—Sir George Jessel, M. R., held a newspaper to be within the meaning of the term "book" in the statute, and, as such, a proper subject for copyright. To entitle a person to take action in respect of infringement, therefore, a newspaper should be registered at Stationers' Hall.[4] The late Master of the Rolls declined

[1] In Maple *v.* Junior A. & N. Stores, *ubi sup.*, p. 379. See also Comyns *v.* Hyde, 1895, W. N. 9, where a coloured supplement to a paper was held to be part of it and entitled to copyright though physically detached.

[2] 5 & 6 Vict., c. 45, s. 2.

[3] Per Sir W. M. James, L. J., in Stannard *v.* Lee, 1871, L. R. 6 Ch. 349.

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

to follow Vice-Chancellor Malins' decision,[1] on the ground that it virtually overruled the plain wording of an Act of Parliament.

Catalogue.

A catalogue.—There is copyright in a catalogue, unless it be a mere dry list of names.[2]

"I cannot conceive," said Sir William Page-Wood, V. C., "on what principle it is supposed that there is no copyright in a catalogue such as this. This is not a mere dry list of names, like a Postal Directory, Court Guide, or anything of that sort, which must be substantially the same by whatever number of persons issued, and however independently compiled.[3] This is a case of a bookseller who issues an account of his stock, containing short descriptions of the contents of the books calculated to interest either the general public or the persons who may take an interest in the questions treated of by particular books. . . . True, the principal value may be in the books themselves; but I cannot, therefore, refuse to recognise the property this gentleman (the author) has in the product of his mental exertion; mental exertion used for this particular purpose and in print. So soon as these notes are printed I consider them completely protected by the Copyright Acts."

Again, where a firm issued an illustrated catalogue of articles of furniture containing illustrations from original drawings, and many of the latter were copied in another similar catalogue issued by a rival firm; it was held, by the Court of Appeal (affirming the decision of V. C. Hall), that the former firm were entitled to an injunction restraining the latter from publishing any catalogue containing illustrations copied from the original book.[4]

Sir George Jessel, M. R., said: "I am of opinion that

[1] In Cox *v.* Land & Water Co., 1869; L. R. 9 Eq. 324; 39 L. J. Ch. 152.

[2] Hotten *v.* Arthur, 1863; 1 H. & M., p. 603.

[3] The Vice-Chancellor's reference to Postal Directories and Court Guides must not be taken in the sense that there is no right of property in such publications now. See Kelly *v.* Morris, Morris *v.* Wright, &c., p. 114.

[4] Maple *v.* Junior A. & N. Stores, 1882; 21 Ch. D. 369.

this catalogue is the subject of copyright, and that the engravings are protected. In the first place it is a book, and so clearly comes within the words of the Copyright Act of 1842. There may be such things as picture books for those who cannot read letterpress. The preamble of the statute has been referred to, but it cannot restrict the enacting part of the statute if the enacting part is clear; and, moreover, the preamble can in no case have much effect unless it is itself clear. Here the enacting part is clear. 'The word "book" shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published,' and the word 'copyright' shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied. . . . I see nothing in the Act to exclude a book which consists of pictures only, or to restrict the Act to books containing letterpress." And he cited Vice-Chancellor Parker,[1] who said: "It appears to me 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 letterpress therein".

Lord Justice Lindley concurred:[2] "In my opinion the true view of the Acts is that taken in *Bogue v. Houlston*,[3] *Hotton v. Arthur*,[4] and *Grace v. Newman*,[5] that a collection of illustrations put together into a book, as distinguished from engravings intended to be sold separately, is within the Copyright Act. They certainly form a book, so as to come within the words of the Act."

Lord Eldon, L. C., recognised in an early case that if a person collects an account of natural curiosities, and employs the labour of his mind by giving a description of

[1] Bogue *v.* Houlston, 1852; 5 De G. & Sm. 267.
[2] Maple *v.* Junior A. & N. Stores, *sup.*, p. 380.
[3] 1852; 5 De G. & Sm. 267.
[4] 1863; 1 H. & M. 603.
[5] 1875; L. R. 19, Eq. 623.

them, it is as much a literary work as many others that are protected by injunction and action.[1]

Translation.

A translation.—If original a translation will not be distinguished and is a fit subject for copyright, whether it be produced by personal application and experience, or acquired from another who has so produced it, and it will be protected by injunction.[2]

And on an attempt to set up a custom among the proprietors of magazines to take from each other articles translated from foreign languages, since they had become public property, Lord Eldon ruled that a "custom among booksellers could not control the law," and that a translation properly produced or acquired would be entitled to protection.[3]

Under the International Copyright Act, 1886, authors of works published in countries belonging to the Copyright Union have the right to prevent the translation of their works in other countries of the Union during the first period of ten years from publication. After the lapse of that time the exclusive right to authorise and control translation is lost, if the proprietor of the copyright has not availed himself of it.

Articles in newspapers relating to political matters can, however, be translated without restriction,[4] unless a special reservation be made.

Directory.

A Directory.—The compiler of a Directory is entitled to copyright in it, even if it contains information derived from sources common to all, and which must of necessity be identical to other compilations of a similar nature if the information in each is correctly given. And no one else is entitled to save himself the labour and expense of original inquiry by adopting and republishing the information contained in a previous work on the same subject.

[1] Hogg *v.* Kirby, 1803; 8 Ves. 221.
[2] Per Lord Eldon in Wyatt *v.* Barnard, 1814; 3 Ves. & Bea. 77.
[3] Wyatt *v.* Barnard, *ubi sup.*, p. 78.
[4] 49 & 50 Vict., c. 33, s. 5, subs. (1), (2), (3), (4).

He must work out and obtain the information independently for himself, and the only legitimate use which he can make of previous works is for the purpose of verifying the correctness of his results,[1] or of directing him whither to go for information;[2] and the fact that persons choose to pay for the privilege of having their names printed in capital letters, with descriptions of their business, will not make that information common property so as to enable the compiler of a rival Directory to reprint it.[3] Nor will the authorisation of the persons mentioned, on payment by them for the insertion of the portions so copied as advertisements, justify their names being copied in a rival publication.[4]

An Advertisement.—Vice-Chancellor Hall held that the fact of its being an advertisement is not *per se* a reason why a catalogue should not be a book within the meaning of the statute.[5] Advertisement

Sir George Jessel, M. R., in the case last cited, said: "The case which has done all the mischief is *Cobbett v. Woodward*.[6] The late Master of the Rolls there says: 'But at the last it always came round to this, that in fact there is no copyright in an advertisement. If you copy the advertisement of another you do him no wrong, unless in so doing you lead the public to believe that you sell the articles of the person whose advertisement you copy.' I think that this is not the law. I am not aware that the use to which a proprietor puts his book makes any difference in his rights. His copyright gives him the exclusive right of multiplying copies, and he may use them as he pleases. I think, therefore, that *Cobbett v. Woodward* will not bear legal examination. There are two cases tending in the opposite direction, viz., *Hotten v. Arthur*[7]

[1] Kelly *v.* Morris, 1866: L. R., 1 Eq. 697.
[2] Morris *v.* Wright, 1870; L. R., 5 Ch. App. 286.
[3] Morris *v.* Ashbee, 1868; L. R., 7 Eq. 34. [4] *Ibid.*
[5] Maple *v.* Junior A. & N. Stores, 1882; 21 Ch. Div. 379.
[6] 1872; L. R., 14 Eq. 407-414. [7] 1863; 1 H. & M. 603.

and *Grace v. Newman*.[1] It is true that in *Hotten v. Arthur* there was considerable literary work in the ordinary sense of the term; the publication was more than a mere catalogue, still its primary object was that of an advertisement to promote the plaintiff's trade. The weight of authority, then, is against the doctrine that there cannot be copyright in a book issued as an advertisement, and I cannot see any principle in support of that doctrine."

And Lord Justice Lindley added:[2] "That the work was original in the sense I have mentioned has been clearly proved; and originality, not skill or merit, is the test whether a work is the subject of copyright. . . . I cannot follow Lord Romilly's reasoning, founded on the book being an advertisement."

So, where a book of designs was issued by a stonemason, in the nature of an advertising catalogue, with scarcely any letterpress, it was held to be entitled to copyright.[3]

Sir Charles Hall, V. C., said: "The first question is whether the case comes within the Copyright Act. The contention has been that it does not, because the book is not capable of being described as one of lasting benefit to the world; but it appears to me that I cannot do otherwise than hold that this is a work which comes within the description mentioned in the Act. . . . It was also contended that it is in fact a mere advertisement, and that an advertisement is not, on the authority of *Cobbett v. Woodward*,[4] entitled to protection. The decision in that case turned entirely upon the circumstances which existed in it,—it was a catalogue of articles which were being advertised for sale. But it does not appear that the case of *Hotten v. Arthur*[5] was mentioned to the

[1] 1875; L. R., 19 Eq. 623.
[2] Maple *v.* Junior A. & N. Stores, *ubi sup.*, p. 380.
[3] Grace *v.* Newman, 1875; L. R., 19 Eq. 623.
[4] 1872; L. R., 14 Eq. 407.
[5] 1863; 1 H. & M. 603.

Master of the Rolls; and whether if it had been his Lordship's decision would have been different it is difficult to say, but certainly it was decided in *Hotten v. Arthur* that a catalogue may under certain circumstances be protected by injunction."

An Arrangement.—Property may be acquired in an arrangement of matter that has already been published, or which exists in itself in a form readily obtainable by all, provided that there is originality in such arrangement.[1] Property is not acquired in the actual matter which has been copied, but the arrangement as a whole will be protected. Arrangement.

Lord Erskine has said that all human events are equally open to all who wish to add to or improve the materials already collected by others, making an original work. No man can monopolise such a subject; but if he produce an original work by his labour in arranging the materials which are in themselves common to all, he will acquire property in that work as an arrangement.[2]

The acquisition of property in such an arrangement or plan does not amount to a monopoly so as to prevent all others from arriving at a similar arrangement by independent labour, but it will be protected against mere piracy by others.[3]

The fact that a particular writer has adopted a certain form, plan, or arrangement for his work, cannot of itself prohibit another from originating a work in the same general form, provided that he does so from his own resources, and makes the work he so originates a work of his own by his own labour and industry bestowed upon it.[4] And the question to be decided in such cases is how far an unfair use has been made of the former work. And if it is found that instead of searching into the common

[1] Per Leach, V. C., in Barfield *v.* Nicholson, 1824; 2 Sim & Stu. 1.
[2] Matthewson *v.* Stockdale, 1806; 12 Ves. 273, 276.
[3] Per Lord Eldon in Mawman *v.* Tegg, 1826; 2 Russ.
[4] Jarrold *v.* Houlston, 1857; 3 K. & J. 708.

sources and obtaining subject matter from thence, an author has availed himself of the labour of a predecessor, adopting his arrangement and matter or adopting them with merely colourable variations, this will be an illegitimate use, and, in consequence, the work so formed will not be a subject for copyright.[1]

And so in making engravings from pictures, where the engraver produces effects by the management of light and shade. The first engraver does not acquire a monopoly of the use of the picture from which the engraving is made. He only acquires a right to insist upon others who wish to engrave it taking the trouble of going to the picture themselves and not availing themselves of his labour by copying his method, arrangement, and execution.[2]

The fact that the matter arranged is itself non-copyright is immaterial to the question of property in the arrangement. And Lord Romilly recognised a collection of biblical texts as a fit subject for copyright; a colourable imitation, published under a title calculated to mislead intending purchasers, of the original, into purchasing it, being restrained by injunction.[3]

Lord Ardmillan held,[4] that "it is not necessary 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, there may be copyright."

And so, where a number of extracts had been selected

[1] Jarrold *v.* Houlston, 1857; 3 K. & J. 708.

[2] Per Best, C. J., in Newton *v.* Cowie, 1827; 12 Moore, 457.

[3] As to where the matter arranged or dealt with still enjoys statutory protection, see *Extracts*, etc.

[4] Black *v.* Murray, 1870; 9 Scotch Sess. Cas., 3rd Series, p. 353.

from well-known authors, and arranged so as to illustrate and explain a non-copyright text, there was held to be copyright in that arrangement.[1] Lord Kinloch said: "To a considerable extent the notes borrowed . . . consist of quotations by various authors employed by Mr. Lockhart to illustrate ballads in the minstrelsy. It was, perhaps, thought that to repeat these 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 save the labour, the learning, and the expenditure necessary even for this part of the annotation."

And a book of words, selected from eight languages, for use in the telegraphic transmission of messages, accompanied by cyphers for reference or private interpretation, has been protected.[2]

A Lecture.—No one may attend at the delivery of a lecture, and, after taking it down in shorthand or otherwise in writing, print, lithograph, or otherwise make copies of or publish it without leave from the author; and a penalty is provided in the "Act for preventing the Publication of Lectures without Consent,"[3] for every sheet so published; publication in a newspaper being especially stated as amounting to a similar offence, and prohibited by the Act.[4] The fact that a person pays a fee or reward for admission to a lecture will not of itself constitute a licence to publish it.[5] The author of a lecture is given protection for a similar period as that formerly afforded

Lectures.

[1] Black *v.* Murray, 1870; 9 Scotch Sess. Cases, 3rd Series, p. 354.
[2] Per Kay, J., in Ager *v.* P. & O. Co., 1884; 26 Ch. D. 637.
[3] 5 & 6 Will. IV., c. 65, s. 1.
[4] *Ibid.*, s. 2.
[5] *Ibid.*, s. 3.

to copyright publications by the Act of Anne,[1] namely, two periods of fourteen years each, or twenty-eight years after publication.[2] But to enjoy the benefit of this Act,[3] notice of the intended delivery of a lecture must be delivered two days at the least before the delivery to two justices of the peace, living within five miles from the place of intended delivery.[4] And the Act does not apply to 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; the law relating to which is distinctly stated[5] to remain the same as if the Act had not been passed.

If a lecture which has been substantially reduced to writing be delivered before an audience, and then copied and published by one of the listeners, an injunction will issue on the ground of infringement of copyright in the lecture as written,[6] under the Copyright Act of 1842.[7] But the writing must be produced. From which it would appear either (1) that the reading from an unpublished document amounts to a publication of it, and so entitles the author to the statutory protection, which can only attach after publication; or (2) that the infringement is not of the statutory right, but of the right at common law which every writer has over his unpublished work.[8]

The more recent case of *Caird v. Sime*,[9] however, which came before the House of Lords in 1887, precludes the theory that the oral delivery of an unpublished lecture to students in a class-room amounts to a publication of it.

Lord Halsbury, L. C.,[10] acknowledged the proprietary right of an author in his unpublished literary productions; and, further, recognised that such a right may still continue, notwithstanding some kind of communication to

[1] 8 Anne, c. 19, s. 1. [2] *Ibid.*, s. 4.
[3] 5 & 6 Will. IV., c. 65. [4] *Ibid.*, s. 5. [5] *Ibid.*, s. 5.
[6] Abernethy *v.* Hutchinson, 1824; 3 L. J., Ch. 209; 1 H. & T. 28.
[7] 5 & 6 Vict., c. 45. [8] Prince Albert *v.* Strange, *ubi sup.*
[9] 1887; 12 App. Cases, 326. [10] At p. 237.

others, instancing "private" letters as a species of communication which does not entitle the recipient of them to cause their unauthorised general publication.

There may, therefore, be a limited publication which is unattended by the consequences of complete publication. And the Lord Chancellor considered[1] that the delivery of a lecture to students in a class-room would not necessarily make public that which the lecturer himself had neither expressly nor impliedly communicated for general reproduction. His lordship, discussing the Act 5 and 6 Will. IV., c. 65, failed to obtain any light, from its provisions, as to lectures delivered in Universities, etc. With regard to the fifth section, in which the law is expressly left as it was before the passing of the Act, he admitted that this had at one time appeared to be something in the nature of a declaration by the Legislature that lectures delivered in a university, or a public school, or any public foundation, were to be assumed to be so published as for the future to become public property. But he was satisfied that the language of the statute had been adopted simply for the declared purpose of not interfering in any way with the law existing on the subject. And it was held that publication does not take place, so as to entitle any one to republish lectures without permission, when they have been orally delivered by a professor in his class-room.

But where a speech is made, to which all the world is invited, either expressly or impliedly to listen, or a sermon is preached in a church, the doors of which are thrown open to all mankind, the mode and manner of publication seem to negative any limitation.[2]

And when any lecture is delivered to an audience admitted by tickets, a contract will, if the circumstances support it, be implied as between the lecturer and the

[1] Caird *v.* Sime, 1887; 12 App. Cases, p. 339.

[2] Per Lord Halsbury, L. C., in Caird *v.* Sime, *sup.*, at p. 338.

audience, to the effect that the latter may take the fullest notes for their own personal purposes, but may not publish them afterwards for profit.[1]

News. *In News.*—The subject matter of the decision of the late Master of the Rolls[2] was not an article or paragraph of "news," but there is authority for the proposition that an article or paragraph relating to "news" is a proper subject for copyright.

In a recent case[3] the proprietors of *The Times* newspaper moved for an injunction to restrain the defendant, the proprietor of the *St. James's Gazette*, from further publishing or circulating any copy of a newspaper containing an article and paragraphs alleged to have been copied from *The Times*. As to the article no question arose, the extracts being clearly an infringement of copyright, though it was attempted, unsuccessfully, to set up a custom among journalists to make extracts from each other's papers, to which custom it was alleged *The Times* had been a party. Judgment went for the plaintiff, Mr. Justice North holding that "the defendants are entirely wrong. With regard to the . . . article the interlocutory order must be continued; with regard to the other paragraphs I do not think any order necessary. Their interest has passed away, and they will not be repeated. It has not been shown that any damage resulted to *The Times* from the illegal appropriation of these paragraphs, and I do not think it necessary to observe the form of giving nominal damages." The judgment, however, ends with a declaration of the plaintiff's title to the paragraphs relating to news.

This ruling is in effect in entire accordance with the principle that copyright may exist in a particular work though not in a general subject, as laid down by Lord

[1] Nicols *v.* Pitman, 1884; 26 Ch. D. 374.
[2] Sir George Jessel in Walter *v.* Howe, 1881; 17 Ch. D. 710.
[3] Walter *v.* Steinkopf, 1892; 3 Ch 489.

Erskine[1] and Lord Mansfield;[2] and that a work is entitled to protection even though it contain information derived from sources common to all, and must be similar to or identical with other compilations or works on the same subject if all are correctly written.[3] And it cannot be doubted that every writer on subjects relating to passing events, as on any other subject, must work out and obtain his information independently for himself. Nor is he entitled to take advantage of the labour and research of others except to verify his own results,[4] or to direct himself to a source of information.[5]

Lord Erskine's opinion that a writer who deals with human events equally open to all may acquire property in his writing has already been cited.[6]

And Lord Eldon, while recognising that the acquisition of property in an individual work by such means cannot amount to a monopoly so as to preclude others from arriving at a similar arrangement by independent labour, held that the individual work will itself be protected against piracy.[7]

A writer on news will, therefore, not be entitled to copy matter relating to news from other published writings which are fit subjects of copyright. The only legitimate method of publishing matter relating to news or any other subject, is by and after obtaining the information from its original source, and without availing oneself of the labour or research of others; excepting to the extent that will be permitted in the extraction of copyright matter from other publications, by the exercise

[1] In Matthewson *v.* Stockdale, 1806; 12 Ves. 270. See p. 21.

[2] In Sayre *v.* Moore, 1785; 1 East., p. 361, *vide sup.*

[3] Kelly *v.* Morris, 1866; L. R., 1 Eq. 697.

[4] Kelly *v.* Morris, *ubi sup.*

[5] Morris *v.* Wright, 1870; L. R., 5 Ch. App. 286.

[6] Matthewson *v.* Stockdale, 1806; 12 Ves. 273. See p. 21.

[7] Mawman *v.* Tegg, 1826; 2 Russ 393. See also Jarrold *v.* Houlston, 1857; 3 K. & J. 708. Newton *v.* Cowie, 1827; 12 Moore, p. 246.

of a sufficient mental operation which will produce a result deserving the character of a new work.[1]

Annotations.

Annotations.—Where two writers had made the same book, the copyright in which had expired, the foundation of two other separate works, brought up to date, but one of them copied the alterations and additions which the other had made, Lord Kenyon, C. J.,[2] held that although neither could have copyright in that part of his book which had been taken from the original non-copyright source, "it is clear that [each one] 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 long been 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 book."[3]

At a much more recent date[4] it was not doubted that copyright exists in annotations to a non-copyright work, either when those annotations are original themselves or are entitled to protection as arrangements from the fact that labour and skill have been bestowed upon their selection from non-copyright sources.

New Edition.

A New Edition.—Copyright can be acquired in a new edition as a whole, formed either by substantial alterations in or additions or annotations to the text of:—

1. A work or portions of a work the copyright in which has expired.
2. A work or portions of a work in which copyright still exists, *quære.*

1. A work the copyright in which has expired.

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

[1] See p. 123.

[2] Cary *v.* Longman, 1801; 1 East. 358.

[3] Citing Mason *v.* Murray; (?) Lord Bathurst (no reference), and Tonson *v.* Walker; 4 Burr. 2325.

[4] Black *v.* Murray, 1870; 9 Scotch Sess. Cases, 3rd Ser., 341, *vide infra.*

will be protected from piracy.[1] That is to say, he will create a new copyright in the new work as a whole. Copyright exists in actual annotations themselves, as in other original matter possessing the other necessary attributes. But it has been doubted whether the addition of such annotations to other non-copyright matter could operate so as to create a copyright in the complete work so produced.

In the case cited[2] the works in dispute were by Sir Walter Scott, the copyright in the original editions of which had expired. The plaintiff, however, had published an edition of the works with annotations by Mr. J. G. Lockhart, and it was this annotated edition which the defendant had in part reproduced.

Lord Kinloch said:[3] "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 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

[1] Black *v.* Murray, 1870; 9 Scotch Sess. Cases, 3rd Ser., 341.
[2] Black *v.* Murray, *ubi sup.*
[3] At p. 344.

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.

"Applying these principles to the case before the Court, I have no doubt that Messrs. Black's annotated edition . . . possesses the privilege of copyright. It was edited under the care of Mr. John Gibson Lockhart, a man of great literary eminence, and peculiarly fitted by his close connection with the author to furnish interesting and valuable annotations. The additional notes supplied by Mr. Lockhart are appropriate, valuable, and numerous, running, as I understand, to about 200. Clearly this was not a colourable republication. It was in the strictest sense a new edition, with so large an accession of matter as in all fairness and reason conferred the privilege of copyright, and made it a piracy to publish these additional notes in whole or in part."

Where a chart had been largely based upon another chart, but with many alterations and improvements, and without servile copying, Lord Mansfield, C. J., declined to recognise it as a piracy.[1] But the alteration must be substantial, and the mere alteration of a single word here and there is not sufficient to give copyright to the new edition so produced.

So where it was proved that though some parts of a defendant's work were different, yet, in general, it was the same, some pages being a literal copy, Lord Kenyon, C. J., was of opinion that the copy should be restrained, even though it contained other original parts.[2]

[1] Sayre *v.* Moore, 1785, cited in Cary *v.* Longman ; 1 East. 361.

[2] Trussler *v.* Murray, 1789; cited in Cary *v.* Longman, 1 East. 363.

2. A work or portion of a work in which copyright still exists.

Vice-Chancellor Shadwell held,[1] that "any person may copy and publish the whole of a literary composition provided he writes notes upon it, so as to present it to the public connected with matter of his own". But possibly it is more in accordance with recent decisions to accept this with the qualification that the labour bestowed upon the annotated edition or extracts must be substantial and sufficient,[2] having in view the quantity and quality of matter reprinted or extracted, and must have a value in the nature of property.[3]

In the case last cited[3] it was held that matter extracted from the work or works of another or others, for the purpose of criticism, is a proper subject for protection if value can be put upon it in the nature of property. The exercise of judgment in selection and of care, skill, and originality in the critical treatment may so change the nature of the extracts as to entitle them in their new form to copyright as a whole.

"It is difficult," said Lord Cottenham,[4] "to prescribe a legitimate mode of extracting what is published in other publications, and to lay down the rule of quantity. But it is necessary for a party to be able to substantiate the value of the matter extracted before he comes for an injunction."

And where the work of extraction and annotation, or of compilation from copyright sources, even though coupled with original composition or annotation, was deemed insufficient to entitle it to copyright as a new work, it was restrained in general terms, as regards the pirated portions, without going into the exact question as to which these portions were.[5]

[1] Martin *v.* Wright, 1833 ; 6 Sim. p. 298.
[2] See Lord Eldon's test, p. 109 *sup.*, and other cases there cited.
[3] Bell *v.* Whitehead, 1839 ; 3 Jur. 68.
[4] Bell *v.* Whitehead, *sup.*
[5] Lewis *v.* Fullarton, 1839 ; 2 Beav. 6.

Particular work.

In a particular work, though not in a general subject.—Though copyright cannot exist in a general subject, such as an East India Calendar, any more than in a map, chart, series of chronology, etc., it may in an individual work; and where it can be traced that another work upon the same subject is 'an original compilation, but a mere copy with colourable variations, the original will be protected by injunction.[1]

"If a man," said Lord Erskine,[2] "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 of the Indian establishment, he has a copyright in that particular work, which has cost him considerable expense and labour, and employed him at a loss in other respects, though there can be no copyright in an Indian Calendar generally."

And Lord Mansfield held that "the Act[3] that secures copyright to authors guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subject".[4]

Other works.

Any work which is the result of a sufficient mental operation, such as the headings of a trade directory.—The headings under which the advertisements in a trade directory are classified are the subject of copyright, and

Headings in a Directory.

probably the collocation and arrangement of the advertisements themselves, though each single advertisement may not be.[5] A list of quotations of shares, etc., on the Stock Exchange, the compilation of which entailed labour and skill, is also a fit subject for copyright.[6]

[1] Matthewson *v.* Stockdale, 1806; 12 Ves. 270.

[2] At p. 276.

[3] 8 Anne, c. 19.

[4] Sayre *v.* Moore, 1785; 1 East., p. 361.

[5] Lamb *v.* Evans, 1893; Ch. 218; 2 R. 189; 62 L. J., Ch. 404; 68 L. T. 131; 41 W. R. 485.

[6] Exchange Telegraph Co. *v.* Gregory, 1895; *The Times*, 14th June.

Chapter V.

REGISTRATION AT STATIONERS' HALL.

Registration.

The eleventh section of the Copyright Act[1] provides for the keeping of a book of registry at Stationers' Hall, wherein may be registered the proprietorship in and assignments of the copyright in books and other subjects; and the twenty-fourth section makes registration in the manner provided a condition precedent to the commencement of any action in respect of any infringement of such copyrights. It is distinctly provided, however, that the omission to register shall not affect the copyright in a book, but only the right to sue.

Registration at Stationers' Hall is therefore not an investitive fact of copyright, nor does an omission to register act as a deprivation of the statutory right except in so far as relates to its assertion by action in the Courts. Neither does registration of a title or name give any right over that name.[2]

An entry in the register book is *prima facie* evidence of title, which is, however, rebuttable by other evidence.[3]

Publication necessary before registration

An entry made in the register of a book or other intended subject of copyright not yet in existence, through not having been published and so enabled to enjoy the statutory right, has no operative effect and gives no copyright;[4] nor can such right be obtained prior to publica-

[1] 5 & 6 Vict., c. 45.

[2] Schove *v.* Schmincke, 1886; 33 Ch. D. 546.

[3] 5 & 6 Vict. c. 45, s. 11. Graves' case, 1869; L. R., 4 Q. B. 721.

[4] Maxwell *v.* Hogg, 1867; 2 L. R., Ch. 307; 16 L. T., n. s., 133. 36 L. J., Ch. 433: 15 W. R. 467. Per Cairns, L. J.

tion.[1] There must be something in existence, outside the mere entry in the register book, which is only the indicium and description of a collateral and existent thing.[2]

The late Master of the Rolls also held that the book to which an entry relates must be a published book. Until the thing is published and given to the world it is not within the statute. That must be the meaning of the section, or how could the entry be made of the time of publication, or the name and place of abode of the publisher, that is of the person who published it? Among other particulars the proprietor is to certify the date of first publication. It would require the gift of prophecy to do that if the book were not already published.[3]

Sir William Page-Wood, V. C., was of the same opinion (where an entry had been made more than a year before the work was published), that registration in advance of publication could not give copyright. It was inconsistent with the scheme of the Copyright Act, he considered, to suffer a registration of a prospective book not yet published. The protection afforded by the Copyright Acts dated from publication, and was founded on it.[4]

But though this is so, registration need not necessarily be effected immediately on publication, nor until it is desired to take action in respect of an infringement.[5]

And in the case of a newspaper, registration of the first number after subsequent numbers have been published is valid.[6]

Registration may also be effected of such portion of a work as the person registering owns, the fact of there

[1] Jefferеys *v.* Boosey, 1854; 4 H. L. C., 815. Platt *v.* Walter, 17 L. T., n. s., 159. Dicks *v.* Yates, 1881; 18 Ch. D. 77.

[2] Per Cairns, L. J., *ibid.*, p. 133, Turner, L. J., concurring.

[3] Henderson *v.* Maxwell, 1877; 4 Ch. D. 163; 5 Ch. D. 893; 46 L. J., Ch. 891; 25 W. R. 455.

[4] Corr. News Co. *v.* Saunders, 1865; 12 L. T., n. s., 540; 11 Jur. n. s., 540; 13 W. R., 804.

[5] Warne *v.* Lawrence, 1886; 54 L. T., n. s., 371.

[6] Platt *v.* Walter, 17 L. T., n. s., 157. Dicks *v.* Yates, 1881; 18 Ch. D. 77.

being additional matter not invalidating the entry so far as it concerns him.[1]

Nor is it material if the infringement complained of took place prior to the entry being made in the register book, because registration is but a condition precedent to suing, and not to the existence of the right itself.[2]

In a case under the statute 54 Geo. III., c. 156, s. 4, it was decided that registration should have been made before piracy in order to secure the delivery up of the piratical copies, as there is no common law right in the author or proprietor of a book which is printed to the delivery up of the copies of the illegal work, and therefore such relief must be given under the provision of the statute for the protection of literary property by exercising the statutory right.[3]

The point came before Mr. Justice Fry (under the present Copyright Act in 1879), who made a similar order, that the plaintiffs in an action for infringement of copyright, not having been registered proprietors at the time when the piratical copies were printed, could not maintain their right to have such copies delivered up to them for their own benefit, under the twenty-third section of the Act of 1842.[4]

The learned judge distinguished between copyright (or the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word applies) and the right to the copies, which may be asserted by an action of detinue or trover.

The late Master of the Rolls, however, in the subsequent year, did not follow the case last cited, though it was brought directly before the notice of the Court.[5] In his opinion the twenty-third section of the Copyright Act of

[1] Chappell *v.* Davidson, 1856; 18 C. B. 194; 25 L. J., C. P. 225, 2 Jur., n. s., 544.

[2] Goubaud *v.* Wallace, 1877; 36 L. T., n. s., 704.

[3] Per Wigram, V. C., in Colburn *v.* Simms, 1843; 2 Hare. 543.

[4] Hole *v.* Bradbury, 1879, 12 Ch. Div., p. 886.

[5] Isaacs *v.* Fiddeman, 1880; per Jessel, M. R., 49 L. J., Ch. p. 412.

1842 entitled the plaintiff to have the works in question for his own benefit, whilst their destruction could not benefit anybody.

Writ may be issued on same day as registration.

So a writ in an action for the infringement of a copyright may be issued on the same day, but subsequently to the registration of the copyright infringed; and this sufficiently complies with section 24 of the Act, so as to enable the person making the registration to sue in respect of the infringement.[1]

Who may register.

By the thirteenth section of the Copyright Act it is enacted that the proprietor of a copyright may effect the entry of it in the register book.[2] Lord Justice Fry expressed the belief that a trustee in whom a copyright is vested may be registered as owner, and may sue in that character.[3] And it was held in an old case that nothing short of an absolute assignment of a copyright could entitle the assignee or any one but the author to register as proprietor.[4] Entries of partial assignments may now be made, however, in the register book.

Title of assignee by entry in register book depends upon accurate entry of assignor's title.

Vice-Chancellor Kindersley held, in 1864, that where an assignee obtains his title by entry in the register book at Stationers' Hall, a defect in the registration of the title of the assignor will render the entry of assignment invalid, and so affect the assignee's right to sue. For unless a proprietor is properly registered an assignment by means of an entry in the register can operate nothing.[5]

But prior entries immaterial to assignee by writing.

But the accuracy of registration by an original proprietor, or indeed registration by him at all, is immaterial to an assignee who takes his assignment otherwise than by entry in the register book. And in effecting registration himself it is not necessary for such assignee to

[1] Warne *v.* Lawrence, 1886; 54 L. T., n. s., 371.

[2] 5 & 6 Vict., c. 45, s. 13.

[3] Lond. Print., etc., Alliance *v.* Cox, 1891; 3 Ch. p. 303.

[4] *Ex parte* Barstow, 1854; 14 C. B., p. 631.

[5] Low *v.* Routledge, 1864; L. R., 1 Ch. 42; 33 L. J., n. s., Ch. 724; 10 L. T., n. s., 839.

trace his title through prior assignments up to the original proprietor. It is sufficient for him to enter his own title.[1]

In 1869, Mr. Justice Blackburn,[2] considering this question, under the Fine Arts Copyright Act,[3] held that it is not necessary that all or any previous assignments of the copyright of the original author shall be registered, though, by that Act, an assignee is prevented from suing for penalties before the assignment to him has been registered.[4] He pointed out the serious injustice which might result from rendering it necessary that an original proprietor, who has ceased to be proprietor (without registering), should still register [be made to register, that is], to support an assignee's title. For it might happen that he should die the day after the assignment and before registration, and then the title to the copyright [in the assignee or any one] would be gone.[5]

Persons who have got their property by assignment, Mr. Justice Mellor said, must register if they wish to sue or take advantage of the Act; but an omission to register will not deprive them of their proprietorship.[6]

Mr. Justice Hannen concurred. The original proprietor, if he does not register, is only subject to the disadvantage of not being entitled to the benefit of the statute. But he can transfer the property like any other personal property.

The decision has been followed by Mr. Justice Stirling,[7] who held that the word "subsequent"[8] means "subsequent to the first entry. It is not necessary to register prior assignments."

[1] Weldon *v.* Dicks, 1878; 10 Ch. D. 247; 48 L. J., Ch. 201; 39 L. T., n. s., 928.

[2] In *re* Walker *v.* Graves, *vide infra;* Mellor *v.* Hannen, J. J., concurring.

[3] 25 & 26 Vict., c. 68, ss. 4, 5, 6.

[4] *Re* Walker *v.* Graves, 1869; L. R., 4 Q. B. 715; 20 L. T., n. s., 881; 17 W. R., 1018. His lordship, referring to Low *v.* Routledge, did not think that decision touched the question under consideration.

[5] *Re* Walker *v.* Graves, *ubi sup.*

[6] At p. 882.

[7] Troitzsch *v.* Rees, 1887; W. N. 151.

[8] Which occurs in the Act of 1862.

There is further authority for assuming that an assignee by writing may register without necessarily procuring the title or titles of his predecessor or predecessors to be entered, Vice-Chancellor Malins having held it to be sufficient to enter the name of the actual proprietor of the copyright at the time of registration, without stating who the first proprietor was, or how the copyright devolved upon the present proprietor.[1]

It may perhaps be doubted whether an assignee by writing need register at all before suing if his assignor has already done so. Chief Justice Cockburn,[2] without actually deciding the point, which was not necessary to the case, inclined strongly to the opinion that in such a case the entry of the original proprietor is enough, and that the assignee need not register. His lordship observed a distinction in the earlier sections of the Copyright Act between the name "proprietor," as applied to the person by whom the work is originally published and in whom the property originally vested, and any person who takes by assignment from him. He also took into account that the statute nowhere gives the assignee any right to insist upon having his name entered as the new proprietor, the only case in which the change of the name of the proprietor is to be made being where the statutory form of assignment is resorted to. And, even in that case, not the assignee but only the assignor can insist on the change being made on the register. To compel an assignee to so register therefore would, in his lordship's opinion, work considerable inconvenience if not injustice.[3]

How to effect registration.

The form for requiring entry for proprietorship is as follows :—

I, A. B., do hereby certify that I am the proprietor of the copyright of a book entitled Y. Z., and I hereby require you to make entry in the Register Book of the

[1] Weldon *v.* Dicks, 1878 ; 10 Ch. Div. 247.
[2] In Wood *v.* Boosey, 1867 ; L. R., 2 Q. B., 340 ; 15 L. T., n. s., 531.
[3] Cockburn, C. J., in Wood *v.* Boosey, 1867 ; *ubi sup.*, 532.

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.

Particulars have therefore to be accurately given of—

1. The title of the book.
2. The name of the publisher and place of first publication.
3. The name and place of abode of the proprietor of the copyright.
4. The date of first publication.

Title of book.

1. As to the title.—The entry must comprise the exact wording of the title, without addition or omission. So, where a title had been entered as the "Warehousemen and Drapers' Trade Journal, Failures and Arrangements," whereas the actual title was "Warehousemen's and Drapers' Trade Journal and Review of the Textile Fabrics," the registration was held to be invalid.[1]

Registration was also held to be invalid when a book was entered as an "Illustrated Book of Shop Fittings," whereas its proper title was "Illustrated Catalogue and Price List".[2] Entries made in the register, Lord Justice Lindley said, must be accurate; and if there is a title that title must be registered.

If the book has no title.

The late Lord Chief Justice, in the case last cited,[3] considered the possible question as to how a book could

[1] Collingridge *v.* Emmott, 1887; 4 T. L. R. 100; per Kay, J.
[2] Harris & Another *v.* Smart, 1889; 5 T. L. R. 594.
[3] *Ibid.*

be registered that had no actual title. His inclination was to think that in such circumstances a statement of that fact, together with a description of the book, would be sufficient for the purposes of registration.

Publisher's name and address.

2. The name of the publisher and place of first publication.—By this is meant the name and place of abode of the first publisher.[1] It is unnecessary to give the name of every partner in the firm. The name by which a firm is known is a sufficient description.[2] This rule was followed by Vice-Chancellor Bacon,[3] in 1883, on the ground that everybody may ascertain for himself how far the right of a person claiming from or under the first publisher may be successfully challenged.

Proprietor's name and address.

3. The name and place of abode of the proprietor of copyright.—This means the person who is proprietor at the time the registration takes place.[4] Vice-Chancellor Malins recognised the materiality of knowing who the original publisher was, but considered that it mattered to no one who was the first proprietor. The proprietor at the time of registration is what is required by the statute. Neither is it necessary to show how the copyright devolved upon the person who is proprietor at the time of registration.[5]

For the address of the proprietor of the copyright it will be sufficient to give such an abode as will permit of his being communicated with,[6] such as the address of his publishers.

Date of first publication.

4. The date of first publication.—The exact day must be given,[7] so that where an entry was made describing

[1] Per Malins, V. C., in Weldon *v.* Dicks, 1878; 10 Ch. Div. 252.

[2] Thus, perhaps, somewhat relaxing the rule laid down in Low *v.* Routledge, 1864; 10 L. T., n. s., 838, where the Vice-Chancellor Kindersley held an entry to be fatal which described Messrs. "Sampson, Low, Son & Co." as "Sampson, Low, Son & Marston".

[3] Coote *v.* Judd, 1883; 23 Ch. Div. 727.

[4] Per Malins, V. C., in Weldon *v.* Dicks, 1878; 10 Ch. Div. 253.

[5] *Vide sup.* p. 36 *et seq.*

[6] Lover *v.* Davidson, 1856; 1 C. B., n. s., 186.

[7] Page *v.* Wisden, 1869; 20 L. T., n. s., 435. Collette *v.* Goode, 1878; 47 L. J., Ch., 370.

the date of publication as "25th of May" when it actually was 23rd of May, the registration was held to be bad.[1]

And similarly, to state only the year,[2] or month,[3] is not a sufficient compliance with the statute. For the object of entering the time of first publication is that people may know when the statutory term of forty-two years will end.[4] No notice, however, is taken of a portion of a day; except in so far that the registration must actually precede the issue of the writ.

Unnecessary details will not invalidate necessary ones which are correct.

If certain portions of the forms of registry are, in a particular case, unnecessary and unmeaning, the introduction of them will not affect those portions of the register which are correct.[5]

Registration of periodicals.

When a work is published periodically or in parts, the registration of the first of those parts will entitle the proprietor of the copyright in it to all the benefits of registration[6] [as if every portion had been registered]. But the first number of a periodical must be actually published before registration; and registration before publication will not acquire copyright, neither will such registration have a valid effect when the first number comes to be published.[7]

If the first number is duly registered in pursuance of section 19 of the Copyright Act, the proprietor of the periodical is entitled to restrain the publication without his consent in a separate form of a serial published in successive numbers of the periodical, the

[1] Low *v.* Routledge, 1864; L. R., 1 Ch. 42; 10 L. T., N. S., 840; and other cases cited below.

[2] Wood *v.* Boosey, 1867; L. R., 2 Q. B. 355; 36 L. J. Q. B. 103; 15 L. T. n. s., 531.

[3] Collingridge *v.* Emmott, 1887; 4 T. L. R. 99. Mathieson *v.* Harrod, 1868; L. R., 7 Eq. 270.

[4] Per Kay, J., in Collingridge *v.* Emmott, *ubi sup.*

[5] Fairlie *v.* Boosey, 1879; L. R., 4 App. Cases 711.

[6] 5 & 6 Vict., c. 45, s. 19. Dicks *v.* Yates, 1881; 18 Ch. D. 76, 50 L. J., Ch. 809, 44 L. T., N. S., 660. Bradbury *v.* Sharp, 1891; W. N. 143.

[7] Henderson *v.* Maxwell, 1877; 4 Ch. D. 163; 5 Ch. Div. 892.

copyright of which belongs to him under section 18, although neither the serial itself nor the number of the periodical containing its commencement has been separately registered.[1]

The effect of duly registering the first number of a periodical as provided for in section 19, is the same in all respects as if the entire contents of all the successive numbers, including future and unpublished ones, had been registered at the same time. In a comparatively recent case the first number of a story to be published in parts was duly registered; but after several chapters had been separately published in England, the story, with the author's permission, was published in numbers in America; the complete story being published there before portions of it had appeared in England. The assignee of the English copyright was permitted to restrain the American publisher from publishing in England.[2] Lord Justice Cotton found the registration to be in strict accordance with section 19 of the Act, which gives all the benefits of registration to the proprietor entering the first number in the register book. If the entire parts are published as one whole, it is sufficient to register the publication of the first part as that of the whole.[3]

Registration of subsequent editions.

A subsequent edition of a work may be:—

1. Actually or substantially a reprint of the first edition; or,
2. Partly a reprint and partly new; or,
3. Altogether a new work.

1. Substantially a reprint.

1. When a new edition is in fact or is substantially a reprint of the first edition which has already appeared, it will not require further registration if an entry has already been effected in respect of the first edition; and if no such entry has been effected, and it is desired to regis-

[1] Henderson *v.* Maxwell, 1876; 4 Ch. Div. 163.
[2] Reid *v.* Maxwell, 1886; 2 T. L. R. 790.
[3] Reid *v.* Maxwell, 1886; 2 T. L. R. 791.

ter, the date of publication (first publication, that is) should be entered as the date of the publication of the first edition.[1] For a reprint of a book that has been already published is not a book in which there can be any copyright as distinguished from the original work.[2] If it could be so, the term of statutory protection over a given work could be indefinitely prolonged by the republication and re-registration of reprints of it.

2. A reprint in part.

2. When a new edition is in part a reprint, the other portions being new, and the first edition of the work has been duly registered, a further registration will be required to cover the new portions; and the date of publication will be correctly described by stating the date of the new edition. For each registration will be a compliance with the Act *pro tanto*.[3]

If the first edition of the work has not been already registered, two entries will be necessary: one, in respect of those portions which appeared in the first edition, the date of which will be that of the first publication of the first edition; and another, in respect of those portions that are new, the date of which will be that of the new edition.

3. When altogether new.

3. When a new edition is in effect a new work, and not a reprint of a former edition or work, registration of it may be effected as if it were a new work, and the date of publication will be the date of the new edition.[4]

Map, separate or part of a book.

The proprietor of the copyright in a map, whether forming part of or published independently of a book, is under a similar disability to maintain a suit in respect of any infringement of his copyright until he has registered at Stationers' Hall in terms of the statute.[5]

[1] Thomas *v.* Turner, 1886; 33 Ch. Div., 292.

[2] Cotton, L. J., in Thomas *v.* Turner, *sup.*, 298.

[3] Per Lindley, L. J., in Thomas *v.* Turner, *sup.*, 299.

[4] Per Lopes, L. J., in Thomas *v.* Turner, *sup.*, 299.

[5] Stannard *v.* Lee, 1871; L. R., 6 Ch. 346, before James and Mellish, L. J. J., reversing the decision of Malins, V. C.

Before the Copyright Act of 1842 included them in the term "book" maps were not within the statute which gave copyright to books, but were governed by the law of copyright of artistic works.

Alterations in register book.

The fourteenth section of the Copyright Act provides for applications being made to the Court by any person who may deem himself aggrieved by an entry in the register book at Stationers' Hall, which has been made under colour of the Act. After hearing such application the Judge will make an order expunging, varying, or confirming the entry; and the registering officer of the Stationers' Company will carry out the terms of the order on its being produced to him.[1]

Who is an aggrieved person.

An applicant under the section must lay before the Court facts showing that he is really a person aggrieved; for the wording shows that the Legislature intended to limit the class of persons who are empowered to apply,[2] and not to allow any one who thinks fit to find as many flaws as he likes in a title to a copyright, and to apply to expunge an entry or compel the registered proprietor to prove every detail connected with his title.

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 may set aside or expunge the entry.[3] Mr. Justice Blackburn did not consider it 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.

Mr. Justice Hannen laid down that 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

[1] 5 & 6 Vict., c. 45, s. 14.

[2] Per Blackburn, J., in Graves' case, 1869; L. R., 4 Q. B. 721; 20 L. T., n. s., 877.

[3] Per Blackburn, J., in Graves' case, *sup.*, 721.

would really interfere with some intended action on the part of the person making the application. For instance, if a person brought to the notice of the Court that he had a right to take copies of certain pictures, but that he was afraid to do so while the entry existed, the Court might entertain his application if they thought it made *bonâ fide*.[1] But where the application is made to raise a technical question the Court will not be likely to grant it.

Sir Alexander Cockburn, C. J., agreed[2] that where there is any question of title between the parties the Court ought not to exercise the summary jurisdiction provided for by the Act. But where there is no such question between them, and one of them can show a substantial grievance, the case is different. In the case before the Court neither party had an exclusive right to the performance of the songs which formed the subject of the entry; and the attempt of one of them, assisted by registration, to place a restraint on their performance must have the effect of lessening the number of copies sold; and this constituted a grievance which the Court could and should prevent.[3]

The jurisdiction of the Court is limited to the powers conferred by the fourteenth section of the Act, which are expressly confined to expunging, varying, or confirming the entry. An order cannot be made without consent, enlarging the rule until the trial of an issue to ascertain the right without using the entry in question as evidence.[4]

An entry which is alleged to be incorrect cannot be varied unless there is evidence to show that the alteration applied for will make it true. And failing such evidence

[1] Per Hannen, J., in Graves' case, *sup.*, p. 724.

[2] *Ex parte* Hutchins & Romer, 1878-9; 4 Q. B. D., p. 94.

[3] Cockburn, C. J., Mellor, J., concurring, in *ex parte* Hutchins & Romer, 1878; 4 Q. B. D. p. 94. Affirmed on appeal before Bramwell, Brett, and Cotton, L. J. J., 1879; 4 Q. B. D. 483.

[4] Per Jervis, C. J. (Cresswell, Crowder, and Willes, J. J., concurring), in *ex parte* Davidson, 1853; 18 C. B., p. 309, not following *ex parte* Davidson, 2 Ellis & B. 577.

the Court will be less likely still to order the entry to be expunged, as no power is given to restore it. Mr. Justice Willes thought that to induce the Court to exercise its jurisdiction under section 14, it must be satisfied that there is something unfair in the entry, by reason of misconduct on the part of the person who made it, or by some right of the applicant which has been injuriously affected thereby.[1]

Mr. Baron Parke held that it is not every one who disputes a title who has a right to call upon the Court to expunge the entry; for there is no power to restore an entry if once struck out. The Court should not grant the application unless it be clear that a plaintiff has no right to use the entry at the trial; and this is a point which ought to be settled, not on affidavits, but by an issue.[2]

Person aggrieved may be the person who made the entry.

Where the proprietors of a photograph ascertained that the entry in respect of it, which they had themselves made in the register book, was technically inaccurate, the Court permitted an order to issue varying the entry, upon application being made under section 14.[3]

Order to expunge or vary must be made by motion, and cannot be granted at the trial.

An application for the variation of the entry in the register book must be made in the manner provided by section 14, by motion or summons; and an order cannot be made at the trial of the action.[4]

Certain enactments of Copyright Act relating to registration apply to paintings, drawings, and photographs.

The several enactments of the Copyright Act, 1842,[5] relating to the keeping of a register book at Stationers' Hall, the making, varying, or expunging entries therein, are applied to works in fine art by the Fine Art Act, 1862.[6]

No appeal from Judge's order expunging entry.

In an appeal against an order of a Judge, expunging the entry of copyright in a picture at Stationers' Hall, a

[1] *Ex parte* Davidson, 1853; 18 C. B., p. 311.
[2] Parke, B., in Chappell *v.* Purday, 1843; 12 M. & W. 306.
[3] Per Williams, J., in *ex parte* Poulton, 1884; 53 L. J., Q. B., p. 320.
[4] Per Fry, J., in Hole *v.* Bradbury, 1879; 12 Ch. Div. 899.
[5] 5 & 6 Vict., c. 45.
[6] 25 & 26 Vict., c. 68, s. 5.

Divisional Court, consisting of the late Lord Coleridge, L. C. J., and Mr. Justice Wright, expressed the belief that there was no appeal, especially as under the original Act it had been twice decided[1] that there was no appeal, and none was given in terms in the later Act. At all events, they thought there was no appeal from an order of a vacation Judge to a Divisional Court.[2]

Registered owners are tenants in common.

Although the registered owners of a copyright take as tenants in common and not as joint tenants,[3] yet any one or more of them may maintain an action against a stranger for an infringement of the entire copyright.[4]

When registration not necessary.

Registration before action is only necessary in cases of infringement of such property as is protected by statute. It is, consequently, unnecessary where the infringement is of some other right—such as the right of property in a title.

[1] *Vide ex parte* Davidson, 1853; 18 C. B. 297 (*sup.*); and Chappell *v.* Purday, 1843; 12 M. & W. 303 (*sup.*).

[2] In the matter of the Registration of a Picture, "The Young Duchess," under the Art Copyright Act, 1862, 1891; 8 T. L. R. 41.

[3] Per Jessel, M. R., in Powell *v.* Head, 1879; 12 Ch. D. 686.

[4] Per Kekewich, J., in Lauri *v.* Renad, 1892; 3 Ch. 402; 67 L. T. 27. 31 L. J. Ch. 580; 40 W. R. 679.

CHAPTER VI.

AGREEMENTS AND TRANSACTIONS RELATING TO LITERARY WORKS, WHETHER PUBLISHED OR UNPUBLISHED.[1]

Unpublished work; transfer of all rights.

Purchase of a book, completed, but not published.—Assignment of the property in an unpublished work may be effected by delivery;[2] but since there will be no presumption in favour of such an assignment comprising more than a mere transfer of ownership in the thing,[3] it should be accompanied by a written expression of intention to transfer, with the manuscript, the right to publish it, and to become the recipient of all rights that shall arise and vest by virtue of such publication in the person who is proprietor of the work; as provided for in the second section of the Copyright Act, 1842, by which the word "assign" is defined to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law or otherwise.[4]

Stamp duty.

The Copyright Act provides that the transfer of proprietorship in a copyright shall be free from stamp duty if effected by entry in the register book at Stationers' Hall.[5] This can only apply to works that have been

[1] For facilities of reference some slight repetitions have been made in this chapter, so as to obviate as much as possible the necessity for cross-references, when the forms are being consulted.

[2] See p. 71.

[3] Duke of Queensberry *v.* Shebbeare, 1758; 2 Eden. Ch. Ca. 329. Thompson *v.* Stanhope, 1774; Amb. 739.

[4] 5 & 6 Vict., c. 45, s. 2.

[5] 5 & 6 Vict., c. 45, s. 13.

published, since the registration of an unpublished work is inoperative, and effects nothing.[1] It must be doubted whether the assignment of a future right can be valid;[2] and it would seem that at most it will place an equitable duty on the assigner to do what may be necessary to vest the title to the copyright in the assignee when the right arises.[3] Hence, an assignment by the author of an unpublished work of copyright in it may possibly do no more than vest an equitable title in the assignee. But a transfer of ownership in a manuscript with the intention that the transferee shall have the right to enjoy all the benefits which shall vest, on its publication, in the owner of it, is not a transfer of a future right, but only a transfer of a right to become the recipient of a right, which is known to vest, by the operation of law, in certain persons. It would appear therefore that by such a process alone can the future copyright of an, as yet, unpublished book, be strictly transferred so as to vest a legal title in the transferee.

By the Stamp Act, 1891,[4] an *ad valorem* duty of two and a half per cent. will be payable on every instrument whereby any property or any estate, or interest in any property, upon the sale thereof, is transferred to or vested in a purchaser. And a contract or agreement, under seal or under hand only, for the sale of any equitable estate or interest in any property whatsoever, is liable to the same duty as an actual conveyance or sale of the estate, interest, or property itself.

No instrument or duty on sale of manuscript with receipt for price.

The liability for stamp duty not being occasioned in the absence of an instrument, if it is desired to sell and

[1] Maxwell *v.* Hogg, 1867; L. R. 2 Ch. 307. Jefferys *v.* Boosey, 1854; 4 H. L. Cases 815; and see p. 33.

[2] Colburn *v.* Duncombe, 1838; 9 Sim. 151.

[3] Sweet *v.* Shaw, 1839; 3 Jur. 217. Leader *v.* Purday, 1849; 7 C. B. 4. Sims *v.* Marryatt, 1851; 17 Q. B. 281. Adderley *v.* Dixon, 1824: 1 Sim. & Stu. 610. Sweet *v.* Cater, 1841; 11 Sim. 579. Hodges *v.* Welsh, 2 Ir. Eq. 290; 1840.

[4] 54 & 55 Vict., c. 39, ss. 54 and 59.

transfer by delivery the property in an unpublished literary work, together with the right to publish it, for a price payable on delivery, no instrument need exist beyond a receipt in writing acknowledging payment and setting out the property which has been sold. It would seem that this can be stamped with the usual penny receipt stamp if the consideration is £2 or over, the form of the receipt being as follows:—

FORM No. I.

Author and publisher; sale of unpublished manuscript; form of receipt.

Form of receipt in a sale of unpublished manuscript.

Received from A. B. the sum of £ s. d., being the whole of the purchase money for my manuscript, C. D., together with the sole right to publish the same.

(Date) (Signed)

E. 1D. F.

Published work: transfer of copyright.

Purchase of a copyright.—Where it is intended to assign the copyright in a published work the property may be passed by entry in the register book at Stationers' Hall, which is expressly exempted from liability in respect of stamp duty by the thirteenth section of the Act.[1]

Since a copyright will not pass by delivery, and since an invoice or receipt relating to the sale of a copyright is sufficient to vest the copyright in the purchaser,[2] an assignment of copyright in a published work by means of such an instrument will apparently give rise to liability for stamp duty.

[1] 5 & 6 Vict., c. 45, s. 13. The form of assignment is given at p. 85.
[2] Lond. Printing, etc., Alliance *v.* Cox, 1891; 3 Ch. 303.

FORM No. II.

Author and publisher; sale of published work; form of receipt passing copyright.

Form of receipt in a sale of copyright in a published work.

Received from A. B., of , the sum of £ s. d., being the whole of the purchase money for all my interest in the entire copyright in C. D.

(Date) (Signed) E. F.

Agreement for payment by royalties.

Where it is arranged that an unpublished manuscript shall be sold, together with the right to publish it and to be vested with the copyright in it when that right shall arise, the consideration or price being paid to the author by way of royalty on sales, an agreement may be drawn containing some or all of the provisions set out below.[1]

FORM No. III.

Author and publisher; agreement to publish; copyright assigned.

An agreement made the day of , 189 , between A. B. (author) of and C. D. (publisher) of , whereby it is agreed and declared between and by the parties hereto as follows:—

The said A. B. (author) hereby agrees—

[1] If a definite consideration be set out in the agreement, or in any event the author or proprietor of the copyright may undertake to make entry of assignment in the register book at Stationers' Hall, as provided for by the thirteenth section of the Copyright Act, which also expressly exempts such a mode of transfer from liability to stamp duty. But whether this will relieve a collateral written instrument from *ad valorem* duty as a conveyance, *quære*.

A contract for the sale of any goods of the value of £10 or upwards, is not enforceable by action unless the buyer accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf. Sale of Goods Act, 1893; 56 & 57 Vict., c. 71, s. 4 (1).

1. To transfer and assign and hereby does transfer and assign to C. D. the entire property in an unpublished literary work, entitled E. F., together with the sole right to publish the same; to register himself as the proprietor thereof; and to enjoy all rights and advantages that shall arise and vest in him as proprietor by such publication, and all other rights and advantages whatsoever.
2. To correct the proofs of the first edition of the work, supply a full index to it, and see it carefully through the press, the cost of corrections being limited to £ s. d., and any excess over that amount being defrayed by him.
3. [If and as called upon] to revise, add to, or correct the book, as may be necessary to bring it up to date for any subsequent editions that may be issued, and correct the proofs and see each such edition carefully through the press for a fee of £ s. d., the payment of which sum shall include the purchase of the entire property in all such unpublished additions, which shall thereupon vest in C. D., together with the sole right to publish the same, to register himself as the proprietor thereof, and to enjoy all rights and advantages that shall arise and vest in him as proprietor by such publication, and all other rights and advantages whatsoever.

The proprietor of a copyright may effect alterations in the work in which it exists independently of the author of it, to whom he need not apply, and whose permission is unnecessary, provided that any alterations that may be made be clearly shown on the face of them to be alterations for which the original author of the work is not responsible.[1] Or the parties may agree that any future editions that may be called for shall be edited, etc., by the author (in which case the portion between brackets can be omitted).

4. To refrain from writing or publishing, or causing or assisting to be written or published, any other work likely to injure, compete with, or prejudice the sale of E. F., whether it be an infringement of the copyright in E. F. or not.

Copyright being the sole and exclusive right to multiply copies of a work which is a subject of it, the sale of

[1] Archbold *v.* Sweet, 1832; 1 Moo. & Rob. 162, see p. 65.

copyright confers that right upon the purchaser and no more. The position of an author to his work the copyright in which he has sold, is substantially that of a stranger who has no rights in relation to it. He will not, by the sale, be prevented from further writing upon the same subject, nor from utilising the work as he may utilise any other work in which copyright subsists, subject to the rules of fair use.

Mr. Justice O'Brien [1] entirely disapproved of the proposition that because the author of a book has transferred the copyright in it he is thereby precluded from writing another book on the same subject; and declined to lay down any such rule.

If it is desired to restrain an author from writing again, a negative covenant should be inserted. For in the absence of such a covenant in the agreement the Court will not supply it.[2]

In a case before Sir James Wigram,[3] the Vice-Chancellor's judgment restraining a subsequent writing on a similar subject is based wholly on a restrictive covenant of the kind; which is not an unlawful restraint of trade, but, on the contrary, a reasonable means of making certain businesses profitable to all concerned in them.[4] And a married woman entitled to the copyright of a work for her separate use may enter upon such a negative covenant.[5]

A rival or competing work produced in contravention of a covenant not to publish anything likely to prejudice the sale of the work assigned, need not necessarily be published under the same title nor be a piracy of the original work. It is enough if it be of such a nature as to pre-

[1] In Rooney *v.* Kelly, 1861; 14 I. R., Ch. 158.
[2] Clarke *v.* Price, 1819; 2 Wills. C. C. 157.
[3] Colburn *v.* Simms, 1843; 2 Hare. 543.
[4] Per Lord Eldon in Morris *v.* Colman, 1812; 18 Ves. 437.
[5] Warne *v.* Routledge, 1874; L. R., 18 Eq. 497.

judice the sale.[1] And a second publisher subsequently producing the work without notice of the restrictive covenant will be restrained from so publishing even after purchasing it from the author.[2] Much more will his publication of a rival work be restrained if he had notice of such a negative covenant.[3]

5. To warrant the work to be an original work and free from infringements of any other subject of copyright, and from libellous or any matter capable of giving cause of action.

The sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he, by his act, warrants the title to it.[4] But it may be shown by the facts and circumstances of the sale that the vendor did not intend to assert complete ownership, but only to transfer such interest as he might have in the chattels sold.

By the twelfth section of the Sale of Goods Act, 1893,[5] unless the circumstances in a contract of sale are such as to show a different intention, a condition will be implied on the part of the seller in the case of a sale that he has a right to sell the goods, and in the case of an agreement to sell, that he will have the right at the time when the property is to pass. A warranty will also be implied that the buyer shall have and enjoy quiet possession of the goods, and that the latter shall be free from any charge or encumbrance in favour of any third party not declared or made known to the buyer before or at the time when the contract is made.

Warranty of title.

The offer by the executor of a deceased author to sell a work, and his subsequent acceptance of the price in payment, in terms of that offer, was held to amount to an

[1] Barfield *v.* Nicholson, 1824; 2 Sim. & Stu. 1; 2 L. J. Ch. 90.
[2] *Ibid.*
[3] Warne *v.* Routledge, 1874; L. R., 18 Eq. 497.
[4] Benjamin on Sales, 631.
[5] 56 & 57 Vict., c. 71, s. 12.

express warranty of title;[1] Lord Holt taking the same view of a similar offer by a person affirming an article to be his.[2] The warranty against infringement and libel is more conveniently dealt with under the heading of indemnity (see next clause).

6. To indemnify C. D. against, and to reimburse him with any damages and taxed costs or other loss that may be incurred from proceedings in respect of the title to the work or copyright, E. F., or of any infringement by it of other subjects of copyright, or of any libellous or other matter that may be contained in it should cause of action arise after publication of the work, or should the sale of the work be prevented by any of the above causes after it has been printed.

Literary works are of such a nature that in some cases it is difficult to test either their originality or their harmlessness. The vendor may have acquired his title by assignment, and cannot place his assignee in a better position than he occupied himself. The indemnification of a purchaser against the consequences of infringement and libel is therefore reasonable.

For indemnity to be valid, purchaser must act innocently.

For the indemnity to be valid the purchaser must act innocently; for a promise to indemnify a party against an illegal act (such as the publication of a libel, knowing it to be such) will be void, as resting upon an illegal executory consideration, which will not support a contract.[3] But Lord Hobart, in the case cited, distinguished between a promise to indemnify in consideration of a promise to do an act which is unlawful and one to indemnify in consideration of the doing a thing which may be lawful, and of which the illegality is not apparent to the party doing it.

Lord Chief Justice Best said:[4] "From the inclination of the Court in *Philips v. Biggs*,[5] and from the concluding

[1] Per Lord Campbell, in Sims *v.* Marryatt, 1851; 17 Q. B. 281.
[2] Medina *v.* Stoughton; 1700; 1 Ld. Raym. 593; 1 Salk. 210.
[3] Shackell *v.* Rosier, 1836; 3 Scott 59, 2 Bing. N. C. 634.
[4] In Adamson *v.* Jervis, 1827; 12 Moore 241, 4 Bing. 66.
[5] 1659, Hardres, 164.

part of Lord Kenyon's judgment in *Merryweather v. Nixan*,[1] from reason, justice, and sound policy, the rule that wrongdoers cannot have redress or contribution from each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act".[2]

It was similarly laid down that the rule that a tort-feasor cannot recover upon a promise to indemnify him made by the person at whose request the tortious act is committed is confined to cases in which the act is of an obviously illegal character, and does not extend to those in which there is any *bona fide* doubt whatever whether, in point of law, the act is authorised.[3]

It has been held in America that an express promise to indemnify another from the consequences of an illegal act already done, and not known to be illegal at the time, is binding.[4]

The Master of the Rolls laid it down[5] that persons who are innocent disseminators of a thing which they were not bound to know was likely to contain a libel will not be liable in respect of the libel; which the late Lord (then Lord Justice) Bowen approved, with the reservation that by no means will the vendor of a publication be irresponsible for a libel contained in it if he knows, or ought to know, that it is one that is likely to contain a libel.

7. (*a*) To warrant and hereby warrants that the work E. F. has not already been printed or published.

(*b*) To warrant and hereby warrants that no other edition, except that known as X., of the work E. F. has been published; and that no copies now remain for sale on the market.

Copyright being the sole and exclusive liberty to multiply copies of a published work, the sale of a copyright will not confer upon the purchaser any right to

[1] 1799; 2 Sm., L. C. 569.

[2] Approved by Ld. Herschell, L. C., in Palmer *v.* Wick, etc. Shipping Co., 1894, A. C. 324.

[3] In Betts *v.* Gibbins, 1834; 2 Ad. & E. 57; 4 N. & M. 64.

[4] Griffiths *v.* Harderbergh, 1869; 41 N. Y. 469.

[5] Emmens *v.* Pottle, 1885; 16 Q. B. D. 354.

copies which have already been made. And the vendor of the copyright, though he will not, after the sale, be at liberty to multiply copies of the work, may, in the absence of agreement to the contrary, dispose of such copies as he may have already produced and have in his possession at the time.[1]

(*c*) To warrant and hereby warrants that no other edition, except that known as X., of the work E. F., has been published, and that all copies of it now in existence unsold shall be delivered over to C. D. [in sheet or bound] at the price of per dozen of thirteen copies.

In consideration of which the said publisher hereby agrees:—

1. To print and publish at his own risk and expense, and within months from the date of this agreement, at least one edition, consisting of copies of the work E. F. in vo size, on good paper, and bind what may be necessary from time to time in a reputable [cloth or leather] binding, all further details, including the question of bringing out further editions, being left entirely to his discretion.

Liability of purchaser to publish.

The purchaser of an unpublished work, or of a copyright, for which a definite price is paid, does not apparently, by the mere fact of his purchase, become bound to publish the work,[2] though in most cases this will in fact be done, since it is the only means of rendering the purchase remunerative.

Where the consideration for the purchase is a payment by way of royalties or profits calculated upon the actual sales which shall take place of the work when published, a duty to publish will apparently fall upon the purchaser, since without it there would be no possibility of royalties or profits arising, and the consideration would fail.

2. To advertise and offer the work E. F. for sale, deliver copies to the press, travel it, and do all that reasonably can be

[1] Taylor *v.* Pillow, 1869; L. R. 7, Eq. 418.
[2] See Hole *v.* Bradbury, 1879; 12 Ch. D. 885; per Fry, J.

done to make it known and successful. To take the risk of all bad debts that may be incurred in the sale of the work, and to warehouse and insure the entire stock, bound or in quire, at his expense, the amount of such insurance to be not less than two-thirds of the selling value of such stock of copies as may be so stored.

3. (*a*) To pay to A. B. [one-half, or one-third, or other proportion] of the net profits that may arise from the publication of the work, after deducting all expenses incurred in and connected with its production and sale together with the publisher's commission of £ per cent. as publishing fee, for office expenses, and for taking the risk of bad debts and a trade discount of £ per cent. on all disbursements in respect of printing, paper, binding, and advertising; in case of fire the account to be credited with the amount of insurance money received.

(*b*) To pay to A. B. a royalty of per cent. on the published [or trade] price of the said book on all sales actually effected in the United Kingdom, and in cases of sales actually effected abroad or in the colonies, or of foreign rights of reproduction or translation, or of plates, to pay to A. B. per centum on the amount actually received.[1]

4. (*a*) To prepare and render every months a statement of account, showing the expenditure which has been incurred in the production and sale of the said work, and the receipts arising from it during that period, and within months thereafter to remit to A. B. such amount as may be found to be due to him; and to permit him, after giving previous notice of his intention, to examine and verify or send a representative to examine and verify all books of account which show the cost of producing and selling the work as well as the number of copies which have been actually sold, and the receipts arising therefrom.

(*b*) To prepare and render every months a statement of account, showing the sales which have actually taken place during that period, and within months thereafter to remit to the said author such amount as may be due to him by virtue of the royalty on such sales hereinbefore agreed to be paid. And to permit him, after giving previous notice of his intention, to examine and verify, or send a representative

[1] See Blackwood *v.* Brewster, 1860; 23 Sc. Sess. Cas., n. s. 142.

to examine and verify, the books of account, in so far as they show the number of sales that have taken place.

In witness whereof the said parties have hereunto set their hands.

FORM No. IV.

License to publish; payment by royalty or share of profits; author retaining copyright.

License to publish; author retaining copyright.

The said author hereby:—

1. Grants to C. D. (the publisher) license to publish [one, two, or more] editions, each consisting of not more than copies of the work E. F., at the sole risk and expense of C. D., the property in the work and the copyright in it after publication being retained by the author. And undertakes not to grant any other license in respect of the same or of any similar work to any person until all copies hereby authorised to be produced, and lawfully produced under this license, shall have been disposed of.

Definite license.

When an author has granted a license to publish a particular edition [or a definite number of editions], consisting of a specified number of copies, he will not be at liberty to otherwise deal with the book while those copies remain unsold,[1] but will be bound to afford the purchaser full opportunity to realise upon the stock in relation to which the license was granted.[2]

Indefinite license.

Where the license is indefinite no restriction will be implied. The Court will not infer that any limitation was intended, unless it be expressly agreed upon. So an author granting an indefinite permission to publish will

[1] Sweet *v.* Cater, 1841; 5 Jur. 68; 11 Sim. 572; Blackie *v.* Aikman, 1827; 5 Sc. Sess. Cases, 719.

[2] The learned authors of *Bythewood and Jarman's Conveyancing* say:—It is a condition so necessarily implied in every grant of an edition of a book as to be seldom, if ever, expressed that the granter shall not create and sell a single new copy of the work until the last copy of the edition has been sold by the grantee, or, as it is expressed, until the work is out of print. Until the edition is sold off the grantee has a qualified exclusive copyright in the work, and is entitled, at least in equity, to protection from all infringements, whether by the proprietor of the reversion or by strangers. Vol. iv., p. 71, citing Sweet *v.* Cater, 1841; 5 Jur. 68.

apparently be entitled to deal further with the same work without regard to the fact that copies printed by the first licensee still remain unsold.[1] In the case cited an authoress granted a publisher a verbal license to publish her work, *How to dress on £15 a year, as a lady, by a lady*, no definite number of copies or editions being specified in that license. She subsequently permitted the same work to be published by another publisher; and upon a bill being sought to restrain her, Sir George Jessel, M. R., expressed himself as unable to see any pretence for saying that she had ever contracted not to so publish the book. It was attempted to set up that the first license to publish amounted by implication to a contract not to deal further with the work until the copies printed under it had been sold. But it was incumbent on the plaintiff to show a clear contract to this effect; and, it not being shown, he refused to import so unreasonable a term into the agreement. It was admittedly only a license at will. *Sweet v. Cater*[2] and *Sweet v. Benning*[3] were cited as authorities in favour of the plaintiff's contention.[4]

Sale of copyright for limited period.

Where a definite number of copies has not been specified, but the copyright has been sold for a limited period, the expiration of that period does not determine the purchaser's right to continue selling the unsold stock that was printed by him during that period.[5] Vice-Chancellor Wood held, in the case cited, that since the purchase of copyright carries with it the right of printing and publishing, the person who purchases it has a right to continue selling after the expiration of the term during which his right exists, the stock printed by him on his premises, during the currency of his right. The Copyright

[1] Per Jessel, M. R., in Warne *v.* Routledge, 1874; L. R. 18, Eq. 497.

[2] 1841; 5 Jur. 68; 11 Sim. 572, and *vide sup.*

[3] 1855; 16 C. B. 477; 24 L. J., C. P. 175; 1 Jur., n. s. 543 and *vide sup.*

[4] See also sect. 13 of the Copyright Act, which provides for a license to print to be in writing; also judgment of Jessel, M. R., in Leyland *v.* Stewart, 1876; L. R., 4 Ch. D. 420.

[5] Howitt *v.* Hall, 1862; 10 W. R. 38; 6 L. T., N. S., p. 350.

Acts, both that of Anne and that of the present reign, are directed against unlawful printing; and when, as in the case of a limited sale, a person has acquired the right of lawfully printing a work, he will be at liberty to sell at any time that which he has so printed.

It was suggested that by so permitting the purchaser of the limited rights to continue to sell copies after the period had ceased, and when the copyright had revested in the author, the remainder of the copyright in the author would be destroyed altogether; for any publisher could print off during his limited ownership enough copies to supply the market for all time. Sir William Page-Wood, while admitting this, considered that the limited purchaser was not likely to incur the risk of having unsaleable copies on his hand by printing an unreasonable number, and that if he did the blame lay with the author for not guarding against such a contingency.

2. Undertakes to correct the proofs of [each] edition of the work, supply a full index to it, and see it carefully through the press, the cost of the corrections in respect of each edition being limited to £ s. d., and any excess over that amount being defrayed by the author.

3. Undertakes to refrain from writing or publishing or causing or assisting or licensing the publication of any other work likely to injure, compete with or impair the sale of the work E. F. during the continuance of this license, or until the whole of the copies lawfully produced under this license shall have been disposed of.[1]

4. Warrants that the work E. F. is an original work and free from infringement of any other subject of copyright, and from libellous or any other matter capable of giving cause of action.[2]

5. Indemnifies C. D. against, and undertakes to reimburse him with any damages and taxed costs or loss that may be incurred from proceedings in respect of the publication of the work

[1] *Vide* p. 52, *sup.*; also Rooney *v.* Kelly, 1861; 14 I. R., Ch. 158. Clarke *v.* Price, 1819; 2 Wills, C. C., 157. Colburn *v.* Simms, 1843; 2 Hare 543. Morris *v.* Colman, 1812; 18 Ves. 437. Warne *v.* Routledge, 1874: L. R., 18 Eq. 497. Barfield *v.* Nicholson, 1824; 2 Sim. & Stu. 1; 2 L. J., Ch. 90.

[2] See p. 55, *sup.*

E. F., by virtue of this license, by reason of any libellous or other matter that may be contained in it should cause of action arise after publication of the work.[1]

In consideration of which the said publisher hereby—

1. Undertakes to print and publish at his own expense and within months from the date of this agreement [at least] one edition (consisting of copies) of the work E. F., in vo size, on good paper, to bind it in a reputable [cloth or leather] binding, all further details [and the question of bringing out further editions] being left entirely to his discretion.

2. Undertakes to advertise and offer the work E. F. for sale, deliver copies to the press, travel it, and do all that reasonably can be done to make it known and successful, take the risk of all bad debts that may be incurred in the sale of the work, and to warehouse the entire stock, bound and in quire, at his own expense.

3. *Clauses relating to payment, etc., may be added here as set out in previous form.*

In witness whereof the parties here, etc.

[1] See p. 55; also Shackell *v.* Rosier, 1836; 3 Se. 59; 2 Bing., N. C. 634. Adamson *v.* Jervis, 1827; 12 Moore 241, 4 Bing. 66. Betts *v.* Gibbins, 1834; 2 Ad. & C. 57; 4 N. & M. 64. Griffiths *v.* Hardenbergh, 1869; 41 N. Y. 469. Emmens *v.* Pottle, 1885; 16 Q. B. D, 354.

Chapter VII.

THE RELATIONS OF PARTIES ARISING OUT OF THE PUBLICATION OF BOOKS.

As to the half profit system and partnership.

Under the ordinary agreement that a work shall be printed and published at the risk and expense of a publisher, who, after repaying himself the outlay, undertakes to divide the profits with the author, the relation of partnership, if it exist at all between the parties, can only exist with reference to the profits or to such copies as may remain unsold after the original expenses have been recouped.[1] And it will be terminable at the instance of either party at any time when an edition of copies printed has been exhausted, and before a further edition has been put in hand.[2]

If the partnership exists solely in respect of the profits or unsold copies, those members of it will alone be liable for the expenses of producing the work who actually incurred them. The joint adventure arises from the time of the admixture of the partnership stock,[3] and each member is individually liable for the share of it which he has agreed to provide or contribute.

The position of the parties appears to be illustrated by an example put by Lord Kenyon[4] of several persons arranging to open a bank, each to bring a certain sum of money into the house as his share. It could not be con-

[1] Per Lord Justice Turner in Stevens *v.* Benning, 1855; De G. M. & G. 231; 1 K. & J. 168.

[2] Per Sir William Page-Wood, V. C., in Reade *v.* Bentley, 1857-8; 3 K. & J. 271; 4 K. & J. 656; 27 L. J. Ch., 254; 4 Jur., n. s. 82.

[3] Saville *v.* Robertson, 1792; 4 T. R. 720. See *Lindley on Partnership*, 6th edit., p. 48.

[4] In Saville *v.* Robertson, *ubi sup.*

tended, if one of them were to borrow money for his share, that all the others would be liable for it; the agency of each partner commencing with the partnership, and not before it.[1]

The profits which are agreed to be divided in transactions of this description are in fact not the true profits, or they would be shown in the books properly kept of a partnership concern; but rather an agreed method of measuring the payments which shall be made to the author of the work published. For in a true partnership, where the author supplied a manuscript work as his share of the undertaking, and the publisher provided capital for the production of it, the work would be valued and charged in the capital value of the joint adventure. The substantial object of the usual half-profit transaction is to pay the author in a specified form for his labour, this being the price of his authorship ascertainable in a particular mode.[2]

A test of an author's non-liability as a partner for expenses incurred in the production of the work is whether the publisher could have used the material—as, for example, the paper—for any other purpose than for printing the particular work in which the author is interested.[3]

[1] See Greenslade *v.* Dower, 1828; 7 B. & C. 635. Dickinson *v.* Valpy, 1829; 10 B. & C. 141. Fisher *v.* Tayler, 1842; 2 Hare. 229-230. Heap *v.* Dobson, 1863; 15 C. B., N. S. 460. Smith *v.* Craven, 1831; 1 Cr. & J. 500.

The concluding words of the Partnership Act., 1890, s. 5, make every partner's acts bind his firm if for the purpose of the business, but concludes with this reservation: "Unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner".

[2] See the judgments of Lord Gillies and Lord M'Kenzie in Venables *v.* Wood; 3 Ross, L. C., Com. Law 530. Also the judgment of Lord Ellenborough in Gale *v.* Leckie, 1817; 2 Stark. 107.

[3] Wilson *v.* Whitehead, 1842; 10 M. & W. 503.—The propriety of this decision has been doubted by Mr. Justice Wightman in Kilshaw *v.* Jukes, 1863; 3 Best. & Sm. 871; but the learned author of *Lindley on Partnership*, 6th edit., p. 211, submits that upon principle it is perfectly correct; for the publisher had in this case no real authority to buy the paper on the author's credit, and no authority so to do ought to be implied in favour of a person who knew nothing of the author or of any partnership or quasi-partnership existing between him and the publisher.

But if, previously to or contemporaneously with the purchase of goods for partnership purposes, a joint interest exist between the parties, all agreeing to share in the purchase, and one of them in consequence going into the market to make the purchase, the effect will be the same as if the names of all the partners had been announced to the seller, and each will be liable in respect of the expenses so incurred.[1]

Variation of text by assignee of copyright.

The assignee of a copyright may deal with it as he pleases, provided that he inflicts no injury on the reputation of its author. There is no law compelling a man to publish an entire work because he has copyright in the whole, nor can he be prevented from publishing extracts from such a work. The question of his right to publish the work in a mutilated form without making it clear that he has done so depends upon whether by doing so the author's reputation will be injured.[2] And the remedy of the author will be an action for damages for injury to his reputation against the publisher of the inaccurate edition of his work, falsely purporting to be executed by him.[3]

The assignee of a copyright will apparently be acting within his rights in altering, adding to or omitting from the text of the copyright work, provided that the work so altered is not put forward as the work of the original author, and that any alterations for which the latter is not responsible be plainly shown to be such.

And if a manuscript is purchased for anonymous publication, and is so published, there can be no object in restraining the purchaser of it from altering it as he pleases, since the reputation of an anonymous author cannot be injured, and it is always open for him to write correctly under his own name.[4]

[1] Per Lord Ellenborough in Gouthwaite *v.* Duckworth, 1810; 12 East. 426. Gardiner *v.* Childs, 1837; 8 C. & P. 345.

[2] Lee *v.* Gibbings, 1892; per Kekewich, J., 8 T. L. R. 773.

[3] Archbold *v.* Sweet, 1832; 1 Moo. & Rob. 162; per Lord Tenterden, C. J.

[4] Per Page-Wood, V. C., in Cox *v.* Cox., 1853; 11 Hare. 125.

The personal nature of contracts to publish prevents them from being assigned.

A contract to publish, in which no transfer is made of the copyright, is not assignable without the consent of both parties to it.[1]

In the case cited, the terms of publication, which were verbal, were that the authors should supply sketches and letterpress which the publishers would engrave, print, and publish. If the publication resulted in a loss, the firm were to bear the whole of that loss; if there were a profit, they were to pay half of it to the authors. Lord (then Mr.) Justice Fry held that the publication of the book was entrusted to the personal skill and ability of the publishers, and that it was not competent for them to pass on the right which they acquired under the agreement to a firm in which neither of them was a partner.

In *Stevens v. Benning*[2] Sir William Page-Wood, V. C., considered that it was not merely a question of an author's literary interests. In that case the publisher was to decide, amongst other things, in what shape the book was to be published, and at what price it was to be sold, and to account to the author for the sales. These considerations the Vice-Chancellor held to be peculiarly personal, and the contract to his mind bore the impression of being a personal one in all respects. "For it cannot be a matter of indifference," he said, "to an author that the assignee in bankruptcy of a publisher who is bankrupt should be at liberty to transfer the future right of fixing the price and editions of the book, of exercising the right of calling upon the author to fulfil his duty of preparing new editions, and the risk which might be incurred in conducting the sale of the book, and other benefits and obligations afforded by the original agreement, to any one that the assignee might think proper. Possibly such a transfer, if it could be unrestrictedly

[1] Per Fry, J., in Hole *v.* Bradbury, 1879; 12 Ch. D. 896; following Stevens *v.* Benning, 1854; 1 K. & J. 168; 1855; 6 D. M. & G. 223.

[2] 1854; 1 K. & J. 168; affd. on appeal, 1855; 6 D. M. & G. 223.

made, might be effected to some one not even carrying on the trade of a bookseller, as might happen in the case of an absolute sale at auction. And it must be a matter of concern to the author if the book should pass from a respectable firm, in London for example, to a bookseller residing in a remote part of the country, or other persons unable to fulfil the engagement entered into with the first publisher.[1]

What constitutes an edition.

Where it was contended that the term "edition" is not applicable to a stereotyped work, and that when a work is circulated in thousands, twenty or thirty thousand being printed at a time, each thousand cannot be properly called an edition. Sir William Page-Wood, V. C., said:[2] "Not merely in etymology, but having regard to what actually takes place in the publication of any work, an 'edition' of a work is the putting it forth before the public; and if this be done in batches at successive periods, each successive batch is a new edition; and the question, whether the individual copies have been printed by means of movable type or by stereotype, does not seem to me to be material. If movable type is used, the type having been broken up, the new edition is prepared by setting up the type afresh, printing afresh, advertising afresh, and repeating all the other necessary steps to obtain a new circulation of the work. In that case the contemplated break between the two editions is more complete, because, until the type is again set up, nothing further can be done. But I apprehend it makes no substantial difference as regards the meaning of the term 'edition,' whether the new thousand have been printed by a resetting of movable type or by stereotype, or whether they have been printed at the same time with the former thousand or subsequently. A new 'edition' is published whenever, having in his store-house a certain number of copies, the

[1] See the remarks of Lord Abinger, C. B., in Gibson *v.* Carruthers, 1841; 8 M. & W. 343.

[2] Reade *v.* Bentley, 1858; 4 K. & J. 667.

publisher issues a fresh batch of them to the public. This, according to the trade, is done, as is well known, periodically; and if, after printing 20,000 copies, a publisher should think it expedient, for the purpose of keeping up the price of the work, to issue them in batches of a thousand at a time, keeping the rest under lock and key, each successive issue would be a new 'edition' in every sense of the word."

Acts of partners after dissolution of partnership.

Where two partners have engaged in the publication of a work and its production, and have decided to discontinue their partnership, it will not be permissible for one of them to do any act by which the position of the publication will be affected in the market. When the late Mr. Charles Dickens gave notice to his co-partners to discontinue a partnership, and issued a circular and an advertisement to the effect that a new work would shortly appear "conducted by Charles Dickens," and that after a certain date he should cease to conduct *Household Words*, and that the "periodical would be discontinued," and its partnership of proprietors dissolved, an undertaking was required that the defendant should insert after the word "discontinued" the words "by him" or "by the editor," or equivalent words.[1]

An injunction was also granted to restrain the publication of a magazine as the continuation of the plaintiff's magazine when the original producers decided to discontinue their connection with it.[2]

Illegal works.

Apart from the question of indemnity and publication, the printers or publishers or any person engaged in the production of a work, who, after contracting with reference to or actually commencing to work upon it, discover that the continuation would be unlawful, will be justified in refusing to proceed any further, and may claim for what has been done.[3]

[1] Bradbury *v.* Dickens, 1859; 33 L. J. Ch. 53; 27 Beav. 53.
[2] Hogg *v.* Kirby, 1803; 8 Ves. 215.
[3] Clay *v.* Yates, 1856; 1 H. & N. 73; 25 L. J., Ex. 237; 2 Jur., N. S. 908.

"The person who lends himself to the violation of the public morals and laws of the country," said Best, C. J.,[1] "shall not have the assistance of those laws to carry into execution such a purpose. It would be strange if a man could be fined and imprisoned for doing that for which he could maintain an action at law. Every one who gives his aid to such a work, though as a servant, is responsible for the mischief of it."

No enforcement of agreement to write.

An agreement to write will not be specifically enforced.[2] But if it contain a negative covenant the agreement is one that the Court can indirectly enforce by restraining the signatory from writing for another.[3]

So where the plaintiffs had purchased the copyright of and the right to use the name of the defendant in the publication of a work, and the defendant agreed to give his whole time to their service and not to engage in any other business, the defendant was restrained from advertising a rival work.[4]

The remedy for a breach of contract to write will be at law, in an action for damages.

No action can be brought against the executors of a deceased author for the non-completion of an agreement to write a book; the undertaking being merely personal in its nature, and performance becoming impossible by the intervention of the contractor's death.[5]

No enforcement of agreement to publish.

An agreement to publish is apparently of the same description, namely, a personal contract, and not enforceable by a court of equity.[6]

[1] Poplett *v.* Stockdale, 1825; Ry. & M. 337; 2 C. & P. 198.

[2] Per Lord Eldon, L. C., Clarke *v.* Price, 1819; 2 Wills, C. C. 164 White *v.* Boby; 37 L. T., n. s. 652. Lumley *v.* Wagner, 1852; 1 De G. M & G. 604.

[3] Per Lord Eldon, L. C., Morris *v.* Colman, 1812; 18 Ves. 437.

[4] Ward *v.* Beeton, 1874; L. R. 19, Eq. 207.

[5] Per Lord Lyndhurst, C. B., and Bayley, B., in Marshall *v.* Broadhurst, 1831; 1 Tyrwhitt, 349, 350.

[6] See judgment of Knight Bruce, L. J., in Stevens *v.* Benning, 1855; 6 De Gex. M. & G. 229; also that of Sir George Jessel, M. R., in Warne *v.* Routledge, 1874; L. R. 18, Eq. 499.

The remedy is at law, in an action for damages; and the fact that the agreement was for the profits of publication to be shared is no bar, as the subject of action is not for partnership profits but for the breach.[1]

And where the publication was intended to take place in a magazine which subsequently ceased to appear, no tender of the manuscript is necessary, since publication is impossible.[2] Nor will the publisher of the magazine be at liberty to produce the articles in book or any other form than that agreed upon without the permission of the author.[3]

And the author of a contribution to a periodical who has not parted with his copyright to the proprietor of the periodical may sue an infringer before publishing his contribution in separate form.[4]

But agreement for sale of copyright can be enforced.

But when a sale of copyright forms the subject matter or part of the subject matter of an agreement, the Court has jurisdiction; and Lord Langdale, M. R., enforced such an agreement when it also included the purchase of other chattels.[5]

Action by purchaser of single edition.

It has not been distinctly decided whether the purchaser of a single edition can bring an action in his own name only for piracy. It would seem that he can, at least, recover special damages, upon the same principle that a licensee of a patent can recover damages which he proves, although he cannot sue for an infringement merely upon his title.[6]

Destruction by fire different to consumption by sales.

Where a work has been sold on terms depending upon the sales which may be effected, the reprint of it to replace copies destroyed by fire will not entitle the vendor to the remuneration which he would have received in the event of the copies being sold upon the market.[7]

[1] Gale *v.* Leckie, 1817; 2 Starkie 107.
[2] Planché *v.* Colburn, 1831; 8 Bing. 16.
[3] Planché *v.* Colburn, *sup.*
[4] Johnson *v.* Newnes, 1894; 3 Ch. 663. 1894; W. N. 129.
[5] Thombleson *v.* Black, 1837; 1 Jur. 198.
[6] See Bythewood and Jarman, 4th ed., vol. iv., 712.
[7] Blackwood *v.* Brewster, 1860; 23 Sc. Sess. Cases, N. S. 142.

CHAPTER VIII.

TRANSFER, BY ACT OF PARTIES, OF UNPUBLISHED WRITINGS, AND OF PUBLISHED WORKS WHOSE TERM OF STATUTORY PROTECTION HAS NOT EXPIRED.

Transfer of unpublished writings.

1. *Of Unpublished Writings.*—Property in a writing which has not yet been published, and to which the protection of the statute has in consequence not yet attached, is personalty, and as such is subject to the ordinary rules regulating the possession, enjoyment, and disposal of personal property.

Delivery.

So the transfer of property in an unpublished writing may be effected by delivery or by virtue of an agreement or contract concerning the sale of it for valuable consideration, or by deed.[1]

Writing is not essential to the transfer, unless the sale is of such a nature as to render written evidence of it necessary under the fourth section of the Sale of Goods Act, 1893.[2]

And an express declaration of a trust will be upheld, although there has been no consideration and no transmutation of possession; and the declaration or creation of the trust may be by parol, for the provision of the seventh section of the statute requiring writing for the declaration or creation of trusts does not relate to chattels personal.[3]

[1] *Goodeve's Personal Property*, 1st edit., p. 13. Cocks *v.* Purday, 1848; 5 C. B. 863; 17 L. J., C. P. 273; 12 Jur. 677.

[2] 56 & 57 Vict., c. 71.

[3] Per Sir J. Leach in Bayley *v.* Boulcott, 1828; 4 Russ. 347. *Goodeve's Personal Property*, 1st edit., p. 13. *Lewin on Trusts*, 9th edit., p. 52, and cases there cited.

As the second section of the Copyright Act[1] defines the word "assigns" as meaning and including "every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book," the third section expressly enacting that the copyright in a book published in its author's lifetime shall be the property of such author and his assigns, it follows that a person to whom an unpublished literary work has been transferred is the proprietor of the copyright which will arise upon its eventual publication, and that he may after publication register himself as such.[2]

The transfer of the corporeal thing, *i.e.*, the completed sheets of manuscript, before publication, vests a right of proprietorship in the transferee which is sufficient according to the plain terms of the statute[3] for the eventual attachment on publication of such further statutory rights as are conferred upon the proprietors of published literary works that are fit subjects for the enjoyment of copyright.

In 1848 Sir Thomas Wilde, C. J., delivering the judgment of the Court,[4] recognised this, holding that where there had been a valid sale of a book before publication the interest of the author became vested in the purchaser before publication, so as to make that purchaser an assignee within the meaning of the third section of the Copyright Act,[5] and to give him a good derivative title to the copyright on publication.[6]

The assignee will thus have the exclusive right to use the manuscript as he thinks proper, in as full a degree as the author himself, and may not only as proprietor of the

[1] 5 & 6 Vict., c. 45, s. 2.

[2] See Lover *v.* Davidson, 1856; 1 C. B., N. S., 182.

[3] 5 & 6 Vict., c. 45, s. 2.

[4] Cocks *v.* Purday, 1848; 5 C. B. 885; 17 L. J., C. P. 27, 30; 12 Jur. 677.

[5] 5 & 6 Vict., c. 45, s. 3.

[6] The subsequent case of Jeffereys *v.* Boosey, *ubi sup.*, does not seem to have overruled Cocks *v.* Purday on this particular point.

work secure the copyright therein by publication, but may prevent its publication by others, including the author.[1]

Such a method of transfer should be accompanied by circumstances which leave no uncertainty regarding the intention of the parties to assign not only the property in the corporeal thing, the manuscript, but also the right to become vested with such future rights as shall arise in relation to it. For such intention cannot be inferred from the possession of the manuscript alone, even if there be but a single copy of it in existence.[2] The right to print and publish being a right detached from the manuscript does not necessarily go with it. And the transfer of a manuscript may be subject to limitations, express or implied, property in such manuscript not being distinguishable from any other personal property, and being governed by the same rules of transfer and succession, and protected by the same process, and enjoying the benefit of all the remedies accorded to other personal property so far as applicable.[3]

Delivery insufficient to pass publishing rights.

In the absence of circumstances denoting an express intention to assign all rights, including that of publishing, and so securing copyright in the writing which is the subject of the transfer, the authorities support the proposition that no presumption will arise in favour of a transfer of such further rights, or of any right beyond that concerning the mere property in the paper on which the written characters are traced.

In the case of the Earl of Clarendon's *History of the Reign of Charles II.*, the earl had, it was alleged, delivered the original manuscript to the defendant's father, that he might take a copy thereof and make use of the same as he should think fit. A copy was accordingly taken, and thirty-three years afterwards was published.

[1] See *Bythewood v. Jarman*, vol. iv., p. 705.

[2] Duke of Queensberry *v.* Shebbeare, 1758; 2 Eden. Ch. Ca. 329.

[3] Opinion of the Court, per Allen, J., in Palmer *v.* De Witt (Amer.), 1872; N. Y. 47, p. 538.

The Lord Keeper continued an injunction, saying "that it was not to be presumed that Lord Clarendon, 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".[1]

So it was held that the delivery of manuscript by an author to a printer did not divest the copyright from the author, but only authorised the publication of an edition.[2]

And in an American case the Court considered that the gift of a copy of a manuscript was no more a transfer of the right of first publication than the gift of a printed copy would be an assignment of copyright.[3]

Letters.

The rule has long been recognised in relation to letters, an early application of it being that in which the letters of the Earl of Chesterfield to his son had been published by the widow of the latter.[4] "The widow had no right," Lord Apsley, C., said, "to print the letters without the consent of Lord Chesterfield or his executors. . . . Lord Chesterfield, when he . . . said she might keep them, did not mean to give her leave to print and publish them."[5]

Lord Hardwicke, upon another occasion, said:[6] "Another objection has been made by the defendant's counsel, that where a man writes a letter, it is in the nature of a gitt to the receiver; but I am of opinion that it is only a special property in the receiver; possibly the property in the paper belongs to him, but this does not give a license to any person whatsoever to publish them to the world; for at most the receiver has only a joint property with the

[1] Duke of Queensberry *v.* Shebbeare, 1758; 2 Eden. Ch. C. 330.

[2] See Knaplock *v.* Curle; Vin. Ab. Books, 3, p. 278.

[3] Bartlett *v.* Crittenden, 1849; 5 M'Lean (Amer.) 41.

[4] Thompson *v.* Stanhope, 1774; Ambler, p. 739.

[5] See also Forrester *v.* Waller, 1741; 4 Burr. 2331; 2 Bro. P. C. 138. Webb *v.* Rose, 1732; 2 Bro. P. C. 138.

[6] In Pope *v.* Curl, 1741; 2 Atk. 242.

writer". And the doctrine was recognised and acted upon by Lord Eldon in 1818.[1] The jurisdiction to restrain the publication of letters is founded on a right of property in the writer,[2] which must be taken to mean either the joint right of property with the receiver in the actual manuscript,[3] or a right of property in the subject matter alone, as delineated or expressed by the manuscript, which appears more consistent with the view of Lord Mansfield, who described it as an incorporeal right to print a set of intellectual ideas or modes of thinking communicated in a set of words and sentences and modes of expression, and equally detached from the manuscript or any other physical existence whatever;[4] and with the decision of Sir William Erle, L. C. J.,[5] who held that the receiver of a letter has a sufficient property in the paper on which it is written to entitle him to maintain detinue for it, even against the sender, should it have come into the hands of the latter again without an intention to retransfer the property in it.

The elaborate distinction, drawn by Sir Thomas Plumer,[6] between a letter that is and one that is not entitled to be described as a literary work has fortunately not been followed. For it is unnecessary to go outside the simple doctrine of property in the writer; not indeed in the paper which he has parted with, but in the subject matter of the writing with which it deals, the property in which will not pass to a transferee of the mere manuscript without a definite intention to also assign further rights connected with it.[7]

[1] Gee *v.* Pritchard, 1818; 2 Swanst. 425. See also ——— *v.* Eaton, 1813; cited in 2 V. & B. 23. Dr. Paley's case, *ibid.* Earl of Granard *v.* Dunkin, 1 Ba. & Be. 209. Macklin *v.* Richardson; Amb. 1770 694.

[2] Gee *v.* Pritchard; 2 Swans. 402.

[3] As suggested by Lord Hardwicke in Pope *v.* Curl, *sup.*

[4] Millar *v.* Taylor, 1769; 4 Burr. 2396.

[5] In Oliver *v.* Oliver, 1861; 11 C. B., n. s. 139.

[6] In Percival *v.* Phipps, 1813; 2 V. & B. 19.

[7] See cases cited, *supra*.

Assignee's right to alter unpublished manuscript.

The assignment of an unpublished manuscript may be subject to qualifications as to the right of the assignee to make alterations in it.[1] In the case cited Sir William Page-Wood, V. C., considered the question, how far a party who had purchased a manuscript has a right to alter it and produce it, anonymously, in a mutilated form, and how far, in a case in which the property has completely passed, it is to be assimilated to a case of goods sold and delivered, and thenceforward in the complete dominion of the purchaser. He recognised that a qualified contract could be made, as to the shape and form of publication.[2] But in the absence of such a contract, either express or implied, reserving to the author a qualified copyright, the purchaser of a manuscript intended for anonymous publication is at liberty to alter and deal with it as he thinks proper.[3]

The author, in this case, had written a legal essay, which was to be published by the purchaser of it under the name and as a portion of a book written by the latter. Any alterations that might be made could not therefore reflect upon the author of the essay, who was not held out as being its author.

The proprietors of a newspaper were similarly not restrained from altering articles after revision by the editor.[4]

A reservation that a manuscript will be published in the form in which it is delivered over by its author would probably be implied where publication is to be made under the author's name, and the work is to be held out to the world as his. And where an express reservation to that effect is made, the work must without doubt be published in the form agreed upon.[5]

[1] Cox *v.* Cox, 1853; 11 Hare 118.
[2] *Ibid.*, *sup.*, p. 125.
[3] *Ibid.*, *sup.*, 118.
[4] Crookes *v.* Petter, 1860; 3 L. T., N. S., 225.
[5] Per Tindal, C. J., Planché *v.* Colburn, 1831; 8 Bing. 14.

2. *Of Copyright Works* (A) *By Writing.*—The author of a literary work or composition has by law a right to the first publication of it. He has a right to determine whether it shall be published at all, and if published, when, where, by whom, and in what form. This exclusive right is confined to the first publication. When once published it is dedicated to the public, and the author has not, at common law, any exclusive right to multiply copies of it or to control the subsequent issue of copies by others. The right of an author or proprietor of a published literary work to multiply copies of it to the exclusion of others is the creature of statute.[1] Transfer of copyright works.

The Copyright Act[2] provides for the assignment of the right which it creates in the author of a published literary work which is a proper subject of copyright in two ways only: (1) by making entry of such assignment, and of the name, and place of abode of the assignee thereof, in the form given in that behalf in the schedule to the Act, on payment of the sum of five shillings; when such an assignment so entered will be effectual in law to all intents and purposes whatsoever without being subject to any stamp duty, and will be of the same force and effect as if it had been made by deed;[3] and (2) by the fact of employment by the conductor of a periodical work of an author who writes for it on the terms that the copyright in his writing shall belong to the employer. In such case the copyright vests in the employer *de facto*, without further transfer. Both methods are treated more fully hereafter.

Where an assignment is not made by entry in the register book at Stationers' Hall it seems that it must be in writing, though not necessarily by deed.[4] Must be in writing.

In the opinion of the late Master of the Rolls, though no judicial interpretation had been put upon the thirteenth

[1] Palmer *v.* De Witt, per Allen, J., 1872, 47 N. Y. p. 536; Jeffereys *v.* Boosey, 1854; 4 H. L., c. 815; 24 L. J., Ex. 81; 1 Jur., n. s. 615; 3 C. L. R. 625.

[2] 5 & 6 Vict., c. 45, s. 13.

[3] *Ibid.*

[4] Leyland *v.* Stewart, 1876; L. R., 4 Ch. D. 420.

section of the Copyright Act, yet all the decisions as to assignments of copyright being in writing under the Act of Anne[1] apply to the later statute. Under the old Act it was established by a series of decisions, that as the consent in writing of the proprietor was required to the printing of any book by any person, the assignment, which was a greater thing, must be in writing also.[2] The provisions of the old Act, as to "consent in writing," are re-enacted by section 15 of the Copyright Act. So upon the principle of these decisions, an assignment of a copyright now, unless made by entry at Stationers' Hall, must be in writing, and an assignment not in writing is not sufficient.[3]

The statute of Anne was, like that of 1842, without any provision that an assignment of copyright should be in writing; and it was argued that the absence of such a provision, when writing was expressly made necessary to the granting a license to print, was fair ground for the presumption that the statute would have provided for writing in the case of assignment had it been so intended.[4] But in Lord Ellenborough's opinion the conclusion was irresistible that an assignment must be in writing, since the statute had required the written consent of the proprietor for the printing or reprinting of any book by another person;[5] for if the license, which is the lesser thing, must be in writing, *d fortiori* the assignment, which is the greater, must also be.

The decision was followed by Sir John Bayley, delivering the judgment of the Court in *Clementi v. Walker*, 1824,[6] and by Sir Thomas Wilde, C. J., in *Davidson v. Bohn*, 1848,[7] and by the Court in *Cumberland v. Copeland*.[8]

[1] 8 Anne, c. 19.
[2] Power *v.* Walker, 1814; 3 M. & S. 7.
[3] Per Sir George Jessel, M. R., Leyland *v.* Stewart, *sup.*
[4] Power *v.* Walker, 1814; 3 M. & S., p. 8, 4 Camp. 9.
[5] *Ibid.*, *sup.*, p. 9.
[6] 1824; 2 B. & C. 865.
[7] 1848; 6 C. B. 459.
[8] 1862; 7 H. & N., p. 126.

The writing need not be under seal. The opposite view had been suggested by Chief Justice Tindal,[1] and under the former statute; but a deed cannot now be considered necessary for a valid assignment of copyright,[2] although the wording of the thirteenth section of the Copyright Act seems to have taken it to be so.[3]

But not necessarily under seal.

Since the statute 54 George III., c. 156, there has been no necessity for the writing to be attested. Lord Wensleydale said:[4] "I think that the opinion of the six judges in the case of *Jeffereys v. Boosey* was correct, that since the statute of 54 George III., c. 156, there is no occasion to have an assignment in writing of a copyright executed in the presence of two witnesses". And again: "I think that the receipt in writing for the price of the copyright would operate as an effectual assignment".[5]

Under the statute of Anne it was clearly established that the proprietor of a copyright could not give consent to the publication, except in writing attested by two witnesses. This being the case with the smaller right, it was held that an assignment, which is in the nature of a perpetual license, should be in writing;[6] and in a later case,[7] on the same reasoning, it was held that the assignment must also be attested by two witnesses.

The statute 54 George III., c. 156, was then passed, which simply enacted that the consent must be in writing, all reference to attestation being omitted. After that Act a written consent to publish has been treated as valid without attestation; and so it followed that an unattested assignment was also valid.[8]

[1] In De Pinna *v.* Polhill, 1837; 8 C. & P.

[2] Per Wightman, J., in Jeffereys *v.* Boosey, 1854; 4 H. L. C. 891.

[3] 5 & 6 Vict., c. 45, s. 13.

[4] In Kyle *v.* Jeffreys, 1859; 3 Macq. 617.

[5] *Ibid.*, p. 617.

[6] Power *v.* Walker, 1814; *sup.*

[7] Davidson *v.* Bohn, 1848; 6 C. B. 456.

[8] Per Erle, C. J., the other Judges concurring: Cumberland *v.* Copeland, 1862 (reversing the judgment of the Court of Exchequer); 7 L. T., n. s. 335; 1 H. & C. 194; 31 L. J., Ex. 353; 9 Jur., n. s. 253.

Right must exist to be transferred.

Sir Lancelot Shadwell, V. C., held, in 1838,[1] that an instrument assigning the copyright of a work not yet in existence is without effect. An assignment to pass the copyright must be made of the completed work, that is, of an existing thing.[2]

In the following year the Vice-Chancellor, in another case,[3] expressed the belief that when a plaintiff has agreed with a defendant that the latter shall write something which the former publishes, be, the plaintiff, cannot have copyright at law, though he probably has in equity. For an agreement to prepare a work for the plaintiff cannot pass the copyright in it if non-existent, since no assignment can be made of a future right.[4]

It was similarly held, in 1849,[5] that an agreement in writing, not under seal, for the sale of a copyright, and undertaking to execute (when called upon) a proper assignment, did not operate as an assignment so as to render inoperative a subsequent regular assignment.

An assignment by an author to trustees, subject to a life interest in himself, of the copyright in certain books, and the copies of them then on hand, on trust for his son, was held to pass copies printed after the date of the deed in the lifetime of the assigner.[6] But an agreement to assign the copyright in a work, and undertaking to execute an actual assignment at a future time, has been held to vest an equitable title in the future assignee, so that a court of equity will decree the person so undertaking to specifically perform the agreement, and to concur in an entry at Stationers' Hall, so as to give the assignee a clear legal title to the copyright.[7]

[1] Colburn *v.* Duncombe, 1838; 9 Sim. 151.

[2] See also Leader *v.* Purday, 1849; 7 C. B. 4.

[3] Sweet *v.* Shaw, 1839; 3 Jur. 217.

[4] Per Shadwell, V. C., at p. 219.

[5] Leader *v.* Purday, 1849; 7 C. B. 4.

[6] Rippon *v.* Norton, 1839; 2 Beav. 63.

[7] Sims *v.* Marryatt, 1851; 17 Q. B. 281. Adderley *v.* Dixon, 1824; 1 Sim. & Stu. 610.

The fact that an agreement for the purchase of a copyright also includes an undertaking to purchase other chattels will not prevent a decree from issuing for the specific performance of the undertaking to purchase the copyright. Where a copyright formed a part of the subject matter in respect of which relief was sought, Lord Langdale was of opinion that a court of equity had jurisdiction, even though other matters should be mixed up with it.[1]

An equitable assignee may obtain an injunction to prevent the improper publication of the work by others.[2]

Vice-Chancellor Shadwell considered a case in which certain writers had been engaged to supply reports of cases to the plaintiffs, who claimed copyright in them. While declining to admit that an agreement to write a work for another gives copyright at law in it to that other, since nothing can pass at law except that which actually exists, the Vice-Chancellor recognised an equitable right as existing in the plaintiffs, who were entitled to protection in that right by injunction.[3]

In the Irish Rolls Court it was held by the Master of the Rolls in an old case that the Court would interfere by injunction to protect the copyright of the assignee of the author, though it appeared that at the time of the alleged piracy there was not an assignment in writing, and the assignee had a merely equitable title.[4]

The Court also disregarded a verbal permission from the author to infringe the copyright given after he had parted with his equitable title for valuable consideration, and it had appeared upon the title page of his work that it was printed for the equitable assignee of the copyright.[5]

Lord Eldon recognised the right of the Court of Chan-

[1] Thombleson *v.* Black, 1837; 1 Jur. 198.
[2] Sweet *v.* Cater, 1841; 11 Sim., p. 579; 5 Jur. 65.
[3] Sweet *v.* Shaw, 1839; 3 Jur. 219.
[4] Hodges *v.* Welsh, 1840; 2 Ir. Eq. 290.
[5] Hodges *v.* Welsh; *sup.*

cery to interfere to protect copyright from piracy at the suit of plaintiffs who appear to have a good equitable title, even though it should not be quite clear that their legal title is complete.[1]

But a mere verbal agreement to part with a copyright will not now vest an equitable title in the assignee, or will at least be void as against an actual subsequent assignment to some one else in writing. Thus, where the author of a song, who agreed verbally with S. to part with his copyright, and subsequently by instrument in writing assigned it to L., it was held that the title of L. must prevail, and that he could sustain an action to restrain S. from infringing his copyright.[2]

As to what amounts to a sufficient writing to effect a valid assignment of copyright.

No particular form is necessary in a written assignment of copyright. An invoice written by the painter of a picture in the following terms was held to operate as an assignment of copyright in it :—

"Messrs. K. & Co., debtors to Mr. N. E., for pastel picture and entire copyright 'On the Threshold,' £52 10s.".

Lord Justice Fry held this to be the correct operation of that instrument; it not appearing that any further assignment in writing was intended to be executed.[3]

In the same case the question of a second transfer was considered. The following portion of a letter, written by the admitted proprietors of the copyright, and recapitulating previous letters, was the instrument by virtue of which it was contended that the copyright had passed :—

"For 55,000 copies of 'The Bride' [style of reproduction described], price £13 9s. per 1000 copies, which price includes sole and entire copyright nett; 5000 copies not later than September, 1890; balance 50,000 copies not later than November 15, 1890. Picture and frame to become your property for an extra sum of £17, we to insure and take all risks of picture during time of progress of work. Terms of payment: bills at five, six, and seven months from date of delivery of goods."

[1] Mawman *v.* Tegg, 1826; 2 Russ. 385.

[2] Per Jessel, M. R., in Leyland *v.* Stewart, 1876; L. R., 4 Ch. Div. 420.

[3] London Printing and Publishing Alliance, Limited, *v.* Cox, 1891; 3 Ch. 303.

"The question is," Lord Justice Fry said,[1] "whether the copyright passed on the sending of that letter. The contract contained in that letter dealt with three things. It dealt with the picture itself, it dealt with the copyright in the picture, and it dealt with the lithographic copies which were to be produced by Messrs. K. The picture passed at once. I think there can be no doubt about that. The intention of both parties was that the picture should pass at once, and that view is confirmed by the fact that there is an express stipulation with regard to the risk of the picture and the insurance of the picture being assumed by Messrs. K. Of course if it had not passed it would still have been at their risk, and it would have been their duty to keep it until the time came for delivering it over. Therefore that stipulation appears to me to be strong to show what I think the rest of the contract would also imply, namely, that the picture passed on the execution of the instrument. The copies of course would pass on delivery, and not until delivery. They were not in existence at the date of the contract. When, then, did the copyright pass? In my opinion it passed with the picture."[2] Nothing further remained to be done with the copyright. There was no condition precedent to its passing. It was a sale on credit, and in the view of Lords Justices Fry and Lopes[3] the letter operated to transfer the copyright at once.

In an old case which came before the Court in 1838, Vice-Chancellor Shadwell held that a written acknowledgment of payment for the entire copyright which went on to say that the author would deliver a regular assignment to the purchaser whenever called upon to do so, was nothing more than an agreement to assign, "which is widely different from an actual present assignment".[4] But the case last cited was decided before the expression

[1] At p. 303. [2] *Ibid.*, 304. [3] Lindley, L. J., *dissentiente.*
[4] Per Shadwell, V. C., in Colburn *v.* Duncombe, 1838; 9 Sim. 155.

of opinion of the six judges in *Jefferey̆s v. Boosey*, 1854, to the effect that attestation by two witnesses was unnecessary in an assignment from and after the statute 54 Geo. III., c. 156. Neither does that statute appear to have been referred to.

The same applies to the decision of Mr. Justice Abbott in a previous case,[1] tried in the fifty-eighth year of George III., in which a receipt in writing for the consideration of the purchase of the copyright was held to be insufficient to operate as a transfer without any further writing.

Lord Wensleydale, in 1859, shortly after the decision in *Jefferey̆s v. Boosey*, recognised that a receipt in writing for the price of a copyright would operate as an effectual assignment.[2]

In another case a written receipt was given by Mr. Wilks, a dramatic author, who had written a drama by arrangement, and with some subsequent assistance from the purchaser in the following terms :—

> "Received this 30th day of January, 1836, of Mr. Lawrence Levy, the sum of four pounds fifteen shillings, account of fifteen guineas, for my share, title and interest, as co-author with him in the drama intituled 'The King's Wager,' balance of fifteen guineas to be paid on assigning my share to him".

The question of the effect of this instrument came before the Court in 1871, in a suit to restrain an alleged infringement of the copyright, Mr. Justice Byles remarking: "The memorandum on the receipt of Wilks did not purport to convey his legal interest, and conveyed no equitable interest; for it was an executory contract on a condition never performed". And in this Mr. Justice Montague Smith concurred.[3]

Transfer of copyright works. (*b*) By registration.

Of Copyright Works (B) *By Entry in the Register Book of the Stationers' Company.*—Section 13 of the Copyright Act[4] enables every registered proprietor to assign his

[1] Latour *v.* Bland, 1818; 2 Stark. 384.
[2] Kyle *v.* Jeffreys, 1859; 3 Macq. 617, *sup.*
[3] Levy *v.* Rutley, 1871; L. R., 6 C. P. 523.
[4] 5 & 6 Vict., c. 45.

interest or any portion of his interest in a published work by making entry in the register book of the Stationers' Company of such assignment, and of the name and place of abode of the assignee in the form given in the schedule to the Act, on payment of five shillings. And such assignment so entered is to be effectual in law to all intents and purposes whatsoever, without being subject to any stamp or duty, and of the same force and effect as if it had been made by deed.

The form of entry of an assignment provides for details being registered regarding the date of the entry, the title of the book the subject of the transfer, and the names of the assigner and assignee of the copyright.

It is a mere alteration of details to show the transfer which is desired to be made from the person already registered as "proprietor of the copyright" to his assignee. From the form and particulars of the schedule of assignment and the reference in it of the original entry, it must be taken that the Act assumes a previous entry of the original proprietorship to have been made, though this is not expressly provided for in the thirteenth section.[1]

The form is thus given in the schedule to the Act.

FORM No. V.

Form of entry of assignment of copyright in any book previously registered.

Date of Entry.	Title of Book.	Assigner of the Copyright.	Assignee of Copyright.
	[Set out the title of the book, and refer to the page of the registry book in which the original entry of the copyright thereof is made.]	A. B.	C. D.

[1] See also p. 38, *sup*, *et seq*.

The assignment is made ready for registration by an expression of concurrence, signed by the assigner in the form provided,[1] requiring entry of the assignment to be made. It is thus given in the schedule.

FORM No. IV.

Form of concurrence of the party assigning in any book previously registered.

I, A. B., of , being the assigner of the copyright of the book hereunder described, do hereby require you to make entry of the assignment of the copyright therein.

Title of Book.	Assigner of the Copyright.	Assignee of Copyright.
Y. Z.	A. B.	C. D.

Dated this day of 18

(Signed) A. B.

Although the thirteenth section, which provides for registration, expressly directs that the "place of abode" of an assignee shall be entered in the register book, the form given in the schedule contains no reference to it. There is, however, no apparent reason why the information should not be added, and it will therefore be desirable to do so. The point was raised before Chief Justice Cockburn, but not decided, in 1867.[2]

An assignment of copyright effected by entry in the register book of the Stationers' Company is expressly relieved from stamp duty.[3]

Where, in registering the proprietorship of a copyright, either the date of the first publication or the name of the publisher is incorrectly entered, a subsequent

[1] No. 4 Schedule; 5 & 6 Vict., c. 45.

[2] Wood *v.* Boosey 1867; 15 L. T., n. s. 532; 36 L. J., Q. B. 100; L. R., 2 Q. B. 343.

[3] 5 & 6 Vict., c. 45, s. 13.

assignment by entry in the book of registry is invalid.[1] Thus an entry which described the date of publication as "25th of May," when in reality it was 23rd of May, was held to be fatal; as also was the entry "Sampson Low, Son & Marston, 14 Ludgate Hill, London," instead of "Sampson Low, Son & Co.".[2]

Divisibility of copyright.

Of the Divisibility of Copyright in Relation to Assignment.—The thirteenth section of the Act,[3] in providing for both the original registration and for the assignment of "any portion of" a registered proprietor's interest in a copyright, gives recognition to a limitation of ownership or assignment of copyright by some means or other. The consideration as to what nature of limitation is contemplated by the Act is a perplexing one; but of the two forms, in which a division of the right may be effected, *i.e.*, in relation to locality or to time, the better opinion seems to favour the latter as being the only valid one.

Limitation as to locality.

Referring to locality of publication, Lord St. Leonards expressed a strong opinion[4] that "copyright is one and indivisible"; that it is "a right which may be transferred, but which cannot be divided".

"Nothing could be more absurd or inconvenient," his lordship thought,[5] "than that this abstract right should be divided, as if it were real property, into lots, and that one lot should be sold to one man and another lot to a different man." It was impossible to tell what inconvenience would arise, as there might be a separate right of publication in every county in the kingdom.

Chief Baron Pollock was clearly of opinion[6] "that in this country the proprietor of the copyright could not assign it with reference to one country,[7] to one person,

[1] Low *v.* Routledge; 1864 L. R., 1 Ch. 42; 33 L. J., Ch. 717; 10 Jur., n. s. 922; 10 L. T., n. s., 838; 12 W. R. 1069. *Vide sup.*, p. 36.

[2] *Ibid., sup.* [3] 5 & 6 Vict., c. 45.

[4] In Jeffereys *v.* Boosey, 1854; 4 H. L. C. 992. [5] P. 993.

[6] Jeffereys *v.* Boosey, 1854; 4 H. L. C. 940; 24, L. J. Ex. 94.

[7] P. 940. The meaning would be clearer if this could be taken as a misprint for "county".

and with reference to another country, to a different person, so as to give to each a right to maintain an action for infringing the copyright".

Mr. Baron Parke agreed that "a part of a copyright cannot be assigned".[1]

Non-divisibility of copyright in respect of locality can only have reference to countries; and there seems no reason to suppose that an assignment of the right, so far as it may be enjoyed in any one country, will prevent the proprietor of it assigning a similar right to another assignee for enjoyment in another country in which such a right is permitted.

The doctrine appears to be, in short, that whereas an assignment to A. of copyright in a work for the county of Kent, with an assignment of copyright in the same work to B. for the county of Cornwall, would be a division of the copyright, which is not recognised at law; an assignment to A. of copyright in the British Dominions, and to B. of copyright in the same work in a foreign country in which the right may be recognised or secured, will be good.

Limitation as to time.

The question of the meaning of the thirteenth section of the Copyright Act[2] came before the Court of Common Pleas in 1848,[3] when Mr. Justice Maule expressed the opinion that the proprietor of a copyright may assign the right for less than the full term.

If this doctrine is correct an assigner who grants a title for a limited time, by entry in the register book, as provided for by the section, or who permits his assignee to be registered, must look to that assignee to join in a further entry on the register at the expiration of the period for which the license is granted. In the event of the assignee failing to join in the re-assignment, the assigner's

[1] *Ibid.*, at p. 934. The case was decided upon the old statute, but no change has been made in the Copyright Act of 1842.

[2] 5 & 6 Vict., c. 45, s. 13.

[3] In Davidson *v.* Bohn; 1848, 6 C. B. 458.

reversion of right will be unsupportable by action until the cumbersome preliminary of varying the register be overcome.

Where it is intended to assign a limited interest, the grant of a license to print a definite number of copies or for a specified period will be attended by less risk of inconvenience.

For a purchase of copyright, even for a limited time, carries with it the right of printing and publishing; and it has been held that the assignee of a copyright for four years is entitled to continue selling, after the expiration of the four years' term, the stock printed by him under his purchase.[1] The Vice-Chancellor was not moved by the argument, that if given this liberty a publisher for a limited period might in effect destroy the reversion of the right to author altogether, by printing off during his term sufficient copies of the book to supply the demands of the market for all time. If an author desired to guard against such a contingency he might (the Vice-Chancellor thought) easily do so by specifying the number of copies that were to be printed. Moreover, the probabilities were against a publisher incurring the useless expense of printing a stock large enough to be likely to lie on his hands unsold.

Divisibility in respect of subject matter.

The subject matter of copyright is divisible. So when the late Dr. Oliver Wendell Holmes published a book containing six chapters of matter entitled to copyright, and the remainder not, it was held that protection could be claimed for the copyright portion of the book as apart from the rest; and the unauthorised publication of the six copyright chapters was restrained by injunction.[2]

The facts of the case were that the work in dispute, *viz.*, the *Guardian Angel*, had, with the exception of the six last chapters, been first (serially) published

[1] Howitt *v.* Hall, 1862; 6 L. T., n. s. 350; 10 W. R. 381.

[2] Low *v.* Ward, 1868; L. R., 6 Eq. 415.

in America, and consequently not entitled to British copyright. Before the appearance of the last six chapters the author took up a temporary residence in Canada, during which period the whole work was published in London. It was not alleged that copyright existed in any but the six chapters; as to which, however, being then first published in the United Kingdom with the author resident in British Dominions, copyright was claimed, *Low v. Routledge*[1] being relied upon, which had been decided but four years previously, upheld on appeal in 1865, and again in the House of Lords only three months previous to this case. Sir G. M. Giffard, following *Low v. Routledge* had no doubt that copyright had been acquired in the six chapters, and opposed the view that there cannot be copyright as to a part of a work only. There are, he said, numerous cases showing that where the parts of a work can be separated, there may be a copyright in any distinct part of it.

Limited assignment with respect to number of copies.

A limited assignment of copyright in equity has been recognised where the limitation has been based upon and measured by the number of copies of the work which the assignee has been authorised to dispose of.[2] By an agreement between the parties an author permitted a bookseller to print, at the cost of the latter, 2500 copies of a work, for which privilege the author was to be paid a specified sum. It was held that the bookseller was not merely a purchaser of 2500 copies of the work, but was, in equity, an assignee of the copyright in it to the extent that he was to be the sole publisher of it until the whole edition, consisting of 2500 copies, should be sold; and consequently that he could restrain by injunction a piracy of the work.[3]

[1] 1864 10 L. T., N. S. 838; 33 L. J., 717 Ch.; L. R., 1 Ch. 42; 12 W. R. 1069; 10 Jur., n. s. 922.

[2] Sweet *v.* Cater, 1841; 11 Sim. 572; 5 Jur. 68.

[3] Sweet *v.* Cater, 1841; *ubi sup.*; per Shadwell, V. C., 579.

When the owner of the copyright in a painting assigns the copyright for the purpose of producing an engraving of one size, the right of producing copies of the painting in other ways, or by engravings of other sizes, remains in him, and can be assigned by him to any other person.[1]

Limited assignment of pictures with respect to methods of reproduction.

So, the purchase of the right to engrave photographs for publication in a particular periodical will not necessarily justify the purchaser in using the illustrations in another publication.[2]

Similarly, where a sale is made of blocks for a particular purpose, or for use in a particular manner, the copyright in the drawings will not thereby pass to the assignee, who will merely enjoy a license to print them in a particular way, which is not assignable.[3]

Importance of establishing when copyright at law vests in assignee.

The moment at which a copyright becomes vested in the assignee at law is of importance as affecting the right of either party to register.

Thus in a recent case[4] an artist had arranged to sell the copyright of a picture to K. & Co., and sent them an invoice:—"For pastel picture and entire copyright, £52 10s.". K. & Co., being colour printers, had been endeavouring to deal with the picture, and a week after receiving the artist's invoice wrote to the A. Company summarising terms of sale, which had by that time been arrived at between them, both for the re-sale of the copyright of the picture and for some reproductions of it. Ten days later, again, the artist was paid and gave a receipt for the money, adding: "which payment includes all copyright, which herewith becomes the property of K. & Co., with sole rights of reproduction". Some weeks later K. & Co. registered as proprietors. Upon an alleged in-

[1] Per Fry, J., in Lucas *v.* Cooke, 1880; 13 Ch. D. 872.

[2] Per Malins, V. C., in Strachan *v.* Graham, 1867; 16 L. T., N. S. 87, 15 W. R. 467; App., 1868, 17 L. T., N. S. 457.

[3] In *re* Cooper, Cooper *v.* Stephens, 1895, 1 Ch. 567; W. N. 470.

[4] London Printing and Publishing Alliance, Limited, *v.* Cox, 1891; 3 Ch. 291; *vide sup.*

fringement by another party the A. Company sued (claiming that the assignment was a license, and, as such, did not require to be registered under the statute 25 & 26 Vict., c. 68, s. 3, under which the action was brought). It was held (1) that the artist's first invoice operated as an assignment, and vested the copyright in K. & Co. at law; (2) that the letter of K. & Co. to the A. Company a week later again effected an assignment to the A. Company; (3) that in consequence the artist's actual receipt of ten days later again did not alter the position of the parties, the copyright having already been passed; (4) that the registration of K. & Co. some weeks afterwards did not acquire for them a title to sue, they not being owners of the copyright at the time; and (5) that the A. Company, not being registered (though they were in fact the owners of the copyright), were not entitled to sue.[1]

Assignment from foreigner or Englishman resident abroad.

It had been held, in 1848, that a foreigner resident abroad or his assignee might have copyright in this country in a work first published by him here, which had not been made *publici juris* by a previous publication elsewhere.[2] And a similar decision was given by Patterson, J., delivering the judgment of the Court, in the following year.[3]

The question came before the House of Lords[4] in 1854, when (though it was decided under the former statute) the two cases last cited were over-ruled, it being laid down that a foreigner resident abroad cannot, by assigning his copyright according to the law of his country,

[1] Lord Justice Lindley considered that the letter of K. & Co. summarising the terms only amounted to an agreement by K. & Co. to sell the copyright to the A. Company, and not to an assignment of it, and that K. & Co., being the registered proprietors, could sue as trustees for the A. Company, and that the action could be maintained.

[2] Cocks *v.* Purday, 1848; 5 C. B. 860, 17 L. J., C. P. 273, 12 Jur. 677.

[3] Boosey *v.* Davidson, 1849; 13 Q. B. 257, 18 L. J., Q. B. 174, 13 Jur. 678.

[4] Jefferys *v.* Boosey, 1854; H. L. C. 815, 3 Ch. A. C. 625, 24 L. J., Ex. 81, 1 Jur., N. S. 615.

give the assignee a copyright which will be recognised in England so as to entitle the purchaser of it here to the right of exclusive publication.

It was also held that a foreigner resident here may acquire copyright in a work first published here, no matter where the work was composed, or whether the author of it came here solely with a view to its publication. Statutory protection was held, however, not to attach to a foreigner who was not resident here at the time of publication.[1]

The case cited was distinguished by Lord Cairns in 1868,[2] when the House of Lords held that the word "author" is used in the statute 5 & 6 Vict., c. 45, without limitation or restriction, and is therefore equally applicable to foreigners as to British subjects; that an alien friend who, during the time of his temporary residence in a British colony, publishes in the United Kingdom a book of which he is the author, is, under the statute 5 & 6 Vict., c. 45, entitled to the benefit of English copyright; that, under the statute 5 & 6 Vict., c. 45, the first publication of a book must, to secure British copyright, be made in the United Kingdom; that British copyright, when once it exists, extends, under the twenty-ninth section of the statute, over every part of the British Dominions; that (per Lord Cairns, L. C., and Lord Westbury) the protection of the statute is given to every author who first publishes in the United Kingdom, wheresoever he may then be resident (*dub.* Lord Cranworth and Lord Chelmsford).

Assignment of copyright does not include transfer of property in copies previously printed.

Copyright being the exclusive right to multiply copies of a work, an assignment of copyright is but the assignment of that right; and, unless there is some stipulation to the contrary in the conditions of sale, the vendor of

[1] Jeffereys *v.* Boosey, 1854; H. L. C. 815; 3 Ch. 625, 24 L. J., Ex. 81, 1 Jur., N. S. 615; *sup.*

[2] Routledge *v.* Low, 1868; L. R., 3 H. L. C., 100, 37 L. J., Ch. 454, 18 L. T., n. s. 874, 16 W. R. 1081.

a copyright may print any number of copies up to the time of the sale, and retain and sell such copies after disposing of the copyright.[1]

Distinction between assignment and license.

An agreement between a publisher and an author for the publication by the former of a work at his expense, the profits being equally divided, is not an irrevocable license to publish, but a joint adventure, which the author may put an end to at any time after the publication of the first or any subsequent edition.[2]

When A. agreed with B. to "let B. have" a particular drama for a specified consideration, this was held to be a complete assignment to B. of A.'s whole property in the drama.[3]

And where the composer of a song assigned in addition to the copyright "all other the estate, right, title, interest, property, contingency, possibility, claim, and demand whatsoever, both at law and equity," it was held that the right of performance also passed.[4]

The Statute of Anne,[5] which gave the exclusive right of multiplying copies of a work for fourteen years only, provided for an extension of that period for a similar term if the author were still living. The question then arose[6] whether an assignment of the author's interest in the first term also vested copyright in the assignee for the second term; and it was held that it did.

Acquiescence not assignment.

Long acquiescence in the publication of unauthorised copies of a work, though it may be a bar to equitable relief,[7]

[1] Per Sir W. M. James, V. C., in Taylor *v.* Pillow, 1869; L. R., 7 Eq. 420.

[2] Reade *v.* Bentley, 1858; per Wood, V. C., 27 L. J., Ch. 254, 3 Kay & J. 271, 4 Jur., N. S. 82, 4 Kay & J. 656.

[3] Lacy *v.* Tooïe, 1867; 15 L. T., N. S. 512.

[4] *Ex parte* Hutchins, 1878-9: 4 Q. B. D. 489; per Bramwell, L. J., Brett and Cotton, J. J.

[5] 8 Anne, c. 19, s. 11.

[6] Carnan *v.* Bowles, 1786; 2 Bro. C. C. 80; 1 Cox, Eq. Ca. 283.

[7] Platt *v.* Button, 1815; 19 Ves. 447.

is no proof that an assignment has been made of copyright in the work.[1]

A copyright, like other personalty, may be made the subject of a bequest, and, as such, will devolve upon the legatee or executors, who may restrain its infringement by others.[2]

Assignment by way of bequest.

[1] Latour *v.* Bland, 1818; 2 Stark. 382. Hogg *v.* Scott, 1874; L. R., 18 Eq. 444, 43 L. J., Ch. 705, 31 L. T. n. s., 73, 163, 22 W. R. 640. Weldon *v.* Dicks, 1878; 10 Ch. D. 247, 48 L. J., Ch. 201, 39 L. T. n. s. 467, 27 W. R. 639.

[2] Keene *v.* Harris, cited in Cruttwell *v.* Lye, 1810; 17 Ves. 338.

Chapter IX.

DEVOLUTION BY OPERATION OF LAW OF UNPUBLISHED WRITINGS, AND OF PUBLISHED WORKS WHOSE TERM OF STATUTORY PROTECTION HAS NOT EXPIRED.

Of unpublished writings.

1. *Of Unpublished Writings.*—Property in unpublished writings being personalty is governed by the law relating to personal property.

Much inconvenience and confusion will be saved by avoiding the use of the term "copyright" in reference to unpublished writings. For, though it was formerly doubted whether an exclusive right to multiply copies of a literary work did not exist at common law in the author of it after publication, there has, since 1769,[1] been ample authority against the proposition. The right properly known as copyright must now be regarded as being conferred wholly by statute, one of the investitive facts of the attachment of the statutory right being publication. Neither is there a co-existing common-law protection during the statutory period.[2] The act of publication, by which the author of a work divests himself of his right or dominion over it at common law, simultaneously renders him an object of protection by means conferred and regulated by the statute, the privilege being limited in its continuance to the statutory term, and protective

[1] Millar *v.* Taylor, 1769; 4 Burr. 2303. Jeffereys *v.* Boosey, 1854; 4 H. L. C. 815.

[2] Reade *v.* Conquest, 1861; 9 C. B., N. S. 755, 11 C. B., N. S. 479; 30 L. J., C. P. 269, 7 Jur. N. S. 265, 3. L T., n. s. 888; 9 W. R. 434.

measures being only available if taken in accordance with statutory directions and conditions.[1]

But before the act of publication has occurred an author enjoys his rights from and must seek protection under the common law, independently of the statute,[2] and in the event of his death intestate, or bankruptcy, the devolution of his property in a literary work will be regulated by the same rules that govern the devolution of all personalty; that is, it will descend in the ordinary course of legal succession,[3] or the property in the manuscript (without the right of publication) will vest in his trustee in bankruptcy.[4]

Where an author agreed with a bookseller for the publication of a work (which would occupy several volumes when completed), the price, according to a certain rate per sheet, being payable by instalments as the work was published, and the author died after the publication of the first volume, constituting in itself a complete part, thus interrupting the progress of the work, it was held that his representatives were entitled to retain the price of the finished portion which had been paid,[7] and were not bound to refund it by reason of the non-completion of the contract.[5]

A copper plate (for printing engravings) may be seized and sold under an execution.[6] But the seizure and sale will not confer upon the ultimate purchaser the right to strike off and sell copies of the engraving,[7] for that would be vesting him with the copyright, which is an altogether different right. The ownership of a plate and the owner-

[1] 5 & 6 Vict., c. 45. Low *v.* Routledge; *ubi sup.*

[2] Southey *v.* Sherwood, 1817; 2 Mer. 436. Tonson *v.* Collins, 1760; 1 W. Bl. 301.

[3] Dodsley *v.* M'Farquhar, 1775; vols. xix.-xx., Mor. Dict. 8303.

[4] 46 & 47 Vict., c. 52, s. 54. Longman *v.* Tripp, 1805; 2 N. R. 67; Stephens *v.* Gladding, *vide infra.*

[5] Constable *v.* Robison's Trustees; Dec. Court of Sess., No. 45; June, 1808.

[6] Stephens *v.* Cady, 1852; 14 How. 528 (Amer.).

[7] *Ibid.*, *sup.*

ship of the copyright are distinct species of property.[1] Just as trustee in an author's bankruptcy, while obtaining such property as exists in the paper on which an unpublished work is written, will have no power to cause it to be published, and so acquire copyright in the work.[2]

An executor or other personal representative is by the nature of his office vested with such power,[3] as well as with that of preventing others from doing so.

Of Copyright Works.

2. *Of Copyright Works.*—By the Copyright Act,[4] 1842, it is provided that all copyright shall be deemed personal property, and shall be transmissible by bequest, or, in case of intestacy, shall be subject to the same law of distribution as other personal property, and in Scotland shall be deemed to be personal and movable estate.

The devolution of copyright in a published work will therefore be similar to that of property in a work that has not been published,[5] in that it will descend to the personal representatives of an author or proprietor who dies intestate,[6] or vest in the trustee of his bankrupt estate[7] (together with the right of publication).

The term "author" must be extended to include his assignee, if any, the devolution by operation of law applying equally to the estate of a proprietor who has acquired his title to the copyright by assignment.

The benefits of a mere agreement to publish, not being an assignment of the entire copyright, will not descend to the representatives of a party to such agreement or to his trustee in bankruptcy, or even to his assignee, such an agreement being of a personal nature, and the benefit

[1] Stevens *v.* Gladding, 1854; 17 How. 448 (Amer.). [2] *Ibid.*, *sup.*

[3] Queensbury *v.* Shebbeare, *vide sup.*, and other cases there cited. See also the remarks of Lord Abinger, C. B., on the relations of an author under contract to write and his bankrupt publishers, in Gibson *v.* Carruthers, 1841; 8 M. & W. 343.

[4] 5 & 6 Vict., c. 45, s. 25. [5] *Vide supra.*

[6] Burnett *v.* Chetwood, cited in Southey *v.* Sherwood, 1817; 2 Mer. 441.

[7] In *re* Baldwin, 1858; 2 De G. & J. 230; Mawman *v.* Tegg, 1826; 2 Russ. 393. Longman *v.* Tripp, 1805; 2 N. Rep., 67. In *re* Curry, 1848; 12 Ir. Eq. 382.

of it not being assignable by either party without the other's consent.[1]

As to a question of title in bankruptcy.

A mere question of title between an author and a bankrupt publisher, as to which is owner of a portion of a copyright, cannot be decided in the bankruptcy matter. But it was once held that where an author allowed the publisher to advertise himself as the owner of the copyright though it had never been assigned in writing to him, it should be dealt with as the publisher's property in bankruptcy.[2]

Devolution of copyright in works published in periodicals.

Devolution of the copyright in works published in periodicals may occur by operation of law if the circumstances are such as to bring the transactions within the 18th section of the Copyright Act, 1842.

This section operates to transfer the copyright without written or any assignment in writings contributed to periodical publications when they have been written on the terms, express or implied, that the copyright shall so vest, and when the authors of them have been duly paid.

An encyclopedia.

In the case of an encyclopedia the effect of section 18 of the Copyright Act has been held to vest the copyright in the proprietor of the encyclopedia, with the limitation that he is not entitled to publish portions of the encyclopedia (such as individual articles) in separate form. And the duration of the copyright so vested in him is for the whole period accorded to an author by the statute, namely, forty-two years, or until seven years after his death, whichever may be the longest.[3]

With the consent of the author, however, an article, published in an encyclopedia on such terms, may be republished by the owner of the encyclopedia in separate form. Or an author may expressly reserve the right of separate republication to himself.

[1] Stevens *v.* Benning, 1855; 6 De G. M. & G., p. 223. Hole *v.* Bradbury, 1879; 12 Ch. D. 886, 48 L. J. Ch. 673, 41 L. T., n. s. 153, 250, 28 W. R. 39.

[2] *Re* Curry, 1848; 12 Ir. Eq. R. 382.

[3] Hereford *v.* Griffin, 1848; 16 Sim. 190; and 5 & 6 Vict., c. 45, s. 18.

Periodicals (not including encyclopedias)

In the case of a review, magazine, or other periodical works of a like nature (which term apparently does not include an encyclopedia), the effect of section 18 of the Copyright Act is not to vest the copyright in an article or writing in the proprietor of the periodical, but merely to give him a license to use the matter for a particular purpose and in a particular way. In thus interpreting the Act, Sir John Stuart, V. C.,[1] followed Vice-Chancellor Shadwell[2] and Sir William Page-Wood, V. C.[3]

During the continuance of the license thus conferred by the statute (*i.e.*, for the first twenty-eight years), neither the author of the writing nor the conductor of the periodical is entitled to publish the writing in separate form without the mutual consent of the other party.[4]

Nor, during its continuance, can the author of a writing composed and published in terms of the section republish it in any form, except with the consent of the conductor of the periodical.[5] The sole right of publication or republication, during the first twenty-eight years, is vested in the conductor of the periodical, who, however, is only entitled to produce or reproduce the periodical in its entirety, as it first appeared. The license given by the section does not confer any further right upon the conductor of the periodical.[6]

After the expiration of the term of twenty-eight years from first publication the right to publish in separate form reverts to the authors of writings in reviews, magazines, or other periodical works of a like nature (not, apparently, including encyclopedias), for the remainder of the term of copyright given by the Act, *i.e.*, forty-two

[1] In Smith *v.* Johnson, 1863; 33 L. J., Ch. 137.

[2] In Hereford *v.* Griffin, *ubi sup.*

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

[4] 5 & 6 Vict., c. 45, s. 18.

[5] *Ibid.*, *sup.*

[6] 5 & 6 Vict., c. 45, s. 18. Hereford *v.* Griffin, *sup.* Mayhew *v.* Maxwell, *sup.* Smith *v.* Johnson, *sup.*

years from first publication, or seven years from the author's death, whichever is the longest.

The reversion to the author of this right of publication in separate form does not, however, prevent the conductor of the periodical work from continuing to republish or reproduce his periodical in its entirety as it first appeared to the end of the statutory term of copyright, *i.e.*, forty-two years from first publication, or seven years from the death of the author, whichever is the longest.

An author may by contract, express or implied, reserve to himself the right to publish his composition in separate form; but his reservation or retention of such right will not prejudice the right of the conductors of the periodical to publish and republish the latter in its entirety.[1]

How the terms may be agreed upon.

An agreement to write for the conductor of a periodical work (including an encyclopedia) on the terms of the section[2] may be express or implied.

Implied agreements.

What amounts to an employment to write, on the terms that the copyright shall vest in the conductor of the encyclopedia or periodical in the absence of an express agreement, must depend upon the circumstances of every case. The question will be whether the nature of the employment in each case does not afford ground for the Court to infer that the writings were furnished upon the terms that the proprietors of the periodical should have copyright.[3] And in the case cited it was held that "where the proprietors of a periodical employ a gentleman to write a given article or a series of articles or reports expressly for the purpose of publication therein, of necessity it is implied that the copyright of the articles so expressly written for such periodical and paid for by the proprietors and publishers thereof, shall be the property of such proprietors and publishers; otherwise it might be that the author might, the day after his article has been

[1] 5 & 6 Vict., c. 45, s. 18. [2] *Ibid.*
[3] Maule, J., in Sweet *v.* Benning, 1855; 16 C. B. 477.

published by the persons for whom he contracted to write it, republish it in a separate form or in another serial, and there would be no corresponding benefit to the original publishers for the payment they had made.[1]

Sir George Jessel, M. R., however, held that the mere evidence that an author had been paid for his services did not show that the writing had been composed "on the terms that the copyright therein shall belong to" the proprietor of the periodical work, or that the proprietor had bought and was entitled to the copyright, or that the author was not the owner of it.[2]

Neither were such terms recognised by Mr. Justice Kay as being implied, where persons were employed to obtain and compile information regarding registered bills of sale, no express arrangement regarding the copyright having been made.[3]

In a case decided in the United States, it was held that no reporter of the decisions of the Supreme Court has, nor can he have, any copyright in the written opinions delivered by the Court.[4]

What amounts to separate publication.

If the writing is not republished in the exact form in which it first appeared in the periodical, together with the other constituent parts of the periodical as they were originally printed, the publication will be a separate one and will be within the prohibition of the statute.[5]

[1] Jervis, C. J., delivering the judgment of the Court in Sweet *v.* Benning, 1855; 16 C. B. 480.

[2] In Walter *v.* Howe, 1881; 17 Ch. D. 708.

[3] Trade Assoc. Co. *v.* Jackson, 1887; 4 T. L. R. 130. In the case already cited, where a writer was requested to write an article for publication in an encyclopedia, and wrote it and was paid for it accordingly, Vice-Chancellor Shadwell held that he had the copyright in the article entirely, "except so far as he parted with it". And as there was no direct evidence of previous employment on the terms required by section 18 of the Act (5 & 6 Vict., c. 45), it was held that the author had not given any additional right beyond the mere right to publish the article in the encyclopedia (Hereford *v.* Griffin, 1848; 16 Sim. 196). This case was decided five years before Sweet *v.* Benning; the latter being considered by three judges.

[4] Wheaton *v.* Peters, 1834; 8 Peters, U. S. 593.

[5] 5 & 6 Vict., c. 45, s. 18.

Vice-Chancellor Stuart,[1] following Vice-Chancellor Shadwell[2] and Vice-Chancellor Page-Wood,[3] construed the statute as intending to give a license 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. What, then, is to be understood by "publishing separately"? "Publishing separately," said Sir John Stuart, "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. . . . What has the defendant in this case done? He has acquired, under the first clause of the Act of Parliament, an actual property in this literary composition [the composition consisted of a series of tales], published in portions or parts of a certain periodical work. The Act of Parliament says the publishers shall not publish these portions separately from those parts for the publication of which they have obtained a license already. What they have done is to print the portions already published of those antecedent parts in what is called a supplementary number, 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."

Christmas number forms part of a series.

The question arose whether a writing first published in the Christmas number of a periodical was in fact first published in a periodical, and not in a separate work. If the latter, it was contended that section 18 of the Copyright Act would not apply, and that the publisher would be entitled to republish the writing subsequently in a

[1] In Smith *v.* Johnson, 1863; 4 Giff. 386; 3 L. J., Ch. 137.
[2] In Hereford *v.* Griffin, *vide sup.*
[3] In Mayhew *v.* Maxwell, 1860; 1 J. & H. 312.

separate or different form. Sir William Page-Wood, V. C., held that the Christmas number must be treated as part of the periodical work, even though the price, paper, the heading and the paging were different from the ordinary serial. The section was held to apply therefore, and publication forbidden in any form except that in which the entire number of the periodical first appeared.[1]

As to writings not within the section.

A writing offered to the proprietor of a periodical, but not actually written in pursuance of a previous arrangement, express or implied, in terms of the section will not be governed by it. The section can only apply to cases in which an author writes in pursuance of an arrangement which was either in fact previously made, or which may be implied to have existed through the subsequent action, relations, or behaviour of the parties.

Where editor personally employs writers copyright vests in him.

Where the publishers of a periodical employ an editor, who personally employs and pays persons for writings in a periodical, the copyright in such articles will vest, not in the publishers, but in the editor.[2]

Circumstances in which copyright will be considered to have devolved to or vested in another.

The 18th section of the Copyright Act only relates to the publication of writings in periodical works. Circumstances may, however, be such as to justify the inference that copyright has been assigned, when the right of the assignee will be protected. As when an author agreed to edit a translation of a foreign work, and add a biographical sketch with notes, for sole publication by a particular bookseller. At the bookseller's death his widow registered the work under her own name, with the author's knowledge, and so it was held that there was evidence of the author's intention to assign, though no assignment had been made.[3] And where a tradesman employed a writer to compile a work for remuneration, Sir Charles Hall, V. C., held that the writer had no claim to the copyright, which

[1] In Mayhew *v.* Maxwell, 1860; 1 J. & H., p. 316.
[2] Brown *v.* Cooke, 1847; 11 Jur. 77, and 16 L. J., Ch. 140.
[3] Hazlitt *v.* Templeman, 1866; 13 L. T., n. s. 593.

became the property of the person employing him, who must be taken to be the equitable assignee of it.[1]

So where a musician was employed to provide music incidental to a dramatic performance, it was held that he had no copyright in that music, though Lord Chief Justice Cockburn does not seem to have gone so far as to say that the copyright had actually vested in the employer.[2] In an earlier case[3] a verbal agreement had been made to the effect that a musician should compose and supply for a certain price some music as part of a dramatic piece which had been adapted to the stage by his employer, who had formed the general design and plan of the whole work. Sir William Erle, delivering the judgment of the Court, held, that under this contract as between the musician and the employer, the latter had the sole liberty of performing the music as part of the dramatic piece without assignment or consent in writing, inasmuch as the facts disclosed that the employer was the author and designer of an entire dramatic composition, and that the music was a part of and a mere accessory to the main piece.

Where an author had been heard to declare that he had parted with all his interest in the copyright of a work, but without mentioning in what manner the transfer had taken place, he was non-suited in an action to restrain further publication.[4]

But in all the cases in which copyright has been held to vest in a person other than the author, without an express assignment, there seems to have been sufficient evidence before the Court to give rise to the inference that an assignment had in fact been made; the behaviour of the parties or the terms agreed upon between them being of such a nature as to make that conclusion reasonable.

[1] Grace *v.* Newman, 1875; L. R. 19, Eq. 626.

[2] Wallenstein *v.* Herbert, 1866; 15 L. T., n. s. 364.

[3] Hatton *v.* Kean, 1859; 29 L. J., C. P. 23. 7 C. B., n. s. 268; 20 C. P., 2 L. T., n. s. 10. Before Erle, C. J.

[4] Moore *v.* Walker, 1814; note to Power *v.* Walker, 4 Camp., p. 9.

Without such sufficient evidence assignment will not be presumed. So where secondary evidence was given of a lost receipt, in which an author was said to have acknowledged payment for his copyriglit, and it was also shown that the author had remarked that he ought to have received a larger sum, the evidence was held to be insufficient of assignment.[1]

In *Shepherd v. Conquest*[2] it was doubted whether under any circumstances copyright could become vested in any one but the author of it, Sir John Jervis distinguishing *Sweet v. Benning*, the decision in which turned upon the construction of s. 18 of the Copyright Act, 1842. And Vice-Chancellor Shadwell was decidedly of opinion that an author has entire copyright, "except so far as he parts with it".[3]

Mr. Hilliard contends that the construction of the law in respect of copyrights should be favourable to authors, as it is intended for their benefit. So when they assign their rights to others no more must be considered as passing than is contemplated at the time by the parties, and paid for and clearly indicated in the contract.[4] And he cites a case in which, after an assignee of a copyright had enjoyed the right for the (old) statutory period, the copyright was held to revert to the author for the extended term which was obtainable under the statute.[5] The resulting right, under the Statute of Anne, was, however, differently accorded in an old English case under circumstances that were similar.[6]

[1] Latour *v.* Bland, 1818; 2 Stark. 382.
[2] 1856; 17 C. B., 427.
[3] Hereford *v.* Griffin, 1848; 16 Sim. 196.
[4] *Law of Torts*, vol. ii., 199.
[5] Pierpont *v.* Fowle, 1846 (Amer.): 2 W. & M. 23.
[6] Carnan *v.* Bowles, 1786; 2 Bro. C. C. 80.; 1 Cox, Eq. Ca. 283.

Chapter X.

INFRINGEMENT OF COPYRIGHT.

Three methods of invading literary property.

Literary property may be invaded either (1) by open piracy,—as when a person publishes an unauthorised edition or copies of a work in which copyright exists, or introduces and sells a foreign reprint of it; (2) by an illegitimate but less openly avowed appropriation of the fruits of another's labour,—as where one man, pretending to be the author of a book, incorporates to an improper extent the writings of another with his own; or (3) by selling a work under the name or title of another man or another man's work,—as where the title of the book represents it to be a work which it is not.[1]

(1) Piracy.

A remedy against the first two modes of invasion is provided by the statute,[2] which provides that if any person shall, after the passing of the Act, print either for sale or exportation any book,[3] in which there is copyright, without the written consent of the proprietor thereof, or shall import it for sale or hire, when it has been unlawfully printed abroad, or knowing it to have been so unlawfully printed, shall sell, publish, or expose it for sale or hire, or have it in his possession for sale or hire, he shall be liable to action.

(2) Appropriation.

It is further provided[4] that no person except the proprietor of a copyright or some one authorised by him shall

[1] Per James, L. J., in Dicks *v.* Yates, 1881; 18 Ch. Div. 90.

[2] 5 & 6 Vict., c. 45, s. 15.

[3] Which term includes, by the interpretation clause, every volume, part, or division of a volume.

[4] 5 & 6 Vict., c. 45, s. 17.

import into the British Dominions for sale or hire any book first published in any part of the United Kingdom, and printed elsewhere, under penalty of forfeiture and fine; and such books may be seized by officers of customs or excise.[1]

(3) Title.

The third mode of infringement is not an invasion of copyright, being in fact a fraud at common law, redressible by ordinary common law remedies, wholly irrespective of any of the conditions or restrictions imposed by the statute.[2]

It was formerly held that to entitle a plaintiff to obtain delivery of piratical copies the entry of his proprietorship in the register book at Stationers' Hall should have been made prior to the infringement. But since the ruling of the late Master of the Rolls[3] it would seem that the date of registration is immaterial to the right to obtain delivery of piratical copies.

As regards open piracy by publishing an unauthorised edition little need be said. Its occurrence is infrequent, and is generally prompted by the supposed existence of a right in the person so publishing, or in the disbelief by him that a sole right to publish resides in another.

The majority of infringements that occur are of the nature described by Lord Justice James as literary larceny, the exact nature of which it is difficult to define

[1] See also Butterworth *v.* Kelly, 1888; 4 T. L. R. 430. And where the importation of piratical copies of a work was anticipated, and the writ served before the copies arrived, it was held that, nevertheless, the defendants had, within the terms of the seventeenth section of the Copyright Act, "imported for sale" the copies complained of, and must therefore pay the costs of the action. The offences mentioned in the Act are "to import for sale" and "to sell knowingly" foreign piracies of the copyright. It was held that a distinction is created by the addition in the statute of the word "knowingly" to the one offence, and therefore that a plaintiff who proceeds in respect of "importing for sale" is not required to give the defendant any notice, but may at once obtain an *ex parte* injunction. If, however, it is intended to take proceedings in respect of "selling knowingly," notice of the nature of the copies complained of should properly be sent to the importer. (Cooper *v.* Whittingham, 1880; 15 Ch. Div. 501.) See 39 & 40 Vict., c. 36.

[2] Per James, L. J., Dicks *v.* Yates, *sup.*

[3] In Isaacs *v.* Fiddeman, 1880; 49 L. J., Ch. 412; *vide sup.*

with more exactitude than the general statement that as an offence it lies intermediately between open piracy and fair use.

The absence of any dishonest intention on the part of the appropriator is immaterial. It is enough that the publication complained of is in substance a copy whereby a work vested in another is prejudiced.[1]

Even a full acknowledgment of the original source will not excuse improper appropriation; as the Court cannot consider honesty of intention, which might have existed in the man's mind at the time of doing the act complained of, but only the result, and he must be presumed to intend all that his publication effects.[2]

Moreover, confession may be proof of honesty, but does not remedy nor justify a theft if one has been committed; though it saves trouble in conviction.[3]

Falsely to deny that you have taken or copied any idea or language from another work will, of course, be a strong indication of *animus furandi*.[4]

Lord Eldon's test has been very generally approved. "There is no doubt," he said, "that a man cannot, under the pretence of quotation, publish either the whole or part of another's work; though he may use, what is in all cases very difficult to define, fair quotation." The question upon the whole is whether a legitimate use has been made of another publication in the fair exercise of a mental operation, deserving the character of an original work.[5] Lord Eldon's Test.

"Quotation, for instance," Lord Eldon said, "is necessary for the purpose of reviewing, and quotation for such a purpose is not to have the appellation of piracy affixed to it; but quotation may be carried to the extent of manifesting piratical intention."[6]

[1] Per Lord Ellenborough, in Roworth *v.* Wilkes, 1807; 1 Camp. 97.
[2] Per Page-Wood, V. C., in Scott *v.* Stanford, 1867; L. R., 3 Eq. 723.
[3] Shadwell, V. C., in Bohn *v.* Bogue, 1846; 10 Jur. 420.
[4] Jarrold *v.* Houlston, 1857; 3 K. & J. 708.
[5] Wilkins *v.* Aiken, 1810; 17 Ves. 424.
[6] Mawman *v.* Tegg, 1826; 2 Russ. 393.

Lord Ellenborough's Test.

Lord Ellenborough considered the test to be whether or not the work containing the appropriation would serve as a substitute for that from which the appropriations were taken.[1] On another occasion, he recognised that the fact of quotation by one author of part of the writings of another is not in itself evidence of piracy, or sufficient to support an action. A man may fairly adopt part of the work of another. But, having done so, the question will be whether the matter so taken was used fairly.[2]

V. C. Page-Wood's Test.

Mr. Justice Story's Test.

Sir William Page-Wood, V. C.,[3] approved Mr. Justice Story's description of the general principles guiding the Court in cases of this description: "We must look to the nature and objects of the selections made, the quantity and value of the material used, and the degree in which the use may prejudice the sale, or diminish the profits, or surpass the objects of the original work".[4]

Lord Cottenham's Test.

Lord Cottenham, L. C., while approving Lord Eldon's test, laid it down that the question whether one author has made a piratical use of another's work does not necessarily depend upon the quantity of the work which he has quoted or introduced (which would be a very vague test), but rather on the value of the extracted portions.[5]

V. C. Hall's Test.

The true principle in all these cases, Sir Charles Hall, V. C., thought, is that a writer is not at liberty to avail himself of the labour which another has given to the production of a book, that is, in fact, merely to take away the result of his labour, or, in other words, his property.[6]

Mr. Justice Story's opinion.

Mr. Justice Story's opinion is also in point: "The true question is not whether the materials which are used are entirely new, and have never been used before, or even

[1] Roworth *v.* Wilkes, 1807; 1 Camp. 97.

[2] Cary *v.* Kearsley, 1802; 4 Esp. 168.

[3] In Scott *v.* Stanford, 1867; L. R., 3 Eq. 722.

[4] Folsom *v.* Marsh, 1841; 2 Story 100, 116.

[5] Bramwell *v.* Halcomb, 1836; 3 My. & Cr. 737.

[6] Hogg *v.* Scott, 1874; L. R., 18 Eq. 458; 43 L. J., Ch. 705; 31 L. T. 73; 22 W. R. 640.

that they have never been used before for the same purpose. The true question is, whether the same plan, arrangement, and combination of materials have been used before for the same purpose, or for any other purpose. If they have not, then the plaintiff is entitled to copyright, though he may have gathered hints for his plan and arrangement, or parts of his plan and arrangement, from existing and known sources. He may have borrowed much of his materials from others; but if they are combined in a different form from what was in use before, and a portion of his plan and arrangement are real improvements on the existing modes, he is entitled to a copyright in the book embodying such improvement. It is true that he does not thereby acquire the right to appropriate to himself the materials which were common to all persons before, so as to exclude those persons from a future use of such materials; but then they have no right to use such materials with his improvements superadded, whether they consist in plan, arrangement, or illustrations, or combinations, for these are strictly his own."[1]

Mere similarity between one writer's work and that of another is no proof of infringement, nor need it be so. Neither will it be a bar to the enjoyment of copyright in both works. A person who has composed a work has a right to it, but he cannot restrain another person from also composing an original work in a fair and proper manner, even though the latter be similar to the former. For all men have the same right to compose original works and to enjoy copyright in them.[2]

What amounts to piracy.

Where a book was published containing an original essay on modern English poetry, biographical sketches of forty-three modern poets and selections from their poems, amongst which were six short poems and parts of longer ones, the copyright in which belonged to another, the

[1] See Emerson *v.* Davies (Amer.) 1845; 3 Story 778.
[2] Bailey *v.* Taylor, 1824; 3 L. J., Ch., o. s., 66.

Court restrained the publication as being an infringement of that copyright. It consisted of a general essay, followed by a mass of pirated matter, which, in fact, constituted the value of the volume. It was said in defence that there was no *animus furandi*, but *animus furandi* will be inferred from the act.[1]

Where an author had himself used portions of another work, but had made material and valuable corrections and additions to them, Lord Kenyon, C. J., while acknowledging that no title was by that means acquired in the portions taken, restrained a subsequent infringement of the alterations and additions, in which he held there was copyright.[2] But Lord Loughborough refused to give protection to alterations and corrections to a work under very similar circumstances.[3] It has been held possible, by publishing a reprint of a work of which the copyright has expired, with notes and illustrations from other works, to create a new copyright which will be protected from piracy. And it is a piratical use of such copyright work to borrow therefrom any considerable number of these illustrations.[4]

Writers on general subjects must go to original source of information.

Writers on general subjects, or on subjects which are open to all mankind to write about, or deal with or otherwise describe, are not entitled to spare themselves the trouble and expense of original inquiry by making an undue use of the writings which have preceded them.[5] For although no one can acquire copyright in or a sole and exclusive right to deal with a general subject, his individual work will be protected from infringement; and another work, if shown to be not an original compilation but a mere copy, will be restrained.[6] In the case cited

[1] Per Shadwell, V. C., in Campbell *v.* Scott, 1842; 11 Sim. 31.
[2] Cary *v.* Longman, 1801; 1 East. 360.
[3] Cary *v.* Faden, 1799; 5 Ves. 26. See cases there cited.
[4] Black *v.* Murray, 1870; 9 Sc. Sess. Rep., 3rd ser., 341.
[5] Matthewson *v.* Stockdale, 1806; 12 Ves. 270.
[6] *Ibid.*, 276; per Lord Erskine.

the subject of the plaintiff's work was an East India Calendar, the defendant having taken and used information which had been collected at great expense and trouble. The plaintiff's individual work was protected, though it was not contended that an East India Calendar could be a subject of copyright.

So, in a book of chronology, where the same facts must be related by all writers, if correctly given, Lord Kenyon held the question to be whether in substance one work is a copy and imitation of another.[1]

In all these cases, as Lord Mansfield observed,[2] the question of fact to come before a jury is whether the alteration be colourable or not.

If there is such a similitude as to make it probable and reasonable to suppose that one is a transcript of another and nothing more than a transcript, or one with colourable additions and variations, it will be restrained.[3]

Writers on history may relate the same facts and in the same order of time; whilst in dictionaries interpretations are given of identical words. So also in the case of directories, prints, maps and charts. No one has a monopoly in the general subject; yet it is the duty of each to procure his information from the original source, and not to merely colourably imitate those works which have preceded his. In the case last cited, however, a rival publication was not restrained, as it greatly improved the value of the original work, containing material corrections and additions.

In a case before Sir William Page-Wood, V. C., an author, Dr. Brewer, who had written on general subjects, claimed an injunction to restrain an infringement of his individual work. He admitted being indebted in some degree to other works, but explained that his habit had been to collect for a long period the inquiries that he

[1] Trussler *v.* Murray, 1789; 1 East. 363.
[2] Sayre *v.* Moore, 1785; 1 East. 362.
[3] Jarrold *v.* Heywood, 1870; 18 W. R. 279.

heard made by very many persons, and even to solicit inquiries from persons of observant habits and familiar with common phenomena. These, which he noted down, and answers, which he furnished, partly from his own information and partly by consulting particular works for that express purpose, formed the material of the work for which protection was claimed. That an author has copyright in a work of this description the Vice-Chancellor had *no doubt*.[1]

Directories.

No one has a right to take the results of the labour and expense incurred by another for the purposes of a rival publication, and thereby save himself the labour and expense of working out and arriving at those results by some independent road. If this were not so, Lord Justice Giffard said, there would practically be no copyright in such a work as a directory. And it was held that just as the defendants would be wrong in merely cutting slips from the plaintiff's directory and inserting them in theirs, so they would still be wrong even if they sent out persons with the slips cut out to ascertain their correctness.[2]

In the case of a road-book a writer must count the milestones for himself. In the case of a map . . . he must go through the whole process of triangulation just as if he had never seen any former map; and, generally, he is not entitled to take one word of information previously published without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information.[3]

And the fact that certain persons paid for the privilege of their names being printed in capital letters in a directory, with extra lines of information, was held not to make that information common property, so as to enable the proprietor of a rival directory to reprint it from slips cut

[1] Jarrold *v.* Houlston, 1857; 3 Kay & J. 713.
[2] Morris *v.* Wright, 1870; L. R., 5 Ch. App. 286.
[3] Per Page-Wood, V. C., in Kelly *v.* Morris, 1886; L. R., 1 Eq. 702.

from the first, even where the persons whose names are so printed were applied to to verify the information.[1]

In a trades directory consisting of advertisements furnished by tradesmen classified under headings denoting the different trades, copyright was recognised as existing in the headings and in the mass of advertisements as arranged, though not in them individually; and an infringement of it was restrained.[2]

Indirect copying.

An injunction was granted to three plaintiffs, the proprietors of three serial publications registered under the Copyright Act, to restrain the infringements of their joint copyright in matter printed in all three publications, though the pirated matter was copied, not from either of the three publications, but from a reproduction of the same matter issued in another form by the authority of one of the plaintiffs without further registration.[3]

And so, where the copying has not been direct but from an unregistered copy of a copyright work, it is none the less an infringement of the original.[4]

General.

A printed diary was protected from infringement, which was interleaved with a blank space opposite each day with a text of Scripture appended, and designed as a birthday book of friends.[5]

The unauthorised publication of copyright matter, or matter that enjoys protection by other means (such as a lecture delivered before an audience admitted by tickets), in shorthand characters, is just as much a piracy as it would be if published in ordinary type.[6]

Similarly the taking down and publishing portions of a drama as it is acted, has been restrained.[7]

[1] Per Giffard, L. J., in Morris *v.* Ashbee, 1868; L. R., 7 Eq. 34.

[2] Per Chitty, J., affirmed by the Court of Appeal, consisting of Lindley, Bowen, and Kay, L. J. J., in Lamb *v.* Evans, 1893; 1 Ch. 218; 2 R. 189; 62 L. J., Ch. 404; 68 L. T. 131; 41 W. R. 405.

[3] Per North, J., in Cate *v.* Devon, etc., Co., 1889; 40 Ch. D. 500; 58 L. J., Ch. 288; 60 L. T. 672; 37 W. R. 487.

[4] Trade Aux. Co. *v.* Jackson, 1887; 4 T. L. R. 130.

[5] Mack *v.* Petter, 1872; L. R. 14 Eq. 431.

[6] Per Kay, J., in Nicols *v.* Pitman, 1884; 26 Ch. D. 374.

[7] Macklin *v.* Richardson, 1770; Amb. 694.

The copying of head-notes to cases reported in the Courts was held to be a piracy and restrained, the mere analytical arrangement of them not constituting the piratical publication a new work, so as to give it protection.[1]

Where the publishers of an annual sent a copy to a newspaper, with a request that it should be noticed or reviewed, and the newspaper published a short review of the work, and in addition copied an entire story, an injunction was granted restraining such publication.[2]

If a foreigner translates an English work and then an Englishman retranslates that foreign work into English, this will be an infringement of the original copyright.[3]

The mere publication by a private individual, in a particular order, of time-tables, which he has taken from the publications of the various railway companies, is not sufficient to give rise to a claim for protection on the ground of copyright. Copyright may, however, exist in a compilation of information as to coach routes, ferries, and steamers, published in the form of an abstract for the use of a particular locality; and a substantial appropriation of the labour of another in preparing such a compilation will be restrained, provided that it be clearly established that such an appropriation has in fact been made. Moreover, if a book depends for its value upon a particular portion, that portion may be treated as an independent work, and will so be protected by injunction.[4]

Lord Eldon had great difficulty in deciding whether the Court should restrain a portion of a work by injunction, though it was not unusual to bring an action for

[1] Per Jervis, C. J., in Sweet *v.* Benning, 1855; 16 C. B. 482; 24 L. J., C. P. 175, 1 Jur., N. S., 543; Maule, Cresswell, and Crowder, J. J., concurring.

[2] Maxwell *v.* Somerton, 1874; 30 L. T., N. S., 11.

[3] Murray *v.* Bogue, 1853; 1 Drew 353. See also Burnett *v.* Chetwood, 2 Mer. 441, where a translation into English of a work originally published in Latin was restrained on the ground that from the nature of its contents the work was best published in the Latin form.

[4] Leslie *v.* Young, 1894; H. L. 6 R. 1.

pirating in such circumstances.[1] It appears to have been Lord Hardwicke's opinion that an injunction might be granted against the whole, although only part was pirated.[2] Lord Bathurst entertained a doubt: "unless the pirated part was such that granting an injunction against that part necessarily destroyed the whole".[3] And this opinion was approved by Lord Kenyon, C. J.[4] The hardship of restraining, or doing that which is equivalent to restraining, the whole of a work when it consists in part of original matter in addition to what has been copied, has always been urged in cases of this description. Lord Eldon's answer was, that if the parts so copied cannot be separated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing. He has only himself to blame.

Lord Langdale, M. R., a few years later,[5] concluded that in cases of this nature nothing but an injunction can sufficiently protect the injured party. And an injunction was granted in general terms, and without waiting till the whole of the pirated parts could be ascertained, restraining the defendant from publishing anything taken from the plaintiff's book.[6]

Infringement by gratuitous distribution of copies.

The second section of the Copyright Act defines copyright as the "sole and exclusive liberty of printing or otherwise multiplying copies" of a subject of the right;

[1] Mawman *v.* Tegg, 1826; 2 Russ. 398. [2] 4 Burr. 2326.

[3] See Cary *v.* Longman, 1801; 1 East. 360; and Trusler *v.* Murray, 1789; 1 East. 365.

[4] In Cary *v.* Longman, *sup.*

[5] Lewis *v.* Fullarton, 1839; 2 Beav. 6.

[6] The order was made in these terms: "Let the defendant, his agents, servants, and workmen, be restrained from further printing, publishing, selling, or otherwise disposing of any copy or copies of a book called '. . . , etc.,' containing any articles or article, passages or passage, copied, taken, or colourably altered from a book called '. . . ,' published by the plaintiff". Its terms were adopted in Kelly *v.* Morris, 1866, by Page-Wood, V. C.; L. R., 1 Eq. 701, and in Morris *v.* Ashbee, 1868; L. R., 8 Eq. 41.

whereas the fifteenth s. ction refers only to "printing" or "importing for sale or hire" as giving cause of action. It was held, however, that the publication of a piece of music, not for sale or hire, but by the gratuitous distribution of lithographed copies of it amongst the members of a musical society, was an invasion of the copyright independently of the fifteenth section of the statute.[1]

So the substantial copying of a book of words selected as a telegraphic code, and the printing of copies for private and gratuitous distribution amongst the agents of the defendants, was held to be an invasion of copyright, and was restrained by injunction.[2]

Where a report prepared by a committee to a society had incorporated in it sufficient extracts from an original work to constitute an infringement of it, and was circulated amongst members of a society, this was held to be just as much an infringement as if the report had been circulated or published in the ordinary way.[3]

And where a novel had been dramatised without the authority of the proprietors of the copyright, of which, however, only four copies had been made containing substantial portions of the original in it, these being either manuscript or typewritten, and intended only for the use of the actors, an injunction was granted and the copies ordered to be given up.[4]

Dramatisation of literary works.

In the Statute of Anne copyright was referred to as the "sole right and liberty of printing and reprinting," and only the printing or importation of unauthorised copies was prohibited.[5] And it was held under that Act that representing a dramatic piece was not such a publi-

[1] Novello *v.* Sudlow, 1852; 12 C. B. 177; 21 L. J., C. P. 169; 16 Jur. 689.

[2] Per Kay, J., in Ager *v.* P. & O. Co., 1884; 26 Ch. D. 637; 50 L. T., n. s., 477; 53 L. J., Ch. 589; 33 W. R. 16.

[3] Per Lord Mackenzie, in Alexander *v.* Mackenzie, 1847; 9 Sc. Sess. Cases 760.

[4] Warne *v.* Seebohm, 1888; 39 Ch. D. 73; 57 L. J. Ch. 689; 58 L. T. 928; 36 W. R. 686.

[5] 8 Anne, c. 19, s. 1.

cation as to give rise to the penalties provided by the Act for infringement;[1] and after the passing of the Act of 1842 the doctrine was upheld,[2] no attempt being made to restrain on account of the "multiplication of copies". But where the author of a novel had also written a play on which the novel was founded, he succeeded in restraining a dramatisation of the novel on the ground of its being an infringement of the play.[3]

The printing and publishing, as distinguished from the performance, of a play dramatised from a novel, was, however, restrained;[4] and the step further which restrains the multiplication of copies (even to the extent of only four, merely for the use of the actors and not for sale) of a drama containing substantial portions of another literary work is now possible under the Copyright Act of 1842, which defines copyright as the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is applied.

Joint owners of a copyright are tenants in common, and each tenant in common is entitled to sue to prevent a stranger, who is not authorised by the other co-owners, from interfering with his rights.[5]

Copyright in a book extending to the illustrations and designs in it, the owner of the copyright may restrain the publication of designs copied from it,[6] even where the letterpress in the book is not of such a description as to be entitled to copyright.[7]

[1] Coleman *v.* Mathen, 1793; 5 T. R. 245, and Murray *v.* Elliston; 1822, 5 Barn. & Ald. 657.

[2] In Reade *v.* Conquest, 1861; 3 L. T. 888; 9 C. B., n. s., 755; 30 L. J., C. P. 269; 7 Jur., n. s., 265.

[3] Reade *v.* Lacy, 1861; 1 John. & Hemm. 524. Reade *v.* Conquest; 1862, 11 C. B., n. s., 479.

[4] Tinsley *v.* Lacy, 1863; 1 Hemm. & Mill. 747.

[5] Lauri *v.* Renad, 1892; 3 Ch. 402; 61 L. J. Ch. 580; 67 L. T. 275; 40 W. R. 679.

[6] Grace *v.* Newman, 1875; L. R. 19 Eq. 623. See also Bradbury *v.* Hotten, 1872; 8 L. R., Ex. 1; 42 L. J., Ex. 28; 27 L. T. 450; 21 W. R. 126; and Smith *v.* Chatto, 1875; 31 L. T. n. s. 775; 23 W. R. 290.

[7] Maple *v.* J. A. & N. S., 1882; 21 Ch. D. 369. Per Jessel, M. R., and Lindley, L. J., affirming the decision of Hall, V. C.

Acquiescence.

The twenty-sixth section of the Copyright Act provides that all actions, etc., in respect of any offence that shall be committed against the Act shall be commenced within twelve months after the commission of the offence.[1] But the effect of this section is not to prevent a plaintiff from suing for an injunction to restrain a piracy of copyright by sale of a book published more than twelve months before action.[2] Neither will mere delay in taking proceedings after knowledge of a piracy be in itself such acquiescence as to deprive a plaintiff of his right to an injunction at the hearing.[3] And where there was no waiver or express acquiescence, an injunction was granted against the further publication of a book on account of its being an infringement, though it had been through three editions, throughout a period of nearly five years, a copy of each edition having been presented to the plaintiff, who was the author of the original.[4] And to sustain a plea of acquiescence against a plaintiff, knowledge of the infringement must be shown.[5]

Acquiescence of two years[6] and thirteen years[7] has, however, been held to be a sufficient bar to the granting of an injunction, as was a similar acquiescence, during fourteen years, in the case of another book,[8] and fifteen years in the case of some music.[9]

In an American case acquiescence was considered to give rise to a presumption that an assignment had been effected, or that the proprietor of the copyright work intended to abandon his right to it.[10]

[1] 5 & 6 Vict., c. 45, s. 26.

[2] Hogg *v.* Scott, 1874; L. R. 18 Eq. 444; 43 L. J. Ch. 705; 31 L. T. n. s 163.

[3] Hogg *v.* Scott, *sup.*

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

[5] Weldon *v.* Dicks, 1878; *ubi sup.*

[6] Robinson *v.* Wilkins, 1805; 8 Ves. 224.

[7] Bailey *v.* Taylor, 1824; 3 L. J., Ch., o. s., 66.

[8] Rundell *v.* Murray, 1821; Jac. 311.

[9] Platt *v.* Button, 1815; 19 Ves. 447.

[10] Bartlett *v.* Crittenden, 1849; 5 McLean (Amer.) 41.

Plaintiff must have clean hands.

The libellous nature of the book alleged to have been infringed, or a mis-statement as to its authorship so as to give it a deceitful character, will be a bar to the granting of relief.[1]

Allegations in statement of claim.

The allegations in a statement of claim should include:—[2]

(*a*) All material facts which show that the right to maintain the action is vested in the plaintiff:

(*b*) Either through being the author, and so the original proprietor of the copyright, or as an assignee of it by writing:

(*c*) Such title being a legal and not merely an equitable one, since the person in whom is the legal title must be before the Court:[3]

(*d*) The mode of infringement complained of, and, if injunction is sued for, the intention of the defendant to continue it.[4]

Defence.

In his defence:—

(*a*) The defendant may deny the plaintiff's right to maintain action through his not being the proprietor of the copyright:

(*b*) Or may allege that there is no copyright in the work infringed through its not being a fit subject for the right:

(*c*) Or that there has been prior publication abroad:[5]

(*d*) And that his copy was taken from the prior publication:

(*e*) Or that the work has not been registered, or that the entry is defective:[6]

[1] Wright *v.* Tallis, 1845; 1 C. B. 893. Percival *v.* Phipps, 1813; 2 V. & B. 19.

[2] See Daniell's *Chan. Pract.*, 6th ed., 1882, p. 1450, *et seq.*

[3] Colburn *v.* Duncombe, 1838; 9 Sim. 153, per Shadwell, V. C. Cathcart *v.* Lewis, 1792; 1 Ves. Jr. 463, and other cases there cited. Leyland *v.* Stewart, 1876; 4 Ch. D. 419. Jewitt *v.* Eckhardt, 1878; 8 Ch. D. 404.

[4] "The ground for an injunction is the fraudulent attempt to appropriate other persons' . . . business." Per Jessel, M. R., in Hendriks *v.* Montagu, 1881; 17 Ch. D. 640; 44 L. T. n. s. 879.

[5] Such as in America, where the International Copyright Act, 1886, does not apply.

[6] Collingridge *v.* Emmott, 1887; 4 T. L. R. 100. Harris *v.* Smart, 1889; 5 T. L. R. 594. Weldon *v.* Dicks, 1878; 10 Ch. D. 252; and other cases cited *sup.*, *et seq.*

(*f*) Or that the action was not commenced within the limitation of time provided in the Act.[1]

But defendant must give the plaintiff notice in writing of all objections on which he means to rely at the trial, and if the nature of his defence is that the plaintiff is not the proprietor of the copyright he must specify who is, and other particulars,[2] otherwise he will not be able to give evidence on these allegations at the trial; neither will he be permitted to raise other objections at the trial than those of which such written notice has been given.

[1] 5 & 6 Vict., c. 45, s. 26.

[2] 5 & 6 Vict., c. 45, s. 16.

Chapter XI.

FAIR USE OF OTHER WORKS IN WHICH THE STATUTORY TERM OF PROTECTION HAS NOT EXPIRED.

What is a fair use.

It is legitimate to use the work of another in the fair exercise of a mental operation, so as to produce in the result a work deserving the character of originality.[1]

A man may fairly adopt part of another's work, provided that he does not merely colourably steal it; and the fact of one author quoting from another is not in itself evidence of piracy or sufficient to support an action.[2]

Mr. Justice Story.

Mr. Justice Story's definition of the general principles by which the Courts are guided in considering alleged infringements of copyright, is instructive in relation to what will constitute a fair use.[3]

So quotation, if not carried too far, is no piracy.[4] And the matter quoted should be introduced for the purpose of criticism or of illustrating other original observations or writing.[5] Lord Cottenham, L. C., recognised the difficulty of prescribing the legitimate mode of extracting what is published in other publications. But, at any rate, it was his opinion that to entitle another writer to restrain extracts from being made from his work, he must show that the quoted matter had some value in the nature of property.[6]

Lord Cottenham.

[1] Lord Eldon's test, in Wilkins *v.* Aiken, 1810; 17 Ves. 426. Lover *v.* Davidson, 1856; 1 C. B. n. s. 182.

[2] Per Lord Ellenborough, in Cary *v.* Kearsley, 1802; 4 Esp. 170.

[3] See p. 110, *sup.*

[4] Per Lord Eldon, L. C., in Mawman *v.* Tegg, 1826; 2 Russ. 393.

[5] Bell *v.* Whitehead, 1839; 3 Jur. 68; 8 L. J., Ch. 141.

[6] Bell *v.* Whitehead, *sup.*; and see Walcott *v.* Walker; 7 Ves. 1. Southey *v.* Sherwood, 1817; 2 Mer. 437. Thorpe *v.* Macauley, 1820; 5 Madd. 224.

An abstract published in the *Annual Register* was held not to be a piracy, especially as the original author had before published an abstract of his own work; and it is the nature and custom of annual registers to give an abstract or analysis of an author's work.[1] The late Mr. Justice Stephen's definition of what is a fair use of extracts, is whether under all the circumstances of the case they are reasonable in quality, number, and length, regard being had to the object with which the extracts are made and to the subjects to which they relate.[2]

Fair competition is perfectly legitimate; and the fact that one work is affected by the publication of another of a similar nature is no damage or injury, be the loss what it may.[3]

Sir Wm. Page-Wood.

In works of the nature of compilations of information open to all persons to apply to and seek for at its original and common source, a limited use may be made of previous publications, although, if all the different works on the subject be accurately compiled, they may resemble each other exactly. Sir William Page-Wood, V. C., considered the only use that a compiler can legitimately make of a previous publication is to verify his own calculations and results when obtained.[4]

Lord Justice Giffard.

To this must be added the right to use a prior work for the purpose of directing one's attention to a source of information, after which the information itself must be derived from that source.[5] The decision in *Morris v. Kelly* did not mean, in Lord Justice Giffard's opinion, that a subsequent compiler may not look into a prior publication for the purpose of ascertaining where the common source of information is situated. That is a legitimate use to make of a prior publication.

[1] Dodsley *v.* Kinnersley, 1761; Amb. 404.
[2] Digest, Report of C. C., 1878, p. lxx.
[3] Per Lord Eldon, L. C., in Hogg *v.* Kirby, 1803; 8 Ves. 225.
[4] In Kelly *v.* Morris, 1866; L. R., 1 Eq. 703.
[5] Per Giffard, L. J., in Morris *v.* Wright, 1870; L. R., 5 Ch. App. 279, affirming the decision of James, V. C. See also Scott *v.* Stanford, 1867; L. R., 3 Eq. 724, per Page-Wood, V. C.

A writer is fully entitled to avail himself, as a starting-point, of matters patent to all the world, when he employs his own time, labour, and expense on the subject matter.[1]

And if a work is successful it is competent to any other person perceiving that success to set about a similar work, *bona fide* his own. But it must be in substance a new and original work.[2] Lord Eldon.

Lord Hatherley, L. C.,[3] said it was only to be expected that writers on subjects already written upon would look about for authors bearing on the question. Supposing them *bona fide*, and about to produce an original work, they would naturally look out for all the older authorities. Therefore it must be borne in mind that a great deal of similarity must exist in works of authors on such subjects. This must be the case when there are common sources of information. And the fact that one makes the same quotations as the other from the same authority is in itself no piracy. The writer who first quotes a previous writer cannot by so doing acquire a monopoly in the quotation. If a subsequent writer sees information quoted by another, and at once refers direct to the original source and obtains the information for himself, he may make the same use of it, or make the same quotation, as his predecessor has done. By referring to the original common source he does all that the Court requires him to do. But he must in fact so refer to the original source; he must not simply copy quoted passages or information from another book. But having been put on the track, and having been so led to the source of information, he may use the passages or the same information that his predecessor has used. Use of a prior work should not, however, be suppressed or denied.[4] Lord Hatherley.

[1] Per Page-Wood, V. C., in Cornish *v.* Upton, 1861; 4 L. T., n. s., 863.

[2] Per Lord Eldon, L. C., in Hogg *v.* Kirby, 1803; 8 Ves. 221.

[3] In Pike *v.* Nicholas, 1869; L. R., 5 Ch. App. 261.

[4] See Lord Hatherley's judgment in Pike *v.* Nicholas, 1869; L. R., 5 Ch. App. 257.

Mr. Justice Story recognises that every book in literature, science, and art, borrows, and must necessarily borrow and use, much that was well known and used before; there can be few, if any, things which in an abstract sense are strictly new and original throughout.[1]

The copying of errors and misprints is not in itself sufficient evidence of piracy,[2] but it must be strong evidence in that direction.[3]

An author who propounds a theory has no monopoly in it.[4]

Sir W. Page-Wood, V. C., quite agreed that a writer is entitled, without exposing himself to a charge of piracy, to make use of preceding works upon the subject, where he bestows such mental labour upon what he has taken, and subjects it to such revision and correction as to produce an original result, provided that he does not deny the use made of preceding works, and the alterations are not merely colourable.[5]

And where a defendant sets up that his work is a fair compilation from a number of others, and not a mere copy from any one, it is of the highest importance that he should produce his original manuscript.[6]

A denial of having used a preceding work when the use of it is obvious will be evidence of *animus furandi*. Vice-Chancellor Page-Wood admitted that the issue before him was one of the most difficult issues that could come before a Court, namely, as to how far a very considerable use of the work of another might be taken to be legitimate. Though a good deal had been taken, a good deal had also been supplied; and upon the whole he did not think the de-

[1] Emerson *v.* Davies (Amer.) 1845; 3 Story 778.

[2] Cary *v.* Kearsley, 1802; 4 Esp. 167; and per V. C. Kindersley in Murray *v.* Bogue, 1852; 1 Drew. 367.

[3] Longman *v.* Winchester, 1809; 16 Ves. 269.

[4] *Ibid., sup.*

[5] Spiers *v.* Brown, 1858; 6 W. R. 352.

[6] Hotten *v.* Arthur, 1863; 1 H. & M. Per Page-Wood, V. C., p. 607.

fendant had gone beyond what the Court would allow, having produced that which was, in fact, a different work from that of the plaintiff.[1]

So where the subsequent work was a distinct improvement on the prior one, from which much matter had been taken, with alterations and corrections which rendered it more accurate and useful, an injunction was refused.[2]

Abridgments.

An abridgment may be made of an original work if it is produced by a fair use of the original or originals from which it is abridged. But the republication of a considerable part of a book is an infringement of the copyright existing in it, although it may be called an abridgment, and although the order in which the republished parts are arranged may be altered.[3]

If an abridgment is of such a nature as to amount to an original work its publication will not be restrained,[4] for then it is no piracy, and will be entitled to protection.[5] This is the principle upon which the right to abridge the work of another—a liberty that at first sight seems unusual and unreasonable—has been recognised in the English law of copyright. But the abridgment must be a fair one and not a colourable shortening of the work.[6]

In order to constitute a true and proper abridgment of a work, the whole must be preserved in its sense, and the act of abridgment must be an act of intelligence employed in carrying a large work into a smaller compass, and rendering it less expensive and more convenient both to the time and use of the reader. This gives it the nature

[1] Spiers *v.* Brown, *sup.*

[2] Sayre *v.* Moore, 1785; 1 East. 361.

[3] Digest by the late Mr. Justice Stephen; Rep. of C. C. 1878, p. lxx.

[4] Bell *v.* Walker, 1785; 1 Bro. C. C. 450.

[5] Dodsley *v.* Kinnersley, 1761; Amb. 402.

[6] *Ibid.*, *sup.* Gyles *v.* Wilcox, 1740; 2 Atk. 143. Butterworth *v.* Robinson, 1801; 5 Ves. 709; Pinnock *v.* Rose, 1819; 2 Bro. C. C. 85; Matthewson *v.* Stockdale, 1806; 12 Ves. 270; Whittingham *v.* Wooler, 1817; 2 Swanst. 428; D'Almaine *v.* Boosey, 1835; 1 Y. & C. 301.

of a new and meritorious work; and when the mind is employed in retrenching unnecessary and uninteresting circumstances which rather deaden the narration, it is not an act of plagiarism upon the original work, nor against any property of the author in it.[1]

Real and fair abridgments, Lord Hardwicke considered, may with great propriety be called new books, because not only the paper and print, but the invention, learning and judgment of the authors are shown in them, and in many cases are extremely useful, though in some instances prejudicial by mistaking and curtailing the sense of the author.[2]

Vice-Chancellor Knight-Bruce was not so ready to acknowledge the legality of abridgments. While he would not say that there could not possibly be an abridgment which might be lawful, it was, in his opinion, going beyond what was recognised in law to say unconditionally that a man is at liberty to publish the work of another in an abridged form. He, however, approved of Lord Eldon's test, already cited, as to whether, on the whole, a legitimate use has been made of a previous publication in the fair exercise of a mental operation deserving the character of an original work.[3]

Opinion of the Copyright Commission.

Discussing the question of abridgments, the members of the Copyright Commission of 1878 said:[4] "At present an abridgment may or may not be an infringement of copyright, according to the use made of the original work and the extent to which the latter is merely copied into the abridgment. But even though an abridgment may be so framed as to escape being a piracy, still it is capable of doing great harm to the author of the work, by interfering with his market; and it is more likely to interfere

[1] Per Lord Chancellor Apsley, Hawkesworth *v.* Newbery, 1776; Lofft's Rep., 775.

[2] In Gyles *v.* Wilcox, 1740; 2 Atk. 141.

[3] Dickens *v.* Lee, 1844; 8 Jur. 183.

[4] In ss. 68 and 69 of their Report.

with that market and injure the sale of the original work if, as is frequently the case, it bears in its title the name of the original author. We think this should be prevented; and upon the whole we recommend that no abridgments of copyright works should be allowed during the term of copyright without the consent of the owner of the copyright."

Chapter XII.

PROPERTY IN TITLES.

No copyright in a title.

There is no copyright in the title of a literary work,[1] nor any right analogous to it,[2] and the contention that a title will be protected as being a material part of the work itself[3] is fallacious,[4] unless, indeed, the title should in itself be of the nature of a literary work, and be deserving of protection for that reason.[5]

But other rights exist

The name under which a work passes may, however, become a trade denomination, and as such the property of the first user,[6] who may restrain others from adopting it.[7] Property in a word, in Lord Westbury's opinion, does not exist. But it arises after the word becomes associated with a particular thing.[8]

in the nature of a trade mark.

This right to the exclusive use of a name or symbol descriptive of a work has been the subject of much confusion in the minds of some lawyers, and perhaps even of some judges,[9] although it is distinct from copyright and is in fact in the nature of a trade mark, in which there is an element of property,[10] the invasion of which will be restrained.[11]

[1] Per Bowen, L. J., in Licensed Viet. N. Co. *v.* Bingham, 1888; 38 Ch. D. 143.

[2] Kelly *v.* Hutton, 1868; L. R. 3 Ch. 703, per Page-Wood, V. C.

[3] As put by Malins, V. C., in Weldon *v.* Dicks; 1878, 10 Ch. D. 263.

[4] Per Lush, L. J., in Dicks *v.* Yates, 1881; 18 Ch. D. 77.

[5] As suggested by Jessel, M. R., in Dicks *v.* Yates; *vide sup.*, p. 89.

[6] Wotherspoon *v.* Currie, 1872; L. R., 5 H. L. 508.

[7] Kelly *v.* Hutton, 1868; L. R., 3 Ch. 703. Per Page-Wood, L. J.

[8] M'Andrew *v.* Bassett, 1864; 10 L. T., n. s., 442.

[9] Per Jessel, M. R., in Dicks *v.* Yates; *vide sup.*, p. 89.

[10] M'Andrew *v.* Bassett, 1864; 10 L. T., n. s., 442.

[11] Walter *v.* Head, 1861; 25 Sol. J. 757. Hall *v.* Barrows, 1863; 4 De G. J. & S. 150.

The acquisition of this right is dependent solely on user; the decisions in which injunctions have been granted in its protection being founded upon the principle that a plaintiff has obtained by user such a title to the name or symbol, that were another person permitted to use it he would be passing off his work as the work of the plaintiff.[1] How acquired.

Unless there is evidence to satisfy the Court that the words in which a right of exclusive use is claimed have become necessarily connected in the minds of the public with a particular work, an injunction will not be granted to restrain their use by others.[2] Thus, in the case cited, the plaintiff's claim to the right of exclusive use of the words "Post Office" in connection with his directories was not recognised, though he had published "Post Office" directories for a number of years.

And where the right was claimed in connection with the words "Splendid Misery," the late Master of the Rolls repudiated any possibility of copyright, or other exclusive right, in such a combination of common and hackneyed words, which displayed no invention, and had in fact been previously used as the title of a novel.[3]

To successfully claim a monopoly in a title it must be shown to have become generally accepted in the market as exclusively denoting a particular work.[4]

But the sale of seven thousand copies of a "Castle Album" was not considered sufficient to establish such a general acceptance.[5]

The mere expenditure of money in advertisements announcing a forthcoming work cannot give it an exclusive right. And no compensation can be gained for the loss sustained by one who has been anticipated in his

[1] Per Cotton, L. J., in Licensed Vict. N. Co. *v.* Bingham; *ubi sup.*, p. 142.

[2] Court of Appeal, in Kelly *v.* Byles, 1880; 13 Ch. D. 682 (affirming the decision of Bacon, V. C.).

[3] Jessel, M. R., in Dicks *v.* Yates; *sup.*, p. 88.

[4] Per Chitty, J., in Schove *v.* Schmincké, 1886; 33 Ch. D. 546.

[5] *Ibid.*, *sup.*

use of a name. For it must first be shown that there was a right of property in that name.[1] And such property cannot be acquired before the vendible articles bearing the name have actually been put upon the market for the purpose of sale,[2] which sale must be a substantial one to establish user.[3]

Registration gives no right to a title.

The mere registration of a name or title gives no right to the exclusive use of it,[4] nor will it prevent all the rest of the world from using or appropriating any of the words registered.[5] It is futile and acquires nothing,[6] and a subsequent publication may bear the same name as a prior one, which has been registered, if it cannot be shown that the prior publication was at the time better known in connection with that name than the subsequent one.[7] Lord Justice Lindley thought it impossible that this reputation had been acquired by the mere publication for three days of a paper which, during that time, had only a very small circulation. And the Lord Justice thought it a flaw in the Copyright or Trade Mark Acts that they do not enable a person to acquire an exclusive right to the name of a newspaper, though commercially it may be of great value.[8]

A case came before the Court of Appeal in 1867, in which the right to the exclusive use of the title "Belgravia" for a magazine was claimed by two parties. The name had been thought of and registered by one, for three years, when it also occurred to the other, who made considerable preparations, and advertised his projected

[1] Per Cairns, L. J., in Maxwell *v.* Hogg, 1867 : 2 Ch. App. 307, affirming decision of Stuart, V. C.

[2] *Ibid.*, *sup.*, citing Lawson *v.* Bank of London, 1856; 18 C. B. 84.

[3] Licensed Vict. Co. *v.* Bingham ; *ubi sup.*

[4] Licensed Vict. Co. *v.* Bingham ; and *ubi sup.*, p. 142.

[5] Per Bacon, V. C., in Kelly *v.* Byles; *sup.*, p. 687.

[6] Per Page-Wood, delivering the judgment of the Court of Appeal in Kelly *v.* Hutton, *sup.* ; Primrose Press, etc., Co. *v.* Mark Knowles, 1886; 2 T. L. R. 404.

[7] Licensed Vict. Co. *v.* Bingham ; *sup.*

[8] *Ibid.*, p. 142.

magazine. His predecessor thereupon hastened and published first, and at once objected to the second magazine appearing under the same title. The Court recognised no right in either to the exclusive use of the title; neither the registration nor the publication for so short a time being sufficient on the part of the one, and the mere announcements of intended publication on the part of the other being equally futile. "It is quite absurd," Lord Justice Cairns said,[1] "to suppose that the Legislature, in providing for the registration of what 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 word could be obtained." And again: "There can be no protection in these Courts for the intended name during the course of manufacture of the article which is to bear that name".[2]

In another case the defendant had published since 1849 a weekly circular dealing with the iron trade, and called "*The Iron Trade* (Griffiths' Weekly Report)". In 1864 the plaintiffs commenced publishing what they termed "*The Iron Trade Circular* (Ryland's)," which became widely known. In 1873 the defendant changed the name of his periodical to "*The Iron Trade Circular* (edited by Samuel Griffiths)," the type used being precisely similar to that in which the plaintiffs' title was printed. An injunction was granted restraining the defendant from using this title, the Vice-Chancellor disregarding his claim to the right from having been the first to publish a review of the kind.[3]

In 1886 Mr. Justice Kay recognised the same principle, granting an injunction against the use of a title by a person who had been the first to register his intended use of it, but had been forestalled by another, who by actual sale in the market had gained a better property by

[1] Maxwell *v.* Hogg, 1867; L. R., 2 Ch. App. 307.
[2] At p. 315.
[3] Corn *v.* Griffiths, 1873, W. N.; 93.

user. The defendant had registered the name of his intended journal *Church and State*, on 24th December, 1885. On 1st January, 1886, plaintiff registered a journal under the same name, actually publishing it on 2nd January, and selling about a thousand copies. The defendant did not publish until 16th January; and Mr. Justice Kay (following *Dicks v. Yates*[1]) held that there was no copyright in a title, and (following *Maxwell v. Hogg*[2]) that whatever property there might be, must be acquired by user; and though neither party had established very much, the plaintiff, by publishing and actually selling first on the market, had the better claim.[3]

The user of a name or symbol will be sufficient when that name has really become known in connection with a particular article. Lord Justice Bowen laid it down, that to restrain another from using a title it must be shown that he is doing something calculated to deceive, and that people are likely to buy one article under the belief that it is the other. To show this there must have been such a sale as will establish in the mind of the public a connection between the name of the particular article that can only be after a reasonable time. It had been urged that the right must exist from the first publication; for if not, how is it to be said at what time it arises? While acknowledging the difficulty in fixing that time, the Lord Justice refused to accept the alternative of saying that the right can arise before a publication has any reputation at all.[4]

Not necessary to show fraud.

It is after this connection has, in fact, arisen between a title or symbol and the article which it describes that the Courts will protect the proprietor of the article and title in his exclusive use. The jurisdiction does not rest upon fraud, but upon the right of the proprietor to the

[1] 1881; 18 Ch. D. 77.
[2] 1867; 2 Ch. App. 307.
[3] Primrose Press, etc., Co. *v.* Mark Knowles, 1886; 2 T. L. R. 404.
[4] Licensed Vict. Co. *v.* Bingham; *ubi sup.*, 143.

exclusive use of the work in connection with a vendible commodity.[1]

Mala mens need not be shown;[2] fraud on the part of the defendant not being necessary for the exercise of equitable jurisdiction,[3] and fraudulent action on his part being immaterial to entitle the plaintiff to relief,[4] even if the defendant be ignorant that a right of property exists in the title, and deem it to be a mere technical term.[5]

Except in special circumstances.

But it will be necessary to show fraud when a defendant has sold an article under his own name, that name being widely associated in the market with the articles made by another firm.[6] And similarly, as stated by Mr. Justice Chitty,[7] it requires a strong case to be made out to sustain a claim to another person's name as a trade name; the object of the plaintiff, in that case, being to establish an exclusive right to the term "Richter Concerts," in which he was unsuccessful.

It was held, in a recent case, that a manufacturer is entitled to call his goods by the name which the goods of another manufacturer have acquired in the market, if the name consists only of words of description, and the description is substantially accurate. Whether purchasers are thereby intended to be misled, and are in fact misled, is immaterial.[8] Lord Esher, M. R., recognised the main principle, that a person may obtain a right to prevent any one else coming into the market and taking away his business by using the name by which his goods are known, even if done innocently. But, nevertheless, he considered

[1] Leather, etc., Co. *v.* Amer. L. Co., 1864; 12 W. R. 289.

[2] Wotherspoon *v.* Currie, 1872; L. R. 5 H. L. 508.

[3] Hall *v.* Barrows, 1863; 4 De G. J. & S. 150.

[4] Clement *v.* Maddick, 1859; 5 Jur., n. s., 592.

[5] Millington *v.* Fox, 1838; 3 My. & Cr. 338, per Lord Cottenham, L. C. (afterwards followed by Stuart, V. C., in Clement *v.* Maddick, *sup.*).

[6] Burgess *v.* Burgess, 1853; 3 De G. M. & G. 896. Per Knight-Bruce and Turner, L. J. J., p. 904.

[7] In Franke *v.* Chappell, 1887; 57 L. T., n. s. 141.

[8] Reddaway *v.* Banham, 1895; 14 R. 205, C. A.

that a man cannot be restrained from telling the simple truth. Lord Justice Lopes agreed that the material of which goods are made may be correctly described in plain language, though the description be the same as that of a rival manufacturer, and though the one, owing to the similarity of description, be likely, by customers, to be mistaken for the other, and though the description of it may have been closely imitated. But he must not, in addition to correctly describing them, dress up or garnish his goods so as to make them resemble the goods of his rival, and he must not, by words or conduct, pass them off as the goods of his rival, or endeavour to do so.

Must show deception on public, and damage to owner of title imitated.

It would seem that where the owner of a publication claims an injunction to restrain the issue of another publication with a similar name, he must show (1) not only that the assumption of the name by the defendant is calculated to deceive the public, but (2) also that there is a probability of the plaintiff being injured by such deception.[1]

What amounts to a deception on the public.

What is sufficient to amount to a deception on the public is not a question of law, but of fact. Has the defendant dishonestly passed off his work as the plaintiff's, and was it calculated to deceive?[2]

It is immaterial whether the two works are, in fact, the same or different, as between the parties, so long as the defendant has represented it to be the same.[3] The false colours under which the publication appears constitute a fraud upon the public, if ordinary purchasers using ordinary caution are likely to be deceived.[4]

The Court will interfere where the use of a name is reasonably calculated to lead the public to believe that

[1] Per Curiam (Lord Coleridge, L. C. J., Cotton and Bowen, L. J. J., in Borthwick *v.* *Evening Post*, 1888; 37 Ch. D. 449, reversing the judgment of Kay, J.).
[2] Metzler *v.* Wood, 1878; 8 Ch. 607.
[3] Per Lord Eldon, L. C., in Hogg *v.* Kirby, 1803; 8 Ves. 225.
[4] Barnard *v.* Pillow, 1868; W. N. 94.

the new publication is that of the original proprietor,[1] or where there is an obvious attempt to pass off a publication for another one which has obtained public favour.[2] In the case last cited the deception arose from similarity of appearance. Copyright words had been set to an air in which there was no copyright, the title page being printed thus: "Minnie: sung by Mdme. Anna Thillon and Miss Dolby at Julien's Concerts; written by George Linley,"—and a portrait of Mdme. Thillon was also given.

Deception by similarity of appearance.

The defendant's title page also had a portrait of Mdme. Thillon (though a different one, and copied from an American source), with these words: "Minnie, dear Minnie: Mdme. Anna Thillon". And evidence to the effect that the defendant's shopmen informed customers that the songs were not identical was held to be not sufficient cause for relief, as trade purchasers could not be compelled to do the same.

The principle was recognised by Lord Hatherley in 1872,[3] namely, that if a previous manufacturer has made goods which have acquired a name in the market under a certain description, the description ought not to be used by others, lest their goods should be bought in mistake for those so known. A resemblance sufficient to mislead an unwary purchaser is enough to justify the intervention of the Court.[4] And it is no justification that the device or inscription upon the imitated mark is ambiguous and capable of being understood by different persons in different ways, so that a person who carefully and intelligently studied it might not be misled.[5] It is a sufficient ground for restraint if mistakes have been or are likely to

[1] Walter *v.* Emmott, 1885; 54 L. J. Ch. 1859. Per Cotton, Lindley, and Bowen, L. J. J., Affd. Pearson, J.

[2] Chappell *v.* Davidson, 1855; 2 K. & J. 123. Chappell *v.* Sheard, 1855; 2 K. & J. 117.

[3] Wotherspoon *v.* Currie, 1872; L. R. 5 H. L., p. 514.

[4] *Ibid., sup.;* see also M'Andrew *v.* Bassett, *ubi sup.*

[5] Per Lord Selborne, L. C., in The Singer Man. Co. *v.* Loog, 1882; 8 App. Cas., p. 18.

be caused by the similarity of the two publications.[1] The subsequent name or description need not be an exact imitation, if there are leading or striking points of similarity. Thus, where the plaintiffs had for years published a paper called *The Grocer*, and subsequently, *The Grocer and Oil Trade Review*, and the defendants, in 1888, commenced publishing what they termed *The Grocer and Wine Merchant and Irish Brewer and Distiller*, the latter were restrained from using the word "Grocer" as the first or principal part of their title, the question considered being whether the second name was "practically the same" as the first, and Vice-Chancellor Chatterton considering that both publications would be generally described and commonly known as "The Grocer".[2]

So in another case an injunction was granted because certain words in large print at the head of the two publications were identical, the only difference being in some other words which had been inserted in the second publication in small print.[3]

And Lord Romilly restrained the publication of a "Children's Birthday Text-book" on the ground that the defendant was not entitled to publish it under a form of binding and general appearance, so as to be a colourable imitation of a "Birthday Scripture Text-book" published by the plaintiff.[4]

The publication of a work, so as to represent it to be a continuation of another work, will be prevented if unauthorised.[5] And where A. assigned his interest in *The London Journal* to B., and covenanted not to produce another publication of a similar nature, and then announced the appearance of *The Daily London Journal*, an injunc-

[1] Clement *v.* Maddick, *sup.*

[2] Reed *v.* O'Meara; 1888, 21 L. R. Ir. 216.

[3] Chance *v.* Shepherd; *The Times*, 3rd August, 1869; and see 18 W. R. 33.

[4] Mack *v.* Petter, 1872; L. R. 14 Eq. 431.

[5] Hogg *v.* Kirby, 1803; 8 Ves. 225. Prowett *v.* Mortimer, 1856; 2 Jur., n. s., 414.

tion against the latter was granted by Sir Wm. Page-Wood, V. C., which was upheld on appeal.[1]

In the case of publications of a widely different nature, and published at different prices and in a different form, the inference is that they will be less likely to . .stead.[2] The ground for injunction, the late Master of the Rolls said,[3] is the fraudulent attempt to appropriate another person's business; but apparently similarity in names need not be enjoined if it is evident that the defendant's business will be carried on in such a way that *it cannot be mistaken* for that of the plaintiff. And Vice-Chancellor Malins held, in 1869, that an injunction will not be granted to restrain a new publication from adopting a name similar to but not identical with an existing one, provided that, all things considered, the new publication has such distinctive marks that persons of ordinary intelligence should not mistake it for the old one.[4]

Permissible where no deception possible.

So, in the case of a trade mark, the mark must be applied to goods of the same kind as the plaintiff's, and must be such as would be mistaken for the plaintiff's trade mark to entitle the Court to interfere.[5]

A person seeking the assistance of the Court must not have been guilty of misdescriptions himself,[6] as where a plaintiff had made up and registered a book which appeared to be something different to what it was, and failed to obtain protection.[7] Any false or misleading action on the part of the plaintiff will disentitle him.[8]

Plaintiff must have clean hands.

The right to the exclusive use of a title or description is a chattel interest capable of assignment.[9]

Property in a title is personalty.

[1] Ingram *v.* Stiff, 1859; 5 Jur., n. s., 947.

[2] Per Jessel, M. R., in Dicks *v.* Yates, *ubi sup.*

[3] In Hendriks *v.* Montagu, 1881; 17 Ch. D. 648; 44 L. T. 879, 50 L. J. Ch. 456.

[4] Bradbury *v.* Beeton, 1869; 18 W. R. 33.

[5] Leather, etc., Co. *v.* Amer. L. Co., 1864; 12 W. R. 289.

[6] Chappell *v.* Davidson, *ubi sup.*

[7] Talbot *v.* Judges, 1887; 3 T. L. R. 398.

[8] Leather, etc., Co. *v.* Amer. L. Co., *ubi sup.*

[9] Kelly *v.* Hutton, *ubi sup.*

Chapter XIII.

THE RIGHTS OF AUTHORS AND THEIR ASSIGNS OVER THEIR PUBLISHED WORKS IN NATIONS OTHER THAN THE COUNTRY OF ORIGIN.

The rights of authors and their assigns over their published works in relation to republication in foreign nations, cannot depend upon the municipal enactments of the country of origin, inasmuch as copyright is a positive or conventional privilege derived by the government of each State, which cannot enjoin the citizens of another State to submit to its enactments. The recognition of the rights of foreign authors is therefore due to the comity of nations; and the rights of foreign authors in England now rest mainly on the Berne Convention of 1887, and the Order in Council of 28th November, 1887, issued under the authority of the International Copyright Act, 1886.[1]

This enactment was preceded by the International Copyright Act, 1844,[2] which, after repealing the Act of 1837,[3] enacted by s. 2 that Her Majesty might, by Order in Council, direct that authors of books, prints, and other works of art published abroad should have such copyright here as the Order should provide. Section 3 enacted that if such order applied to books, the copyright law as to books first published here should apply to the books to which such Order related, with certain exceptions. Section 4 contained similar provisions as to prints and other works

[1] 49 & 50 Vict., c. 33.

[2] 7 & 8 Vict., c. 12.

[3] 1 & 2 Vict., c. 59, s. 1.

of art. Section 6 enacted, among other things, that in the case of a book "the name and place of abode of the author, the name and place of abode of the proprietor of the copyright thereof, and the time and place of the first publication thereof in the foreign country named, should be entered in the register book of the Company of Stationers in London, and a printed copy delivered to the officer of the Company at their Hall". There are similar provisions in the same section as to prints or other works of art. Many Orders were issued under this Act, and much difference of practice prevailed in the various countries to which the Orders applied. In order to obviate the inconveniences which thus arose, a conference of the Powers was held in 1885, at Berne, and a Convention, drafted in 1885, was agreed to on 5th September, 1887, between Her Majesty and other Sovereigns.[1]

Meanwhile the International Copyright Act, 1886,[2] was passed. This Act must be read with the Articles of the Berne Convention and the Order in Council of 28th November, 1887, which adopts the latter without reservation.

The undermentioned countries, together with the British Dominions, comprise the countries of the Copyright Union :—

> Belgium, France, Germany, Hayti, Italy, Spain, Switzerland, Tunis, Luxemburg, Monaco and Austria-Hungary;[3] and it is open for other countries to join at any time.

As from 6th December, 1887, the author of a literary or artistic work which is first produced in one of the foreign countries of the Union enjoys, throughout the British Dominions, the same right of copyright (with certain provisoes) as the work would have enjoyed had it been first produced in the United Kingdom. In no case,

[1] Per Charles, J., in Hanfstaengl *v.* Holloway, 1893; 2 Q. B., p. 3.

[2] 49 & 50 Vict., c. 33.

[3] *Lond. Gaz.*, May 1, 1894.

however, does the right exist for a longer period than that accorded in the country of origin.[1] And in the event of publication taking place simultaneously in two countries of the Union, the work is considered, for the purpose of copyright, to have been produced in that country in which the term of protection is the shortest;[2] and the period of protection in the British Dominions will accordingly be equal to that accorded in the country of origin.

So French authors will enjoy the right for lifetime and ten years, German authors for lifetime and thirty years, and so on.

Authors of works produced before 6th December, 1887 (the date upon which the Order in Council came into operation), whose period of protection had not at that date already expired, enjoy the same rights and privileges, subject, however, to certain conditions and limitations hereafter dealt with, as they would have enjoyed had their works been published after the Order came into force.[3]

Protection is also extended to authors who are not citizens of one of the countries of the Union whose works have been first published in one of those countries, though proceedings for the enforcement of their rights must in such cases be taken by their publishers.[4]

The Court may, however, require the production of a certificate from a competent authority to show that the formalities prescribed by law in the country of origin have been duly complied with. In such cases an extract from a register or a certificate or other document, stating the existence of the copyright or the person who is the proprietor of it, or who stands in his place, will be admissible as evidence if authenticated by the official seal of a Minister of State of the foreign country, or by the official

[1] 49 & 50 Vict., c. 33, s. 2 (2). Order in Council of 28th November, 1887.
[2] 49 & 50 Vict., c. 33, s. 3 (1). Order, 28th November, 1887, s. 5.
[3] See s. 6 of the Act of 1886, and cases hereafter referred to. Lauri *v.* Renad, 1892; 3 Ch. 402, 8 T. L. R. 536, 61 L. J. Ch. 580; 61 L. T. n. s. 275; 40 W. R. 679.
[4] S. 4. Order in Council, 28th November, 1887. 49 & 50 Vict., c. 33, s. 2 (2). Art. II., Berne Convention.

seal or signature of a British diplomatic or consular officer acting in such country. For the enjoyment of international rights is subject to the accomplishment of such conditions.[1]

Registration.

The provisions of the International Copyright Acts with respect to registration and to the delivery of copies to the Museum and to certain libraries, do not apply to foreign countries, unless so provided for in any Order in Council bringing the Acts into operation. The Order of 28th November, 1887, does not contain any such provision.[2]

Exclusive rights over translations.

Where a literary work or a dramatic piece is first produced[3] in a foreign country to which the International Copyright Acts are applied by an Order in Council, its author or publisher, as the case may be, has, unless otherwise directed by an Order in Council, the same right of preventing the production in and importation into the United Kingdom of any unauthorised translation of the work, as he has of preventing the production and importation of the original work. The Order of 28th November, 1887, does not vary this provision in any way.

But must be exercised within ten years.

The enjoyment of this right of exclusion is only permitted, however, for a period of ten years from the 31st December of the year of first publication, except in the case of works published in incomplete parts, when the period of protection runs from 31st December of the year of publication of the last part. But in the case of works composed of several volumes, as well as of bulletins or collections published by literary or scientific societies or private persons, each volume, bulletin or collection, is, with regard to the period of ten years, considered as a separate work.

If, after the period of protection has expired, no authorised translation of the original work into the English language has been made, the right to prevent the

[1] 49 & 50 Vict., c. 33, s. 7; Berne Convention, Art. II.
[2] 49 & 50 Vict., c. 33, s. 4 (1); Order, 28th November, 1887. Hanfstaengl v. Amer. Tob. Co., 1895; 1 Q. B. 347, C. A.
[3] *Ibid.*, as to the meaning of the word "produced," etc.

production in and the importation into the United Kingdom of an unauthorised translation ceases.[1]

There is copyright in English law in a translation by reason of the labour applied to its production,[2] without regard to its having been produced by authority; and the law relating to copyright will apply to lawfully produced translations of works entitled to protection by virtue of the International Copyright Acts and other enactments in countries of the Copyright Union.[3]

Unauthorised indirect appropriations of a literary or artistic work of various kinds, such as adaptations, arrangements of music, etc., are especially included among the illicit reproductions to which the Berne Convention applies, when they are only a reproduction of a particular work, in the same form or in another form, with non-essential alterations, additions or abridgments, so made as not to confer the character of a new original work.[4]

Political articles exempted.

It seems, however, that articles of political discussion, or relating to politics, published in newspapers or periodicals in foreign countries belonging to the Union, may be translated or reproduced in the United Kingdom without restriction, the source being acknowledged, unless the author has signified his intention to reserve those rights in a conspicuous manner by announcement in the newspaper or periodical. In the event of his so reserving his rights, he will enjoy the same protection as is accorded to books.[5]

A translation, to be entitled to protection under the law of International Copyright, does not necessarily require to be an absolutely literal translation, but may be substantially a translation.[6]

[1] 49 & 50 Vict., c. 33, s. 5, subs. (1), (2); Berne Convention, Art. V.
[2] See p. 18.
[3] 49 & 50 Vict., c. 33, s. 5, subs. (3); Berne Convention, Art. VI.
[4] Berne Convention, Art. X., and Order in Council, 28th November, 1887, varying s. 6 of 15 Vict., c. 12.
[5] 15 Vict., c. 12, s. 7, re-enacted by 49 & 50 Vict, c. 33, s. 5, subs. (1), (2), (3), (4).
[6] Per Kekewich, J., in Lauri *v.* Renad, 1892; 3 Ch. 402.

The Copyright Acts now apply to literary and artistic works first produced in a British possession, except as regards registration at Stationers' Hall and the presentation of copies to libraries. But to avoid the necessity for registration in the United Kingdom the colony must provide a local registry, and an extract from such a registry, duly kept and authenticated, is admissible as evidence. But a colony is not restrained from making local enactments respecting copyright within its own limits and in respect of works first published there.[1]

Similarly, the International Copyright Act of 1886 applies to every British possession, unless expressly exempted.[2]

The first publication of a work in a British possession therefore entitles it to the same protection as is accorded to works first published in the United Kingdom. And, similarly, works published in countries of the Copyright Union enjoy protection in all British possessions to the same extent as in the United Kingdom.

Articles in newspapers and periodicals exempted.

The privileges of international copyright are not extended to articles from newspapers or periodicals, which may accordingly be reproduced without restriction either in their original language or as translations, unless this right is expressly reserved by their authors or publishers. Such reservation may be made in a general manner, in the case of periodicals, at the commencement of each number. But neither articles of political discussion, news of the day, nor reproductions of current topics, can be prohibited from translation in this manner.[3]

Printed works can be seized on importation into those countries of the Copyright Union where the original work

[1] 49 & 50 Vict., c. 33, s. 8, & s.s. 1, 2, 3, 4. See Report of Royal Commissioners of 1878 for the position of colonial authors before the passing of the International Copyright Act, 1886.

[2] 49 & 50 Vict., c. 33, s. 9; Berne Convention, Art. XIX.

[3] Berne Convention, Art. VII.

enjoys protection : the seizure being effected conformably to the domestic law of each State.[1]

Works produced before International Copyright Act

Works produced before the coming into force of the Order in Council, namely, 6th December, 1887, enjoy the same protection as if they had appeared after it,[2] provided that the term of protection in the country of origin had not by that time expired. For the Act does not revive or re-create expired copyright or confer any new right on the owner of an expired right without any fresh act done by him.[3] But to be entitled to this protection the work must have been lawfully produced in the United Kingdom, and direct and valuable pecuniary interests must have been subsisting at the date referred to.[4] The words used in the Act are "rights or interests"; the word "interests," as Mr. Justice Chitty held, having a more extended meaning than "rights,"[5] and not meaning necessarily capital embarked. Production would be lawful if it took place in this country before the proprietor of the foreign right gained copyright here, and would not depend upon authority being obtained from him for an act which did not require his authority before the rights of foreign proprietors were recognised by the Statute and Order in Council.

Subsisting and valuable interests.

Any interest will be recognised if arising from or in connection with the subject of copyright, and subsisting and valuable at the date of the publication of the Order in Council. So where a firm published a piece of music in England before 6th December, 1887, and the defendant had purchased a copy for five shillings, for the use of his band, who had performed it, it was held, affirming the judgment of Justices A. L. Smith and Grantham, that

[1] For the United Kingdom, see 5 & 6 Vict., c. 45, s. 17; 7 Vict., c. 12, s. 11; 15 Vict., c. 12, s. 9; 25 & 26 Vict., c. 68; Customs Act, 1876; *London Gazette*, 1st May, 1888.

[2] 49 & 50 Vict., c. 33, s. 6; Order in Council, 28th November, 1887, s. 3; Berne Convention, Art. XIV.; Hanfstaengl *v.* Holloway, 1893; 2 Q. B. 1.

[3] Lauri *v.* Renad, 1892; 3 Ch. 402; 67 T. L. R. 536.

[4] Per Charles, J., in Hanfstaengl *v.* Holloway, 1893; 2 Q. B. 1.

[5] Schauer *v.* Field, 1893; 1 Ch. at p. 40.

there was evidence to warrant the finding that the defendant had an interest arising from or in connection with the lawful production of the work in the United Kingdom, which was subsisting and valuable when the Order in Council was published, and that he was therefore protected by the proviso of s. 6 of the International Copyright Act, 1886.[1]

Infringement abroad not restrainable by English Courts.

The English Courts have, however, no jurisdiction to restrain by injunction an infringement in one of the other countries of the Copyright Union of the international copyright granted by the Berne Convention, even although the party against whom proceedings are taken is a British subject resident in England.[2] In the case cited, the infringement was being effected in Germany, and the learned Judge said:[3] "It is sometimes the duty of an English Judge to enforce German law in England. It is, no doubt, the duty of a German Judge to enforce English law in Germany. But to enforce German law in Germany cannot be more the duty of an English Judge than it would be the duty of a German Judge to enforce German law in England. . . . Even if I were to grant an injunction, it would be practically impossible for me to enforce it: . . . the rights are English rights, except so far as they are extended by the Berne Convention, and in their extended form they are not only German rights but German rights to be exercised in Germany."

American Copyright.

By the Act of 1891 of the Revised Statutes of the United States, the author or proprietor of, *e.g.*, any book, map, chart, or engraving may, upon complying with certain provisions, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same. Authors or their assigns have also the exclusive right to dramatise and translate any of their works for which copyright shall have been obtained

[1] Moul *v.* Groenings, 1891; 2 Q. B. 443; 7 T. L. R. 623.
[2] Per Kekewich, J., in "Morocco Bound," Synd *v.* Harris, 1895; 13 R. 183.
[3] At p. 186.

under the laws of the United States.[1] The term of copyright so obtained is twenty-eight years from the time of recording the title thereof in the manner provided.[2]

The author, if living, or his widow or children (but apparently not his assignee), can, however, obtain an extension of this exclusive right for a further term of fourteen years, upon recording the title of the work a second time, and complying with all other regulations in regard to original copyrights within six months before the expiration of the first term.[3]

Copyright cannot be recognised unless the person entitled to it, on or before the day of publication, in the United States or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian of Congress at Washington, a printed copy of the title of the, *e.g.*, book, map, chart, or engraving for which he desires copyright; nor unless he shall, not later than the day of publication thereof in this or any foreign country, deliver, as above, two copies of such copyright book, map, chart, or engraving. Provided that in the case of a book, photograph, chromo or lithograph, the two copies to be delivered shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives or drawings on stone made within the limits of the United States, or from transfers made therefrom.[4] And during the continuance of such copyright, the importation into the United States of any book, chromo, lithograph, or photograph, so copyrighted, or an edition or editions thereof or any plates of the same not made from type set, negatives or drawings on stone made within the limits of the United States, is prohibited.[5]

[1] 4952 of the Act of 1870, as amended by s. 1 of the Act of 1891.
[2] Act of 1870, s. 4953.
[3] S. 4954, as amended by s. 2 of the Act of 1891.
[4] A musical composition is not a "book" within the meaning of the American Copyright Act, 1891, and it is consequently not necessary to print a musical publication in the United States as a condition of obtaining copyright there—(Court of Appeal, Amer., Novello *v.* Oliver Ditson & Co.; *Times*, May 2, 1895).
[5] S. 4956, as amended by s. 3 of the Act of 1891.

An exception is made, however, in favour of persons purchasing for use and not for sale, who import, subject to duty, not more than two copies of such book at any one time; and in the case of books written in foreign languages, of which only translations in the English language are copyrighted, the prohibition of importation will apply only to translations, importation of the original being permitted.[1]

A copy of every subsequent edition has also to be delivered wherein any substantial changes are made.[2]

An action in respect of an infringement of copyright cannot be maintained unless a notice is printed on the title page or page immediately following it, that the work has been "Entered according to the Act of Congress in the year —— by A. B. in the office of the Librarian of Congress at Washington".[3]

A penalty is imposed upon any person who shall print such a notice upon any, *e.g.*, book, map, chart, or engraving for which he has not obtained copyright.[4]

An action for damages is given against any person who infringes a copyright duly obtained,[5] and a license to print and publish a copyright work, or translate, dramatise, import or sell infringements of it must be made in writing, signed by the proprietors in the presence of two witnesses.[6]

The printing of a manuscript without the consent (not necessarily in writing) of the author or proprietor of it being first obtained, will render a person who does so liable "to the author or proprietor for all damages occasioned by such injury".[7]

Each volume of a book in two or more volumes, when such volumes are published separately, is to be considered

[1] S. 4956, as amended by s. 3 of the Act of 1891.
[2] S. 4953, as amended by s. 6 of the Act of 1891.
[3] S. 4962 of the Act of 1870.
[4] S. 4963, as amended by s. 6 of the Act of 1891.
[5] S. 4964, as amended by s. 7 of the Act of 1891.
[6] S. 4965, as amended by s. 8 of the Act of 1891.
[7] S. 4967, as amended by s. 9 of the Act of 1891.

a separate publication (unless the first volume was published before 1891), and the same rule applies to each number of a periodical.[1]

The Act of 1891 is only to apply to citizens of such foreign states or nations as grant to citizens of the United States the benefit of copyright on substantially the same basis as its own citizens, or which are parties to an international agreement providing for reciprocity in the granting of copyright, by the terms of which the United States may at its pleasure become a party to such agreement.[2]

[1] S. 11 of the Act of 1891.

[2] S. 13 of the Act of 1891.

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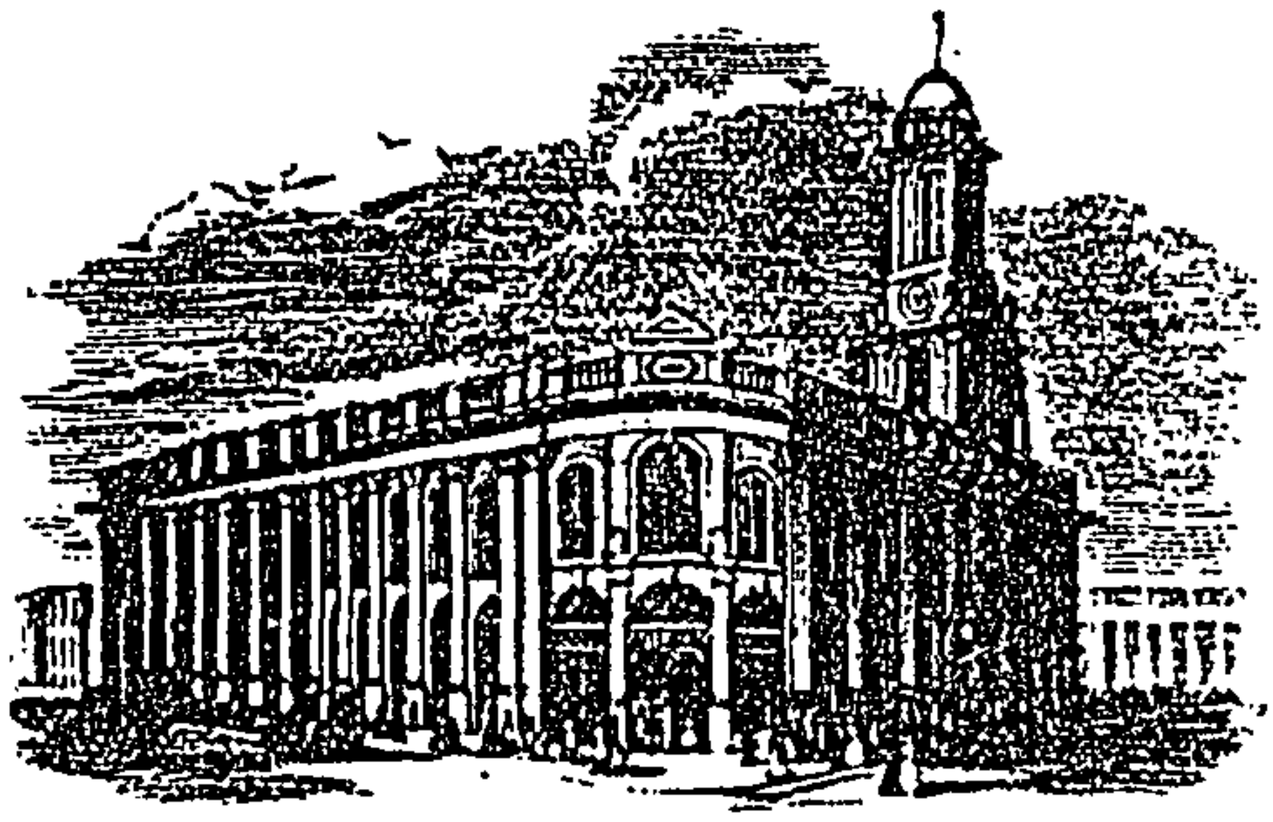
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