A MANUAL OF MUSICAL COPYRIGHT LAW.

FOR THE USE OF

MUSIC-PUBLISHERS AND ARTISTS,

AND OF

THE LEGAL PROFESSION.

BY

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London:

SIMPKIN, MARSHALL, HAMILTON, KENT & CO., LTD.

—

1905.


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TO

THE HON. SIR CHARLES SWINFEN EADY,

ONE OF HIS MAJESTY'S JUDGES IN THE CHANCERY DIVISION

OF THE HIGH COURT.

IN MEMORY OF

MUCH SYMPATHETIC INTERCOURSE

AT THE BAR.

THE UNIVERSITY
LIBRARIES
OF GEORGIA

PREFACE.

A TREATISE on musical copyright, combining the results of a refined musical training with those of a legal one, is, the author believes, without precedent, or nearly so; the fact that his antecedents enable him to realise this combination was brought to his notice by several influential musical publishers and induced him to commit his practical experiences to paper.

It was pointed out that one who is exclusively a lawyer wants the personal contact with the publishing trade, which is necessary for explaining and adjusting the legal rights and obligations of composers, executants and publishers of music, both as between themselves and as between either of those three classes and the public. Such an one may easily overlook, or not quite grapple with, an infinity of subtle points likely to arise in business. He is not practically familiar with those niceties of trade which are only acquired by a series of personal dealings with music publishers, British and foreign, during many years. Not having the habit of closely analysing and dissecting melodic phrases, and relying merely on an untutored ear, he overlooks details of importance, with the result that he sees resemblances where the whole phrase, studied in its entirety, shows that none really exist; again, there are cases where the *cultured musician* would scent out an origin, common both to a supposed piratical copy of a given theme and to the theme itself; and the family likeness may be sufficiently definite to take away the right to complain of an infringement, but *the mere lawyer*, in such cases, might be misled into advising an action by the close similarity between the original phrase and the copy.

The author desires, partly by statement, and partly by concrete examples, to put composers and their publisher on their guard against these and similar mistakes; and

though he cannot deal with facts which have not arisen, he hopes, by suggestions as to what *may* arise, to inspire caution.

There are many themes of which an expert would at once say that they have probably occurred before the present time, though he may have never before heard or seen the actual notes, and only comes to a conclusion from simplicity of structure or other internal evidence.

In such a case any legal proceedings, even against a person who has reproduced a motive note for note, should be advised with great hesitation. This is no imaginary combination of circumstances, and has occurred in many cases within the author's experience. He was consulted by a publisher as to suing in respect of a popular tune of the day, over which the latter claimed copyright and which was reproduced *notatim* in a musical comedy. The author at once pointed out that the melody consisted mainly of broken chords; that the phrase was one which readily fell under the hand on a pianoforte, and that these facts pointed with great probability to a previous stage of existence. Relying on the boldness of the copyist's imitation, the publisher persisted in bringing an action, in the course of which, experts, consulted by the defendant, traced a transmigration through several stages from a serious cantata twenty years old, where the exact phrase (four or five bars) occurred, though in a different time and with a totally different sentiment. Needless to say the action failed.

The author earnestly hopes by dealing with this sort of question, in addition to those purely legal ones, some of which have often before been discussed, to add a new quota to the large stock of copyright-lore already existing.

His familiarity with this branch of the subject is founded on considerable practice as Counsel in the law courts; he has also had experience in drafting copyright statutes, and reporting on one very important one for the Board of Trade; and he has the satisfaction of being able to say that a bill which was framed by him contained a clause dealing with the two points on which the success of the street pirates has turned, viz.: he inserted words (1) empowering magistrates to act *ex parte;* and (2) making it a penal offence to sell piratical copies under the circumstances which have ruined hundreds of honest tradesmen, and brought British administration of justice into con-

tempt. His salutary provision was, however, eviscerated and rendered useless, as though on purpose to pour ill-gotten riches into the pockets of shameless thieves.

He wishes to discharge a debt of gratitude by cordially thanking for able and invaluable assistance in the preparation of this treatise, Mr. C. A. Bennett of the Chancery Bar, and Mr. Henry Clayton, also a Member of the Bar, and of the Copyright Association, but now a partner in one of the largest London firms of publishers.* This little work has materially gained by many hours of discussion with these gentlemen, and by many suggestions made by them, and acted upon by the author.

Up to a certain point of time he profited largely by the assistance of Mr. Frederick Daldy, especially in that part of this treatise which deals with Canada. Mr. Daldy had a thorough knowledge of our relations with the Dominion in the matter of copyright, and in addition to a keen intellect, had had the advantage of twice making the voyage to Montreal, Toronto and Quebec for the purpose of discussing the burning questions between Canada and the Mother Country, which have hung up and delayed the settlement (by a codification bill long since prepared) of the whole subject of British copyright. Mr. Daldy's lamented death, when this work was only partly written, cut short the intercourse between him and the author, who lost at once a sagacious adviser and a sympathetic friend.

The Copyright Association with their head, Mr. John Murray, and their secretary, Mr. Sharon Turner, also deserve the author's thanks for facilitating his access to the collection of Colonial statues, with Mr. Daldy's preface, dated in the year 1889, and printed for the Association.

In conclusion he has also to thank Mr. Copinger, whose work, a masterpiece of compendious arrangement, constitutes a copyright library in itself. The author has freely consulted, and, within the limits of fair usage, once or twice cited passages from this work, and has greatly profited by the learned writer's statements of law, and vigorous arguments, even where he differs from them.

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* Mr. Clayton has with his own pen contributed useful matter, founded on practical knowledge, in the chapter on America.

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CHAPTER I.

(1) Enemies of monopoly of brain-product. (2) Apology for copyright. (3) Historical sketch. (4) Remedy in respect of unpublished works, perpetual. (5) Statutory origin: Talfourd's Act. (6) Term in a published work. (7) Some unpublished works comprised in statutory remedies. (8) Literary copyright not dealt with in this work. (9) Statutory performing right. (10) International rights. (11) Machinery in respect of reciprocal rights. (12) The International Copyright Act, 1886. (13) Rights thereunder.

COPYRIGHT, AND ANALOGOUS FORMS OF PROTECTION EXPLAINED.

(1) THERE is a certain class of persons, who look upon the protection which the law throws around the offspring of a man's brain as an unjust monopoly, an invasion of the liberty of the subject. These would-be lavish givers of other people's property are more numerous, and in some cases more influential, than one would suppose in an enlightened age when, to use the often quoted language of Lord Chancellor Brougham, "the schoolmaster is abroad." Their policy is not dissimilar from, though fraught with far wider mischief than that of the opponents of the game-laws. The attacks of both assailants of the rights of property like other socialistic believers in the axiom "*la propriété est le vol*" are suicidal, and would result in the slaughter of the bird which lays the golden eggs. Instead of getting cheap music of a good class, the abettors of the pirates will end by stopping the production of all works of genius and even of popular ones.

(2) This argument is too familiar to need development. If the allies of the notorious pirate of musical publica-

tions have minds so constituted that they cannot see the inevitable result of withdrawing protection from producers of "thoughts that burn," no reasoning of the present writer on the old lines would convince such one-sided and narrow thinkers. There is, however, another form of argument derived from the mode in which copyright sprang up; an evolution founded on the absolute necessity for intervention by the legislature to prevent a scandal for "no man's property," in the region of ideas creation; a necessity resembling that which gave rise to the laws giving validity to testamentary documents. If it be found necessary in the interests of society, and if it is not a vicious monopoly, to allow a man by making a will to withdraw his goods and chattels after his death from the clutches of the strongest and least scrupulous citizens, there is no impropriety in following an analogous course, and protecting what is often more precious than money, brain product.

(3) Sympathisers with the street buccaneers who carry out the principle "*non vobis mellificates apes*" and fatten upon the pastures which industrious publishers have cultivated and enriched by the sweat of their brow and the money from their purse, think that musical copyright sprung into life, the offspring of a few wealthy publishers, nursed by the advocates in Parliament of those interested wire pullers; and that it is only the apathy of an ignorant and lazy public which allows it to live. The reverse is the fact. Topsy's mode of accounting for the existence of stupendous London, "I suppose it growed," applies to copyright. It is not necessary to enlarge upon the state of society prior to the reign of Queen Anne, when not only the musical art was at a low ebb, but means of multiplying copies of a musical piece were in their infancy; theft was not attractive, street pirates were unknown in those halcyon days. Then men began to suspect that music, following on to the heels of literary composition, had a value, both intrinsic and pecuniary. The theft of a MS. musical composition containing often matter of national, nay, of European interest, was a crime, and punishable as such; and police-protection was accorded to this sort of property. Then it came to be held that even where a felonious intention or act was wanting, as in the case of an executor, borrower, or other person becoming possessed of, or obtaining access to a

MS. by legal means, such person should be restrained by the court from *illegally* publishing the contents of such MS. or otherwise dealing with it so as to encroach upon the rights of the author; and performance in public, and under certain circumstances in private, of a piece of music or a dramatic piece not communicated to the public by the composer or author, would be subject to the same rule.

(4) The right to recover an unpublished MS. or to restrain publication or multiplication of copies of it or performance, was and is unrestricted in point of time, and remains for ever unless interrupted by some act of acquiescence by the proprietor amounting to "leave and license" to interfere with his rights or some part of them.

See MacGillivray on Copyright 220 and the cases there cited.

(5) These rights to protection for valuable property sprang up by degrees and as it were, spontaneously, and were due to no envious invention of avaricious publishers; they took root in the natural sense of justice and necessity, to avoid confusion and literary anarchy. The same deep-seated motives caused the legislature to intervene, and to crystallise the unwritten law by several Statutes, which the writer abstains from referring to in detail, as the measures in question were all repealed, and the whole copyright law relating to Great Britain was dealt with (or purported to be so) by the Act of 1842 herein referred to as "The Copyright Amendment Act." This Statute was due to the unceasing labours of the large-minded and classical Serjeant Talfourd, and as will be seen from his published correspondence, was free from the taint of any editorial intrigue.

5 & 6 Victoria c. 45.

(6) In so far as the law relates to a MS. which the author or composer has "published," (an expression defined and explained later) he has to pay for the additional clearness and precision of his rights by an important limit in point of duration. He retains "copyright" (defined by the Statute as "the exclusive liberty of printing or otherwise multiplying copies") for the term of forty-two years from the date of first publication, or for his own life and seven years after, if the term of forty-two shall earlier expire. As soon as his work is published therefore he (or his assigns) becomes automatically entitled to protection during the whole of his life at all events; his representatives or assigns are so entitled for seven years from his death: and if the period

of forty-two years from publication has not then expired, then for the remainder of that period.

(7) This statutory provision only relates *in terms* to works which have been "published." It seems to have been generally assumed that the Statute has no operation upon unpublished works at all. This seems inconsistent with the language of some of the sections carefully read, but as the author or composer unquestionably has, in perpetuity, either under the Statute or by virtue of the common law, all the rights to protection of his unpublished work which he formerly had, the question by which jurisdiction those rights are conferred has only a limited interest, which will be subsequently discussed.

(8) Inasmuch as the Copyright Amendment Act, 1842, applies in terms to musical compositions as well as literary ones, the writer will now drop all allusion to the latter, except to touch upon some points connected with words intended to be set to music.

(9) The same Statute confers on composers and their assigns an exclusive right of performance of their musical compositions, for the term of their life and seven years after, or if an absolute period of forty-two years from the first *public* performance shall be then unexpired, then till the expiration of such forty-two years; this period is similar to that of copyright, except that the latter commences with publication, while performing right commences with first performance.

3 & 4 William 4th, Chapter 15.

Under this Statute and a previous one, the Dramatic Copyright Act, 1833 (commonly known as "Bulwer-Lytton's Act"), the right to exclusive performance of an unperformed work is conferred upon the author from the composition of his work in perpetuity.

All the rights which flow from composition of a musical piece, either apart from, or under legislation, will be considered in detail; but a short sketch of extra-territorial relations will first be given.

(10) So large a proportion of the music performed in Great Britain is imported from France, Germany, Italy, and more recently, Norway, Sweden, and Poland, that international rights and obligations assume as great an importance, or even a greater, than intra-territorial ones. As long ago as early in the forties, conventions were entered into between sundry continental States and Great Britain; and a continuous chain of reciprocity was kept

up; but a more compendious measure had for its result the Berne Convention, ratified in 1887, which was signed by several continental and other States which are made one for all substantial purposes of copy-and-performing-right.

The additional Act of Paris, 1896.

A supplemental convention was signed a little later making some modifications in the original one of Berne.

The interests of the British Colonies, and other distant possessions under these conventions, are stated in the chapter which deals with the British possessions other than the United Kingdom.

The United States of America have abstained from signing. The process by which British subjects are enabled to protect their compositions in America is given in the chapter on that country. A separate convention has since been entered into between Great Britain and Austria, which in its main provisions is similar to the Berne Convention. The differences will be noticed hereafter.

(11) The machinery in this country which gives a valid, legal existence to any convention with foreign States, in respect of copyright matters, consists of a statute of the legislature, giving power to the Privy Council to carry out the contract in question by an order which usually recites such contract. In some cases the order precedes the Statute in point of time, and the Statute operates as a ratification.

(12) The Statute of 1886 giving validity to the order of the Privy Council which refers to the Berne Convention, the order and the convention itself are summarised or set out in the chapter on International rights or in the appendix.

(13) Suppose then a composition, of whatever description, which would be entitled to copy-and-performing-right in Great Britain, has been since December 6, 1887, published in one of the signatory States, the Act of 1886, the order and convention, confer upon the composer and his assigns "the same rights as the laws of Great Britain confer on natives" (of Great Britain). No greater right, however, can be enjoyed by a foreigner in Great Britain (nor probably by a British subject abroad) than that which the composer would have in his own country.

CHAPTER II.

(1) Publication, a voluntary act, not enforced upon an author. (2) Police protection for a MS. (3) Continental procedure: Reissiger's A flat Mass. (4) Protection only granted where first publication in British dominions, except by conventions. (5) Assignment. (6) Writing necessary: what is the proper stamp. (7) Devolution on bankruptcy. (8) Passing off under a piratical title: remedies. (9) Ground of jurisdiction. (10) Joint authors.

RIGHTS BEFORE PUBLICATION.

(1) THE biblical injunction restraining Christians from hiding their talents in a napkin has no parallel in law; there is no rule of British jurisprudence forbidding a composer to withhold from the public the products of his brain, no matter how brilliant or valuable they may be. The law will afford its protection to any author, even to one who has produced work which it would be a national benefit to have published, against piracy, although the robber be inspired by a laudable wish to communicate his literary booty to an admiring posterity.

(2) The mere theft of a manuscript, that is, of the paper upon which are written the author's ideas, would be an offence punishable by the Criminal Law; the reproduction in any form, or the public performance, of those ideas, would be restrained by a civil court on general principles of equity.

(3) The right of a man to keep concealed the expression of his musical ideas exists also in some, if not all, continental states.

A striking instance of the exercise of this right is to be found in Dresden. Some of our musical readers may, perhaps, have heard at the *Hof-Kirche* (the Roman Catholic Cathedral) in that city, the Mass in the key of A flat by Reissiger. Some, perhaps, have also (like the writer) sought to obtain a copy of this, by far the most highly inspired of the works of that somewhat unequal composer. The answer always given is that

the consistory forbid the engraving of the work from an amiable wish to have the monopoly of performance.

(4) It must be understood that a work previously published outside the British dominions, in a State not a party to any copyright convention, cannot be entitled to protection here, except as regards actual theft of the manuscript. If, however, the country of publication is a party to a convention with Great Britain, protection may be claimed on grounds which will be stated in a subsequent chapter. Protection, however, is afforded to works published simultaneously in the United States and the United Kingdom, on grounds which will be explained hereafter.

An author may assign or bequeath to another his unpublished work, including or not the right to publish the same in foreign countries; the right, however, in respect of countries not parties to a convention would be probably nugatory, as the composer's work would not be protected there.* On his death his rights in such work, if undisposed of, devolve upon his personal representatives. The proprietor of a composition may sub-divide his copyright by way of assignment to different persons, *e.g.*, giving to one the exclusive right of orchestrating the piece, or, if a song, of reproducing it in a different notation; this may be done whether the original piece is published or not. This subject is dealt with in the next chapter.

(6) Writing is necessary to transfer a composer's right to his unpublished work,† but there are no rules as to the form which such writing must take, and a receipt indicating clearly the intention to transfer will be sufficient. If, however, it is intended to rely on a receipt or any

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* An example of this was found in the case of Mr. Beerbohm Tree, who generously paid a large sum to the late Mr. du Maurier for the right to use "Trilby" here; though the writer explained to the eminent actor-manager that the work having been first performed in the U.S., and America not being a party to a convention, the work was in the public domain in Great Britain.

† It has been held in the United States that "a publisher may become the owner by parol transfer of the rights of the composer in an unpublished work, though a writing is necessary to transfer title after obtaining a copyright." Calahan *v.* Myers 128 United States, 658. White Smith Company *v.* Apollo Company, United States Circuit Court in Equity, Nos. 8126, 8127, June 21, 1905.

other document as a cession of interest, the common sixpenny stamp is insufficient, and a penalty is incurred which must be paid in order to make the instrument producible in Court. The proper stamp is an *ad valorem* one, or if an unascertained amount (as in the case of royalties) is the consideration, or part of it, the stamp is a ten-shilling one. This point is of great importance, as hundreds of assignments have been executed on a six-penny stamp when that amount is illegal, and some cessions of very considerable value and importance are thus tainted.

It is hardly necessary to add that the assignment of an unpublished work may be made subject to almost any limitations which the author may wish to impose as to performing or abstaining from performing the same, or otherwise.

(7) There is a doubt whether the manuscript of an unpublished work, and the right to publish the same, pass in the event of the bankruptcy of an author to his trustee, or whether the author's right to withhold publication continues notwithstanding bankruptcy. There is a strong case in favour of the trustee where the manuscript is one of a musical composition which may, possibly, be utilised to add a considerable sum to the bankrupt's assets. Where it is a question whether a diary or private memoranda can or cannot be published, more delicate considerations would arise. On the whole it would seem up-hill work for a bankrupt to endeavour to restrain his trustee from making available for the benefit of creditors a manuscript opera, for instance, which the bankrupt might be wishing to keep back in order to make a large gain at some subsequent period.

(8) The right of protection treated of in the earlier sections of this chapter does not fall within the strict meaning of the word "Copyright." It is mainly founded upon the combined effect of the author's common law right of property in his manuscript, and the equitable jurisdiction to restrain improper or piratical use of a chattel fraudulently obtained. There is another form of wrong not strictly an invasion of copyright (though it is analogous thereto) which is conveniently mentioned here. If some unscrupulous person publishes a song, and gives to it a title identical with, or being a colourable imitation of, the title of some publication which has already achieved

success, and exposes the song for sale, with such external details of colour and printing similar to those of the successful work, as would be calculated to lead purchasers to believe that the song, so prepared and "got up," is really the successful song, the Courts will restrain by injunction and punish by damages such a fraudulent act. The case does not seem to have ever been litigated so far as a musical composition is concerned, but there are many analogous cases of punishment of those who seek to pass off non-musical (*i.e.*, literary) matter of another as original; and there is no doubt on principle that if any one offered for sale a song with the name for instance of "The Lost Chord" (not being the well-known song of that name), and handed it to a purchaser asking for "The Lost Chord," such a sale would be restrained; and of course, similarity of colour and printing which would help the deception would render the case against the seller all the more clear. The court would act in such a case partly in the interest of the public who might be deceived, and partly in that of the traduced composer, and without any reference to the law of copyright except in so far as it was necessary to enable the person injured to prove himself the owner of the song imitated. And in such a case not only the deceived purchaser (who would have a financial interest), but also the composer would be entitled to sue, on the ground, in the case of the latter, that his reputation would be injured by circulation of an inferior work as though it were his. An assignee of the author who would have a financial interest would also be protected. If the fraudulent act and intent be proved, it is not necessary to show that any person has *actually* been deceived into purchasing the spurious article. The composer or other the owner whose reputation or property is endangered might sue for an injunction and delivery up of spurious copies.

(9) The existence of the remedy in such a case is emphatically insisted upon by the writer because of the erroneous impression in the minds of the musical public that there is no remedy in a case of such fraud. The error is caused by the legal proposition that "*primâ facie* there is no copyright in a mere title." The remedy undoubtedly exists, but as before stated it is founded, not upon copyright, but upon inherent jurisdiction to repress fraud.

(10) It is obvious that a piece of music may be the work of more than one person. Not only an opera or oratorio, but all the component parts of those forms of composition, may have been due to joint efforts. The consideration of joint rights is more important in the case of copyright in the strict sense of the term (that is where there is the statutory remedy hereinafter mentioned) than it is where unpublished manuscripts are being treated of. The writers know of no case where the question of joint rights to a manuscript *unpublished* has ever come before the Courts, though it will not escape the acumen of the legal reader that even in cases prior to publication, embarrassment might be caused where one of two joint authors wished to sue alone, a case which actually has occurred where the subject matter was a *published* manuscript, and the author entitled to strict copyright. The far more serious question, "from what period the term of copyright is to be calculated, whether from the death of the first dying of the joint authors or from that of the survivor," is hereafter dealt with in its proper place, and is not applicable to an unpublished manuscript, the protection of which, is unlimited in point of time.

CHAPTER III.

(1) What is publication: Prince Albert *versus* Strange. (2) Short reference to term (Already stated in Chap. I.). (3) Posthumous works. (4) Abandonment of copyright by deed, &c. (5) Joint, and plurality of, Authors; question of duration of term in such cases: different from question of property in term: must all authors sue jointly: *Voyage en Suisse*. (6) Assignment of copyright will not pass performing right. (7) Where publication must occur to confer right: simultaneous publication. Whether first performance abroad destroys copyright here. (8) Foreigners whether entitled to copyright. Residence here whether necessary. Routledge *versus* Low. (9) Place where music composed or printed, whether material under Sect. 8 of Copyright Amendment Act, 1842. Under Section 17. (10) Area of protection. (11) Assignment how effected: by writing: by entry on register: What stamp necessary. (12) Registration not necessary unless action brought. (13) Copyright divisible: *quâ* locality: *quâ* shares: *quâ* time: *quâ* form of publication. (14) License is not assignment: whether licensee can be a good plaintiff against an infringement. (15) Whether a royalty runs with the copyright—*quâ* burden—*quâ* benefit. (16) Registration cannot precede publication: particulars to be entered: discrepancy between section of statute and schedule: forms must be rigorously followed: who is publisher for purposes of entry. (17) New editions how registered. (18) Expression marks: "*La Frileuse*" of Heller: how registered. (19) Remedy for faulty registration, if any. (20) Copyright in titles: Dick *versus* Yates. (21) What is a "sheet of music": Boosey *versus* Whight. (22) Foreign law as to mechanical instruments. (23) Instrumental scores, lawfully made, are protected against piracy: arrangements: adaptations: expression marks. "*La Frileuse.*"

RIGHTS AFTER PUBLICATION.

(1) UPON publication, by or by order of a composer, of his work, the common law rights, which as we have just seen, a composer has in his manuscript, absolutely cease and determine.

Publication operates as an abandonment of such rights, and in their place arise those given by the Copyright Acts.

There is no statutory definition of the word "publica-

tion," but it may, perhaps, be defined as a "communication putting the subject matter within reach of the public generally." A composer may, without "publishing" his work, show it to his friends, and may give them copies of it, provided he does not come within the above definition, and bring it before the outside world either for value, or gratuitously.

1 Macnaghten and Gordon, page 25

In the case of Prince Albert *versus* Strange, her late Majesty Queen Victoria and the Prince Consort, had occasionally for their own amusement made drawings and etchings of subjects of private and domestic interest to themselves. Of some of these etchings they had had impressions made which had been placed in the private apartments at Windsor Castle and some had been given to personal friends. The defendant had surreptitiously obtained copies of these etchings and proposed to hold an exhibition of them, publishing what he called, "a Descriptive Catalogue of the Royal Victoria and Albert Gallery of Etchings." A bill was filed in chancery to restrain the defendant from holding the exhibition and publishing the catalogue; and an injunction was granted; the Lord Chancellor (Lord Cottenham) saying that the gift of some of the etchings to personal friends did not amount to publication.

1854. 4 House of Lords Cases 809.

The rule then laid down was approved of by the House of Lords in the case of Jeffreys *versus* Boosey.

The most usual means of publication is the offering of a composition for sale by a publisher.

(2) The term for which copyright is to endure has been already stated in the first chapter; it may, however, be convenient to repeat here that it endures for the composer's life and a term of seven years from his death: if the term of seven years expires in less than forty-two years from first publication, the copyright lasts for the term of forty-two years.

(3) As regards posthumous works, *i.e.*, work published after the composer of it has died, the copyright endures for a term of forty-two years from the date of first publication, and is the property of the proprietor of the author's manuscript from which such book shall be first published, and that of his assigns.

It would seem that where a posthumous MS. is given as a valuable relic or souvenir, without the property in the term being intended to pass, the statute would often defeat this intention.

It is obvious from what is above stated that a single author (as opposed to joint authors) cannot survive his copyright, though, if not abandoned, it must survive him. The minimum period is the term of his own life.

(4) He may abandon his copyright by executing a deed, or some other solemn instrument showing an unmistakable intention to do so.

It is apprehended that such a document would operate so as to estop the author from asserting any exclusive right.

See Copinger, 4th edition, page 112.

A recent case of abandonment of copyright occurred when Messrs. Novello had employed the late Dean Hole to write a new verse of "God Save the Queen," in substitution for the traditional one, which, it was thought, contained allusions likely to give umbrage to foreigners visiting England at the time of the Jubilee of 1897; on the substitutional lines being known, the demands for license of user became so numerous that Messrs. Novello patriotically gave up their rights by announcing their intention in letters addressed to the editors of some of the London daily papers, and duly published therein.

Copyright is personal property and belongs to the author and his assigns. The word "assigns" is defined in the statute to mean "every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after publication, and whether acquired by sale, gift, bequest, operation of law or otherwise."

(5) There may be joint authors of a musical composition by whom copyright may be acquired. What amounts to joint authorship is a question of fact, and it is impossible to lay down any rule for determining the question.

Levy *versus* Rutley (1871) L. R. 6 Com. Pleas 523. Shelley *versus* Ross, cited in Note to above case at page 531.

If the piece has been originally written by two persons jointly *in prosecution of a preconcerted joint design*, the two may possibly be said to be joint authors of the whole, notwithstanding that different portions were respectively the sole production of each.

The authorities are worthy of study, as showing the facts by which courts of law are guided when such cases arise.

Shepherd *versus* Conquest, 17 Common Bench, 427.

There can, of course, be no question in such a case as the sixth book of Mendelssohn's "Lieder ohne Worte," in which one number was said to have been composed by

Cutler, Smith and Weatherly, page 13.

Fanny Henschel, or, in the case of a piece framed on the lines of "The Geisha" and other musical comedies, where there are, in a sense, a plurality of authors. The numbers signed by Mr. Lionel Monckton form a totally different property from those composed by Mr. Sidney Jones.

It is a mere accident, in such cases, that they all form part of what is popularly considered to be one work.

The combination in one volume, for the purposes of sale of the separable work of two or more persons, would not constitute joint authorship. The separate work of each author would, in such cases, be the subject matter of separate copyright. But this question might well have arisen in France in the days of *Alexandre Dumas fils*, where (to use the language of the late Mr. Albert Smith) "it seemed to take three people to write anything." In many cases one, at least, of the three was a dummy, except to the extent of paying the well-known author for permission to be named as a *collaborateur*. If questions, in such a case, arise, either for the purpose of fixing the term or otherwise, is the person to whose invention the whole piece is substantially due estopped from denying that the non-worker is a co-author? The answer would seem to be that in an action brought by one ostensible author against another, the actual inventor would not be allowed to deny representations made by him to the public as to the co-operation of another person; in an action brought against an infringer, however, a different rule from that prevailing between the ostensible authors *inter se* would apply; and the question of length of term would be regulated by the life of the actual authors, to the exclusion of a person having had no share in the creation of the work, but merely held out to the world as a *collaborateur*.

There is no statutory provision as to the duration of term in the case of joint authorship; nor is there any direct authority on the subject, and it is a question of some difficulty whether the term would be for the life of the last surviving of joint authors, and seven years, or for the joint lives of the joint authors and seven years. For instance, to borrow a case from literature, the "Golden Butterfly" was the joint work of Sir Walter Besant and Mr. Rice. Assume that it was first published in 1840. Mr. Rice died first in 1882, Sir Walter Besant died in

1901.* Does the copyright come to an end in 1889, seven years after the death of Mr. Rice, or does it endure until seven years from the death of Sir Walter Besant, *i.e.*, until 1908? In other words do Sir Walter Besant and Mr. Rice together count as one author—"Such author," as the Statute says? The case has yet to be decided but probably the courts, which usually give the largest interest they can to an author, would make the term as long as possible, and would hold that it did not expire until seven years from the death of Sir Walter Besant.

Copyright Amendment Act, 1842, Section 3.

Nottage *versus* Jackson, 11 Queen's Bench Division, 627. MacGillivray, 57, 65.

A careful distinction must be made between the question of duration of the term and the question of property in the work. The former point is the one dealt with above.

As regards the latter point, the question of property, the interest of the first dying of joint authors (not having been assigned by him in his lifetime) would on his death pass to his legal personal representatives, who would be entitled to all royalties or profits arising from such interest during the subsistence of the copyright, the survivor or his representatives being entitled to the other interest. The same rule would apply, if the first to die left a will disposing of his share of the profits.

Powell *versus* Head, 12 Chancery Division, 686. Lauri *versus* Renad, 1892, 3 Ch. 402. These cases do not actually raise the neat point stated in the text, but the observations of the late Sir George Jessel in 12 Chancery division, page 683, strongly support the view that in the case of copyright as in that of other incorporal property, joint authors are not joint tenants, but are part owners or tenants in common.

An illustration of the rights of joint owners occurred some years back when Mrs. Powell purchased a half share in the performing right of an opera. The late Mrs. Liston being entitled to the other moiety only, purported to give a license to a Mr. Head to perform the opera (which was produced by him and ran for fifty-five nights), without the concurrence of Mrs. Powell, who brought an action to recover the penalties under the Statute.

Head was condemned in this action to pay to Mrs. Powell one half of the 40s. damages (the statutory penalty) in respect of each performance, *i.e.*, it was held that the owner of half the interest in the copyright could not legally grant a licence to perform the work behind the back of the co-owner, but on the other hand it was also held that one co-owner could act to the extent of bringing an action without the concurrence of the other owner.

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* The "Golden Butterfly" was *in fact* first published in 1876, so that in this particular case the question can never *really* arise, as forty-two years from first publication does not elapse until 1918, more than seven years after the death of Sir W. Besant.

1892. 3 Chancery 402.

In another case, namely, that of "*Le Voyage en Suisse*," the four celebrated pantomimists and acrobats, the Hanlon Brothers, with a fifth brother, were the registered owners of both the copyright and performing right.

In 1884 two of the five died, and shortly afterwards the three survivors entered into a contract with Charles Lauri (also a celebrated pantomimist and acrobat), for the sale to him of all their rights in the play. Lauri made arrangements and expended a large sum of money with a view to the performance of the play in the provinces, when a Parisian troupe of pantominists, "*Renad Frères*," advertised an intention of performing the play in England.

In an action by Lauri against the Rennds, it was objected that Lauri had no title to sue, because he had acquired the rights of only three out of five of the original owners (two having died before the sale). The objection was overruled by the Judge in the Court of first instance on the ground that though the plaintiffs had not the complete title to the whole property they were, as part owners, entitled to three fifths, and in that character entitled to sue in trespass, to prevent a stranger interfering. As they were preventing interference with that of which they were part owners they could maintain their action.

The case was dealt with on grounds which are treated at greater length in the chapter on International Rights.

(6) Where an opera or ballet is composed to order for the manager of a theatre or music hall who pays for it, the copyright and performing right remain with the composer, unless an agreement is made in writing, though he may have been in the employ of the manager as musical conductor.

Eaton *versus* Lake, 20 Queen's Bench Division, 378. Afflalo *versus* Lawrence, 1902, 1 Chancery 264.

The money having been paid by the employer under a mistake of law could not, it would seem, be recovered by him, it being a settled rule that there can be no remedy for money paid under mistake, except under a mistake of fact, and not of law.

It is very desirable, where music is composed in such circumstances, that the rights of the parties should be expressed in writing; a course but seldom resorted to in artistic life.

5 & 6 Vict. chap. 45, sec. XXII.

No assignment of the *copyright* in music will pass *performing right*, unless an entry be made in the registry of such assignment expressing the intentions of the parties that performing right should pass.

(7) In order to secure protection publication must take place in the United Kingdom or in some British Possession. Until the passing of the International Copyright Act, 1886 (49 and 50 Vict. c. 33), publication must have taken place within the limits of the United Kingdom. The eighth section of that Act, however, provides in effect that the provisions of the Copyright Amendment Act, 1842, shall apply to a musical composition first published in a British Possession, in like manner as they apply to a musical composition first published in the United Kingdom.

Routledge *versus* Low. Law reports 3 House of Lords 100.

The rule is generally stated as above, but it would be more accurate to put the converse, viz., the work must *not* have been *previously* published *outside British Possessions*; for the simultaneous publication in some foreign state and in British territory will not destroy copyright. The foreign state just alluded to is supposed to be one which has not joined in any convention with Great Britain. If there were a convention between Great Britain and the foreign state they would, as will be hereafter seen, be one for the purposes of publication, and it would be immaterial, so far as *the acquisition of copyright* is concerned, in which of the two states publication first occurred. Of course, publication by the author or his assigns is the publication contemplated by the rule. No copyright would be acquired by a wrongdoer who has surreptitiously obtained the author's manuscript, nor would such publication operate to set the copyright term running; his action would enure for the benefit of the author, who would be entitled as elsewhere stated in these pages to an account of profits and damages.

A prior foreign *performance*, as opposed to *publication*, does not in any way affect copyright here.

In the United States of America (a republic which has never entered into any convention with Great Britain), first, or rather "*unanticipated*," publication is one of the conditions for the acquisition of copyright; it is the daily custom for London publishers to keep back a musical work ready for publication until copies have been despatched to the United States: publication is then made both in this country and in the United States simultaneously. In this manner copyright is secured here as well as on the other side of the Atlantic, the

Chappell *versus* Boosey, 21 Chancery Divis on 232. See Cutler, Smith and Weatherly, page 35.

American law being the same in this respect as ours, viz., that simultaneous publication is the same in practice as first publication. The whole of this subject will be gone into detail hereafter.

(8) Copyright can be acquired by any one, whether a citizen of a foreign state or of this country. It is, however, not free from doubt whether in the case of a foreign citizen residence in British territory at the time of publication is essential to the acquisition of copyright.*

(9) Music in order to obtain protection need not generally have been composed or printed in any particular place. There is, however, an apparent exception to this rule which will be considered when Section 17 of the Copyright Amendment Act, 1842, relating to unauthorised importation is dealt with.

(10) Once protection has been acquired, it extends into every part of the British Dominions, and to all countries which are parties to a convention with Great Britain.

The protection, however, as regards Canada and one or two other colonies, is modified by special legislation in a mode which requires carefully detailed statement to be found in the chapter on colonial copyright.

See Chapter II., paragraph 6.

(11) Assignment of copyright must be effected by writing, but a deed under seal is not necessary, and the form of writing is not important: it may take the form of a receipt, *if the intention to transfer is clear*; a *mere receipt*, however, is not in itself a sufficient expression of intention to operate as an assignment.

Eaton *versus* Lake. 20 Queen's Bench Division, 378.

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* In the case of Routledge *versus* Low (Law Reports 3, House of Lords 100), decided by the House of Lords in 1868, Lord Cairns and Lord Westbury stated that in their opinion residence within British territory was not necessary; the other Lords who were parties to the decision, viz., Lords Cranworth, Chelmsford and Colonsay, refused to express any opinion on the point which it was not necessary on the facts to decide.

The opinion of Lords Cairns and Westbury is in direct conflict with the decision of the House of Lords in Jefferys *versus* Boosey on the earlier Copyright Statute passed in the reign of Queen Anne, and since repealed, and so the matter stands.

The better opinion seems to be that expressed by Lords Cairns and Westbury, and probably an alien can acquire copyright in this country although he is not within the British Dominions at the time of publication. This view was taken by the law officers when the British Government had to make to that of the United States a declaration on a point of international law, as will be hereafter seen in the chapter of this work devoted to America.

This rule is so rigid that by analogy, even the payment of money by an employer to a composer on a verbal agreement that the copyright shall vest in the employer, will not be sufficient to have that operation. Taylor *versus* Neville, 38, Law Times, N.S., 50.

In some cases, however, a long and consistent course of dealing has been held to be a sufficient ground for the Court to presume, without positive evidence, that an assignment has been duly made. The necessary stamp on an assignment is an *ad valorem* one; or where the value is unascertained, as when the consideration consists of a royalty, ten shillings. Any document purporting to operate as an assignment of copy or performing right, which only bears a receipt or agreement stamp, cannot be used in Court to prove a cession of right except subject to the usual penalty.

An entry on the register at Stationers' Hall made in statutory form by the registered proprietor of copyright, is sufficient to all intents and purposes to transfer the copyright. The statutory requirements and formalities must, however, be strictly observed, and a fee of five shillings for each entry is demanded. 5 & 6 Victoria, ch. 45, section XI. XIII.

(12) Registration of copyright is not essential to the acquisition or existence of copyright; but it must be effected before any action for infringement is taken. The registration may take place on the same day as that on which the first step in the action is taken. Sec. XXIV. Warne *versus* Lawrence, 34, Weekly Reporter, 452.

An assignment, in other respects valid, does not require to be registered.

Any person aggrieved by an entry in the book of registry may apply to the High Court and may procure the entry to be expunged or varied. Sec. XIV.

(13) It is clear that copyright under the international conventions, hereafter set out, is divisible as between different states and this subject will be hereafter dealt with.

It is, however, a question of some doubt how far copyright is assignable for some particular inter-territorial district; and it is also doubtful whether it is so for some specified term shorter than the statutory term.

Either of these objects can, however, be attained by license, a supple form of transfer, which is recommended whenever it is desired to split up copyright in a particular work, either locally or as regards duration.

This method will enable the desired result to be

obtained, and by its means the difficulties attendant upon an assignment, including the necessity for registration, are avoided. The license ought to be, and probably must be, in writing.

There is no doubt that the whole *subject-matter* of copyright is divisible and capable of assignment in parts; that is to say, half, or any other part of, or a given number of, shares in, the copyright in a particular work may be assigned or transferred, and such an assignment is contemplated by Section 13 of the Copyright Act, 1842.

In such a case it is not necessary to have recourse to a license. A partial transfer by way of license extending only to provincial rights of performance, is of every day occurrence; and is a good practical example of this convenient form of modified assignment.

Cutler, Smith and Weatherly, 46.

A good instance of divisibility of copyright is given in a recent work, viz., assignment by a lyric writer of a set of words for musical setting, with the reservation to himself of the right to publish those words as a literary work apart from music.

The case of a composer assigning his rights in a choral work to one publisher in the staff notation, and to another publisher in the tonic sol-fa notation, is not very uncommon.

(14) The right of a licensee, even an exclusive one, to sue an infringer without the concurrence of the legal owner of the copyright is sometimes questioned. If this doubt be well founded it would present the rare though not unprecedented case of a legal wrong without a remedy. It would seem, however, that the right must, in some cases, exist; a licensee of an amount of copies which would practically exhaust the copyright, or nearly so, can not be expected to stand by and see an unscrupulous infringer — a musical pirate, perhaps — eviscerate and render valueless the work over which his license, given for value, extends. It would create a substantial equity if the licensee, going for an injunction to restrain irreparable damage and danger to property, were to allege and prove collusion, or even supineness, on the part of the owner.

Again, suppose the copyright owner grants a license for England, reserving Scotland to himself, the licensee must be able to sue in England, for the owner, having practically, though not legally, parted with all substantial interest *quâ* England, might not be held to be a good

plaintiff. The case would seem analogous to those where a person, having a merely indirect equitable interest in corporeal property, is entitled to an injunction to prevent its destruction.

(15) A question which often occurs on sales of copyright is, "how far an assignee, on purchasing, is bound by the undertaking, or contract, of the assignor (the original proprietor) to pay to the author a royalty proportional to sales of copies." It would seem that such a contract is a purely personal one and cannot be made to follow the copyright into whosesoever hands the same may come, and that no person buying from the original proprietor would be liable to pay the royalties to the author, unless the buyer is, in some mode or other, personally fixed with the liability, and that the mere purchase by him of the copyright would not be sufficient so to fix him. It would seem convenient that agreements between authors and publishers should be so prepared that, on resale to a third person, the publishers should retain their obligation and remain liable to pay the royalties they contracted to pay to the author, even after the property in the work has passed from them.

It is a common practice in catalogues on resales to insert, after the title of each work, the words, "subject to a royalty of 3d. per copy," or similar words; and, no doubt, the intention of the parties is, by such words, to shift the burden of the royalties from the original purchaser to the buyer at the second sale. It is singular that no case should have occurred for decision of a purchaser buying on a catalogue containing the words in question and being sued for royalties; nor on the other has there been any decision fixing the original purchaser (the publisher) with the liability. It would seem that the mere fact of the catalogue containing the above words would hardly amount to a contract by the purchaser to take upon himself the liability, and that he ought to enter into a specific undertaking to relieve the first purchaser, if that be the intention of the parties.

An agreement by the original purchaser to "pay the author a sum per copy sold, subject to the usual trade deductions," or words to the like effect, would seem not to apply to a sale of the whole subject matter *en bloc*, but only to retail sales.

A purchaser of copyright should enquire whether any

licenses have been granted by his vendor or any previous owner. The writer was called upon to advise in a case where a well-known English composer assigned an oratorio to one of the largest London publishers on an agreement which entitled the composer to a royalty on every copy of the work sold by them. In the absence of any provision in the contract dealing with the case of a sale piecemeal, the question was raised whether they could be prevented from selling choruses, or any other isolated morceau, separately. In such a case, if it were intended so to limit the publisher's right of dealing, the agreement ought to have contained a clause to that effect. Otherwise the publisher's contract with the composer does not imply any such shackle, on their user of the work, exercised *bonâ fide*. If there were a determined attempt to defeat the composer's rights by rendering the subject matter of the contract worthless, he might raise an equity to restrain them. The mere withdrawal of the work from sale would be optional, and would not amount to such an attempt.

So, if a man contracting for a royalty wishes to prevent the owner from giving leave to makers of gramophones and other similar instruments to utilise the work, the royalty holder should stipulate to that effect in his contract. He who bargains for a mere royalty gets that and no more, and cannot interfere with the control of the owner over his property except in a case of bad faith.

On an assignment by the original purchaser, in the absence of special agreement to the contrary, he would not be prevented from selling any copies previously printed by him and remaining in stock.

(16) It is a widely-disseminated error that registration confers copyright. The fact is that it is only a vexatious and absurd preliminary to the commencement of an action. In the course of the consideration before Lord Monkswell's committee of the recent codifying copyright bill, the uselessness of this capricious regulation was admitted by the conspicuously able lords forming the committee, and it was unanimously agreed to abolish registration altogether. Until, however, a government can be found able and willing to spare sufficient time to consider and amend the existing copyright law, the necessity for registration continues. The Statute is express to the effect that no proprietor of copyright shall maintain

5 & 6 Victoria, ch. 45, sec. XXIV.

any action, or take any summary proceeding, in respect of any infringement of copyright without registration.

The Copyright Amendment Act, 1842, Section 2.

Registration cannot be effected before publication.

In the 13th section of the Copyright Amendment Act are prescribed the particulars which are to be entered upon the Registry of the Stationers' Company. They are as follows:—

(1) The title of the book.
(2) The time of first publication.
(3) The name and place of abode of the publisher.
(4) The name and place of abode of the proprietor of the copyright, or of any portion of the copyright.

The section provides that these particulars are to be entered in the form given in the schedule to the Act.

There is a difference between the particulars prescribed by the section and those required by the form in the schedule; the item "place of publication" taking in the form, the place of the item "the place of abode of the publisher," in the text.

The form in the schedule is the one adopted at Stationers' Hall, and entry of the place of publication is there treated as obligatory.

Every particular required by the Statute must be registered with the minutest care. The title of the book must be correctly stated. It is stated in the text books no doubt correctly, that if a book has no title a description is sufficient.

Mathieson *versus* Harrod, L. R. 7 Equit. 270. Thomas *versus* Turner, 33 Ch. Division, 292.

The exact date of publication to *the very day* must be stated.

There is less minuteness required in the entry of *locale* (place of abode of the proprietor) than in the entry of date. A place of business will do duty for "place of abode." In the analogous realm of international copyright (hereafter described in detail), it was held by a very able judge that "Munich" was a sufficient address to be registered of the proprietor, who was in the case in question the celebrated painter Muncaczy.

Mr. Justice (now Lord Justice) Stirling.

No doubt the Court took this fact into consideration when invited to relax the strict literal view.

It is perhaps unnecessary to say that "publisher" in the statutory registration entry, means the original publisher, and not any subsequent vendor of music who may for the time being hold the plates.

Coote *versus* Judd, 23 Chancery division 727.

This is in accordance with the sense in which the writer believes the words "publish" and "publisher" to be invariably used in the Statutes relating to copyright.

"Publication, in the United Kingdom," "publication in a foreign state," and similar phrases, always import "original publication." In Section 5 of the Copyright Amendment Act, where a renewed or second publication is spoken of, the word "republish" is used.

In the matter of registration entries "publisher" means the business man who first exposes a piece for sale at his place of business, though it may be done vicariously on commission, for the author, and even though the words "author's property" may be printed on the copies.*

In the case of a composer who, like the eminent organist of "The People's Palace," has some of his compositions printed for himself, and sells them without the intervention of a middle-man, for the purposes of registration entries the composer is both publisher and proprietor.

London Printing Alliance *versus* Cox, 1891, 3 Chancery 291.

If a man is trustee for certain persons entitled to the beneficial interest: say, the executor of Sir Arthur Sullivan, who would hold that composer's pieces (or such of them as had not been vested by contract in his lifetime in other persons) upon trust for his legatees, such trustee or executor may be entered on the register as proprietor, and such registration is good. But there must be a real proprietor *in some sense* entered, and if Sir Arthur Sullivan registered himself as composer of a hymn tune, and afterwards assigned it to Messrs. Novello, there would be no one in existence who could sue an infringer, until Messrs. Novello had caused themselves to be entered as proprietor for the time being. The double rule is easily retained in the mind from the antithesis. The

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Cutler, Smith and Weatherly, p. 52.

* In a recent work on music and dramatic copyright the authors, commenting on an observation of Vice C. Bacon in Coote *versus* Judd (28 Chy. div. 727), justly (as it is submitted) complain of the narrowness of his definition, "He who gets the song engraved, and keeps the metal plates and lithographic stone"; and the supposed case is suggested of a composer who has a song engraved and sung, and keeps the plates, but does not sell any copies. He after assigns his copyright to a publisher who sells copies. The present writer does not feel pressed by the Vice-Chancellor's dictum, and feels no doubt that the rule stated earlier in this chapter applies. Mere performance is not publication; analogously, engraving with performance is not so.

first publisher and the *last* proprietor are to be respectively registered.

It has been held that in the case of the publisher's name, the actual style used in the business must be entered, so as to convey the proper information of identity to the public. Thus, to draw upon fiction for an illustration, "Dombey and Son" would be the proper style to enter, though Paul Dombey was an infant, or actually non-existent: and even if Mr. Carker had been taken in as a partner, "Dombey and Carker" would be a bad registration, unless it had come to be the generally known and adopted title. Readers will understand that the consequence of non-compliance with statutory requirements as to registration, however minute, is the same as if there had been no registration at all, and that an action for infringement fails, with costs to be paid by the person suing, if the registration is defective; so it is all important for a litigant, if an intended plaintiff, to register with literal accuracy, or to ascertain that the actual proprietor at the time of suing has done so; if he be a defendant he should scrutinise closely the plaintiff's entry, that the proper objection may be taken. If any entry be bad, the action drops automatically, however flagrant the defendant's piracy may have been. Copinger, 4th edition, 110.

(17) Some embarrassment is caused where a new edition is issued containing matter in a sense inseparable, but for purposes of registration, separable, from that contained in the original edition. As regards new editions containing new matter, the date of publication registered will be that of publication of the first edition, as regards the old matter, and of the additions, as regards them.

(18) An instance where this form of registration would occur arose in the case of the pianoforte study "*La Frileuse*," by Stephen Heller. In 1862, some years after the date of the original publication of the music, at the instance of Messrs. Ashdown, the composer revised the original version and added numerous and important marks of expression, which of course coming from so distinguished a person would have a substantial value both artistic and commercial. In 1895, when the copyright *in the music* had expired, but *not that in the subsequently inserted expression marks*, a firm of publishers brought out a new edition of both music and expression marks, which they had of course a right to do as regards

the music; and they claimed a similar right as regards the expression marks, on the ground that such trilling matter was not the proper subject for protection. The Court *restrained the use of the appropriated expression* marks. The decision is not reported, but the facts are within the knowledge of the writer who advised professionally in the matter. In this case, no doubt, the date when the new expression marks were first published, was on the register, unless, indeed, the point was overlooked.

The rule has been stated differently with reference to literary *i.e.*, unmusical, matter, and it has been treated as though in the case of a new edition containing new matter the proper registration was the date of publication of the new edition; but it must be remembered that in the case of a book the new edition answers the description in the Statute as *a thing* the date of publication of which must be registered. Where, however, one is dealing with sheets of music, even where bound up together, the position would be somewhat altered; each of them is "a book" according to the definition in the Statute. The sheets of music therefore which contain any substantial amount of new matter are separable, and are properly registered as having been published for the first time when the new edition is brought out. If this were not so, and the amount of new matter were considerable, the obligation of registering it might be evaded by issuing it together with the old portions as a new edition. If the matter is inseparable, or it is doubtful whether it is or is not, it will be prudent to register the date of publication of the new edition to avoid question; for the authorities show that if registration covers unnecessary ground, the worst result which can happen is that it would be considered superfluous, and the surplusage will not create invalidity.

Fairlie *versus* Boosey, 4 Appeal Cases, 711.

(19) In case of erroneous registration, through the fault of the officials at Stationers' Hall, the plaintiff is the sufferer and the Courts will not grant him any relief unless before bringing any action he rectifies the register.

(20) The question whether there can be "*copyright*" in a mere title, as such, has been usually met with an emphatic answer in the negative; but, like other emphatic answers to a general question, it needs some qualification. In the case of Dicks *versus* Yates, which is generally

18 Chancery Division 70.

referred to as the leading authority on this point, a claim was made to "*copyright*" in the title "Splendid Misery." The plaintiff claimed a monoply in those words for a novel which was being brought out in a weekly periodical called *Every Week*. The defendant adopted the same title for a novel written by Miss Braddon, which was coming out in *The World*. The action to restrain the defendant from using the title failed, but the Master of the Rolls (the late Sir George Jessel) guarded himself from laying down that copyright in a title was impossible, and put the supposed case of a title expanded to such length, and containing literary matter of such character as to constitute an amount of invention worthy of protection. As regards a title for a musical composition the possibility of the supposed case occurring is so remote that it may well be ignored.

In the case we are now citing the Court decided emphatically that there could be no copyright in a title consisting of two or three common English words, which might possibly be nothing more than mere description. Take the case of such a title as "Songs for Children," or "Songs without Words," for instance, the first known taker of such a title cannot possibly have a monopoly in it.

This question was much discussed before Lord Monkswell's Copyright Committee. It arose before them whilst the well-known composer and conductor, Mr. James Glover, was giving his evidence. Mr. Glover complained bitterly, that the value of one of his songs had been materially diminished through the action of some unscrupulous publisher who had taken his title, had applied it to a song of an inferior character, and was selling a large number of copies to persons who were under the impression that they were buying his (Mr. Glover's) composition. It was pointed out, after the question whether it was possible to give protection to a title had been discussed at considerable length, that persons in Mr. Glover's position were not without a remedy. In such a case if it were proved that the inferior song was being sold to persons who believed that they were buying Mr. Glover's song, a court of equity would interfere by granting an injunction and awarding damages, not indeed because there had been an invasion of copyright, but on the ground of fraud. This matter is discussed in chapter II. ante.

It appears to the author that the only way in which statutory protection could be extended to titles would be by adopting some system of registration analogous to that which obtains in the case of trade marks; giving jurisdiction to some official to decide whether a particular title is a proper subject for protection; and excluding everything which is mere description. Such a system would, however, be fraught with difficulty, and their Lordships who formed Lord Monkswell's Committee took this view, and declined to insert in the proposed bill any clause dealing with the matter.

Perhaps the strongest case that can be conceived for granting protection to titles would arise if some person, aware how difficult it is to select a pithy and attractive title for a song or a drawing-room pianoforte piece, were to publish a list containing striking catchwords to be used as titles. It is quite clear that if anybody took a substantial part of the list, and published the titles as his own invention, he would be restrained from so doing, but if single items were taken by single individuals, would the author have any remedy? It would seem that he would not; for the question of quantum is important in cases of infringement; yet it is a hard case that a person should not be protected in such a way as to enable him to reap the fruits of his ingenuity, and invention, when he may only be desirous of making some moderate charge for the right to use a particular title invented by himself. Such a list as here suggested might be invalnable to prolific and worn-out composers.

It will not have escaped the reader that this topic is somewhat outside the subject of musical copyright. It is, however, of such importance to composers and publishers that some allusion to it was absolutely necessary.

1900. 1 Chancery, p. 122. White Smith Company *versus* Apollo Company, United States Circuit Court, Southern District of New York, 8128-8127.

(21) The term "sheet of music" has been criticised recently in the case of Boosey v. Whight, in which Messrs. Boosey, the firm of musical publishers, sought for an injunction to restrain the defendant, the proprietor of a mechanical organ called the "Aeolian," from reproducing by means of cardboard discs, copyright airs the property of the plaintiff. The Aeolian is a mechanical instrument worked by perforated rolls of cardboard representing the musical scores. The perforations were not intelligible to any musician, however skilled a reader of music he might be, and the Court held that the rolls were

not "sheets of music," within the meaning of the act, and *refused to grant* the injunction asked. It was not considered that the owners of the mechanical instrument had *copied* the publishers' sheets of music. "To play an instrument from a sheet of music which appeals to the eye is one thing; to play an instrument with a perforated sheet which itself forms part of the machine producing the music is quite another thing." Of course in many cases it is advantageous to a composer and to a publisher to have the additional publicity for their wares which such performance gives them; but justice requires that the consent of the proprietors of the copyright should be asked, and that they should be entitled to have some share in the fruits which are being reaped from the productions of their brains, their labour, and their capital.

There are, too, cases in which a composer feels that his style of work is not suited for reproduction by means of a machine. In some cases, indeed, airs of an exalted or pathetic character have become so vulgarised and hackneyed from such reproduction that their sale has been materially injured.

This question also came under the discussion of Lord Monkswell's Copyright Committee. The general feeling of that body was against altering the law laid down in Boosey *v.* Whight, so as to give to a composer or his assigns a right to veto such a reproduction of his work, which would have enabled him, or them, to demand payment for this form of reproduction.

Lords Knutsford and Thring, in particular, were very strongly in favour of perfect freedom amongst the manufacturers, believing that the power of composers or publishers to exact payment would operate as a clog on the poor man's enjoyment of music; but the manufacture of mechanical musical instruments is so flourishing, and such large fortunes are made by the individuals engaged in it, compared with those made by composers, and even by musical publishers, that a moderate royalty, which would be an important matter to these two classes, would not really be felt as an appreciable tax by the manufacturers.

(22) Both in France and Germany the law is now also in favour of the instrument makers. In Germany, until recently, the decisions in the Reichstag were in favour of the composers; but the tide has now turned, with a

distinction, however, in favour of the composer under certain circumstances. The Land-Gericht of Berlin has decided, in the case of Lincke *v.* Gramophone Company, that the reproduction of copyright music on the gramophone was an infringement, and an injunction, and £5 damages, were granted. The decision extended also to performing right. *In France* there is an old law, the words of which would cover the case of modern mechanical instruments, but the influence of the Swiss people has been unsparingly used in order to induce the French Government to construe the rule in question in such a way as to weaken its force and to extinguish the rights of the composer to control, forbid, or make profit by, *the production of his music by means of mechanical* musical instruments.

(23) Other instances of works, to which the protection of copyright is afforded, are :—

(i.) Arrangements, adaptations and instrumental scores of non-copyright pieces, or of copyright ones, of which the composer has authorised the arrangement or instrumentation. There may be sufficient originality in the arrangement of the notes or the choice and disposition of the instruments to rise to the height of invention ; and, indeed, even the most common-form orchestration cannot safely be copied, as the copyist would be reaping in another's field. The author of a score is entitled to maintain an action against any person who has availed himself of his ingenuity and labour.

This point is somewhat analogous to the case of a photograph or engraving. The engraver or photographer is supposed to put so much of his own style into his work that the engraver, *e.g.*, of one of Turner's pictures, could sue any person who copied his engraving, though the subject of the picture is no longer protected. So *Berlioz*, or his heirs, could sue any copyist of his orchestration of Weber's "*Invitation a la valse*," though that brilliant composition is not, in itself, entitled to protection ; and the proposition will not seem far-fetched to any musician who hears the Berlioz score (in D♯), and that by Rheinberger (in the original key of D♭) close upon one another. The feeling of, and treatment by, the two arrangers is wholly different, and it will be

readily seen that the individuality of style in orchestral writing may be sufficiently marked to constitute a work deserving protection.

The evidence, if a case of alleged plagiarism occurred, would be of an extremely scientific nature. *Themis* would be more than usually blind, or rather deaf (in the persons of judge and counsel), and the case would be decided by the word of experts, for explanation and demonstration would be nearly, if not quite, impossible to persons not educated as musicians; indeed, the writer has pleaded before judges who seemed to think that they ought not to assume judicial knowledge of the existence of musical notes, far less of the effect of change of tonality, or even of the most ordinary and simple rules of form and rhythm.

It is possible that the respect for individuality in colour may be carried a step further, and that the reproduction of a striking orchestral figure might be restrained, even where the instrumentation is fitted to a different melody. Few musicians would fail to recognise the orchestral combination in the wedding chorus of Balfe's "*Satanella*" (in the key of G) as having occurred in the first number (in the same key) of *Meyerbeer's* "*Prophète*," though the melodic themes are wholly different.

(ii.) Authorised arrangements of airs from operas as fantasias for the piano or organ, or even as dance music for the orchestra or pianoforte, may show sufficient invention to merit copyright, which might paradoxically be enforced, even against the composer of the original melodies, if he were to reproduce them in their new dress, without, in his turn, obtaining authority to do so. This would, no doubt, be a startling result of perfectly logical reasoning. At all events any reproduction, lawfully made, of original music in a different form involving invention by the reproducer is protected.

(iii.) Adaptation of original words to a non-copyright* air, or of old words to a non-copyright

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* The term "non-copyright," as used in this part of the text, is intended to comprise protected matter as to which the owner has, *pro hâc vice*, renounced copyright, and permitted the combination with original words, &c.

air, or to an original air with a suitable accompaniment, may be copyright.

(iv.) Expression marks and fingering marks. In the case previously mentioned of Heller's study, "*La Feilense*," it was held that such marks and figures, when applied by the composer to music of his which was already published, were a fit subject matter for copyright and entitled to protection, though the term of copyright in the piece of music to which they had been added had expired. The Courts rejected the claim of the original proprietor of the copyright of "*La Feilense*" to the title "*L'avalanche*," which he had given to the piece on bringing out a new edition; another instance of the reluctance of the Courts to give a copyright in a title. The case is an unreported one.*

Boosey *versus* Whight, 1900, 1 Chancery, 122.

* The protection would be confined to the use of the marks in connection with the music to which they were originally applied. It must not be supposed that a composer could interfere with the appropriation of even an original mark of expression when used in connection with a musical phrase only similar to, and not identical with, his own.

CHAPTER IV.

(1) Copyright how defined. (2) Ignorance, whether a defence: selling copies of a pirated work without knowledge of piracy. (3) Fortuitous resemblances. (4) What is a copy. The Æolian. Boosey *versus* Whight. (5) Application of the principle in Boosey *versus* Whight to the Tonic Sol-fa notation. (6) Is one copy an infringement. (7) The "Little Lord Fauntleroy" case. (8) Piratical rectors and choir masters: chants and hymns thought fair game. (9) Copying on black-boards in village schools. (10) Transposition, an infringement. (11) Quantum: proportion of pirated matter, (*a*) to the original work as a whole, (*b*) to the pirate's work as a whole. (12) Value of more importance than quantity in judging of an infringement: does not depend upon a certain fixed number of bars being taken. (13) Passages taken from a common source:—some common-form phrases used by the classical masters would not be protected. Handel an unscrupulous, though beneficent, pirate. (14) Sometimes a phrase of two bars or even less, is so marked in character as to be protected: the first two bars in Beethoven's C Minor Symphony. (15) The subject of Bach's E Major Fugue, Bk. 2 of the *Wohltemperirtes Clavier*, not original. (16) "Part not particle": the "Wandering Jew" case: though the case of a drama, applies in principle to music. (17) Colourable alterations, an aggravation. (18) What is identity. (19) "Marguerita," an air so loosely constructed that protection would be difficult. (20) Instances of scale and arpeggio motives which, though copied would be dangerous subjects of an action for infringement. (21) Badges of piracy; copying errors. (22) D'Almaine *versus* Boosey. Disguise by change of purpose and general character no defence if the ear can trace the theme through the disguise. (23) Mendelssohn's Lied in A Major in fancy dress. (24) Fair criticism allowed, but in other cases pious motive no defence. Novello *versus* Sudlow. (25) Mutilation restrained. Gilbert *versus* Boosey: "Pianista." (26) Analogous case in literature of translations. (27) Street pirates. (28) How this form of robbery is carried on. (29) Playing or singing copyright music is no infringement of copyright, though it may come under the head of another form of protection: see chapter on performing right. (30) Effect of performance abroad on copyright here. (31) Practical hints to a young composer whose work is pirated. (32) As to moving *ex parte*. (33) Limitation of time for suing. (34) Section 23 of the Copyright Amendment Act, 1842. (35) Sections 15 and 17 considered. (36) Customs Consolidation Act, 1876, Sections 42, 44 and 45. (37) The penalties enacted

by Sections 15 and 17 of the Copyright Amendment Act, 1842, not exhaustive, and do not exclude the remedy by injunction. (38) Question of guilty knowledge. (39) Sections 2 and 3 of Copyright Amendment Act, 1842. Offences and remedies in tabular form. (40) Sections 15 and 17. Offences and remedies in tabular form.

INFRINGEMENTS.

(1) The word "copyright" is to be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject "to which the word is by the Statute applied." This is the definition in the Copyright Amendment Act, 1842.

It is curious that this definition should have been overlooked by Lord Cranworth in the case of Routledge *versus* Low, where his Lordship says that it is a remarkable fact that the Act in question "though it repeats all the former Statutes, nowhere defines or declares what is to be understood by the word copyright. It assumes copyright to be a well-known right, and legislates in respect of it accordingly."

Law Reports, House of Lords, at page 122.

(2) The first question that seems to arise in considering the above-mentioned statutes is, whether ignorance of the existence of the copyright infringed is a defence, and whether the plaintiff must prove that the defendant knew that he was committing a wrongful act?

In the case of selling, publishing, exposing for sale or hire, or the having in possession for sale or hire, copies of a pirated work, knowledge of the rights of the proprietor of the copyright is essential. In these cases knowledge that the sheet of music in question has been unlawfully "printed or imported" is by the express words of the Statute (see 15) made a necessary ingredient in the offence.

That Section (stated briefly) confers a right to bring an action for damages in cases (among others) where a person sells, publishes, or exposes for sale or hire, or has in his possession for sale or hire, any book unlawfully printed or imported, with knowledge of the illegality of his act. It would seem that this special remedy for the offences mentioned, limited as it is by the condition making a guilty knowledge necessary for the right of suing to accrue, would exclude the right to get damages under the earlier sections of the Statute

in cases where the selling, publishing, exposing for sale or hire, or unlawful possession results from ignorance of the facts creating illegality.

It is clear that the special remedy by way of damages given in Section 15 does not exclude jurisdiction to grant an injunction to restrain the acts in question, *where the guilty knowledge exists*, for wherever an Act is declared illegal by a Statute, and a special remedy, other than an injunction, is conferred, the right to an injunction exists under the inherent jurisdiction of the Court.

But surely the Courts ought not, acting under the earlier clauses which merely confer the general right, and in the teeth of Sections 15 and 17 which make knowledge of illegality the test of guilt, to restrain a selling, exposing for sale, &c., without that knowledge.

Cooper *versus* Whittingham, 15 Chancery Division, page 501.

He who wishes to multiply copies of any work is bound to satisfy himself that the work is in the public domain, either by expiration of the copyright term or otherwise, or to obtain a license from the author or his assigns.

(3) Even if, by some striking coincidence, an author happens to compose, and make a copy of, a piece similar to one which is the subject of existing copyright, he commits an infringement.

(4) The Statute does not define a copy. It is settled law that the perforated rolls of cardboard sold for use with a mechanical organ, called the "Æolian," by means of which the sounds of a copyright piece of music are produced, are not "copies" within the meaning of the Copyright Act, 1842, and cannot, therefore, infringe copyright. This was decided by the Court of Appeal in Boosey *versus* Whight. The learned judge, Mr. Justice, now Lord Justice, Stirling, who decided the case in the Court of First Instance, went upon the ground that the perforations in the roll were not such a mode of notation as a reader of music, familiar with the ordinary musical notations only, would be able to decipher; and also that such mechanical instruments as Æolians not being known, or, at any rate, very slightly known, when the Act was passed, the cardboard rolls could not have been "copies" within the purview of the Act, and consequently the Legislature could not have contemplated this mode of transcription as "a multiplication of copies."

1900. 1 Chancery, p. 122. White Smith Company *versus* Apollo Company, U.S. Circuit Court, Southern District of New York, 8126-8127.

(5) It must not be supposed that the decision in Boosey *versus* Whight would justify the copying in the tonic

sol-fa notation of a copyright piece of music printed in the ordinary musical notation. This would clearly be an infringement. In the case of Boosey *versus* Whight the Court held that the perforated roll was not "a sheet of music;" a piece of music printed in the tonic sol-fa notation, or embossed according to the Braile system for the blind, would clearly be a "sheet of music."

(6) There is no decision to the effect that a single copy is "a multiplication" of the original, though it would be a rash experiment to rely on the suggestion of multitude in the definition, and to defy an action, for the sake of a single copy of a musical piece. But in the cognate realm of dramatic literature there is authority that four copies amount to an infringement, and will be restrained from circulation.

Warne *versus* Seebohm: 39 Chancery Division 73.

(7) In the case in question the plaintiff was the owner of the copyright in "Little Lord Fauntleroy." The defendant dramatised the story, and caused it to be performed as a play. This he was entitled to do, for, as the law stands, a novelist cannot, without going through a process not observed in the Fauntleroy case, prevent any person from *acting* his or her novel. This anomalous state of things depends on the construction placed by the Courts on statutes hereinafter alluded to. The defendant, however, with a want of forethought which few of us can regret, supplied the plaintiff with a rod for his own chastisement by having four copies made of the necessary parts of the novel, and handed three to the actors, while the fourth was sent to the government censor for inspection. The copies contained many passages taken verbatim from the novel. The Court held that though unauthorised performance of a novel by speaking its language on a stage is not forbidden, *copying* any substantial portion of it, even to the limited extent which occurred in this case, is a "multiplication," and subjects the defendant to the remedies given by the Act, and which are, later on in this chapter, treated in detail as applied to music. The principle of the Lord Fauntleroy case as to the multiplication applies to music, and the case might be read convertibly, substituting "printed and published lyrical piece or opera" for "novel" in the literary case. However, the defendant might be said gratuitously to have invoked punishment for his moral theft (if any) by *copying* the speeches, for he might have

come off scot-free had he bought copies of the book, and so avoided the necessity of reproduction. This would not be so in the case of an opera where, as will be hereafter seen, unauthorised performance, as well as copying, is forbidden.

(8) The public cannot be too seriously warned against the danger, so rarely appreciated or even known, which they run by copying in MS. protected matter. Popular ignorance as to the law even among the intellectual classes is shown by the typical case of the rector or choirmaster, who sends to the largest known London firm of publishers of church music for one copy of a copyright Kyrie, chant, or hymn, which would be useless for choral purposes unless the music were to be reproduced, presumably in MS. A still more transparent case occurs in a not uncommon form of order for a single copy of a copyright chant book and fifty MS. music copybooks. Every presiding authority of "choirs and places where they sing" should have, as a reminder, a copy of the Lord Fauntleroy case embroidered as a phylactery to be worn on his brow.

(9) A very common form of infringement is the purchase by a school teacher of one copy of a favourite copyright song, and the writing, both words and music, on the blackboard for the pupils to learn, or on magic-lantern slides. This is, no doubt, a mild form of the epidemic; the reproduction is not intended for sale, and no actual profit is made out of the composer or publisher; but, on the other hand, they are illegally deprived of the profit which would accrue had the whole class been provided with purchased copies of the work.

(10) The writer has elsewhere dealt with unblushing purchasers (often of the rich classes) from the street pirates. The young lady who comes in her thousands to buy popular songs and transpose them in MS. has more excuse, as she may want the songs in keys in which they are not published; but it is only the excuse of the person who wants a thing which is not for sale and steals it. It is, perhaps, specially necessary to inform the lay reader that alteration of key does not absolve the copyist from the sin of theft. If the melody is reproduced in any form it will be an infringement.

(11) A nice question arises when the quantum of matter copied can be alleged to be so insignificant as

not to justify judicial interference. This point may be looked upon from two sides; on the one hand the quantity of matter taken from a book will be balanced by the Courts against the relative amount contained in the whole book; and on the other, the Courts will not pass over as unimportant the amount of original matter with which the pirated portion is mixed up in the defendant's work. There are infinite gradations between the two extremes; one being that of the theft of nearly all the original matter in a copyright work of important proportions appropriated by the thief so as to form the largest part, or it may be the whole, of his book; the other extreme case being that of half a dozen lines taken from a volume of a hundred or two pages, and used piratically in company with as many pages or chapters of original matter. That there is a difference in principle between the aspects of these two forms of piracy is shown by the difficulty found by a layman in even contemplating the possibility of the first, as seeming to presuppose incredible audacity; but the case is by no means impossible, as when some unauthorised person carelessly reprints a whole book under a mistaken impression, either of law or fact, that the term of copyright is expired; or that the copyright being international, has been lost through the neglect of certain forms; and indeed the present writer was the victim of a piracy in the larger proportions where neither doubtful law nor fact could be pleaded as any excuse.

If half a dozen lines, or otherwise a small proportion of matter, are piratically taken, the answer to the question, infringement or not, would be in the importance of the portion copied. In the case of a legal work, for instance, consisting mainly of authorities, *i.e.*, judicial cases cited, selected, and cast in a mould, the copying and putting forward as original an isolated passage containing an ingenious theory of the author, or his comments on the cited cases printed for the first time would be mercilessly dealt with by the Court. "It is not only quantity, but value that is always looked at."

(12) In the case of music a not infrequent error consists in the belief that a certain determined number of notes or bars identical with the same number in a previous composition constitutes an infringement.

This error arises from an incautious wording in the

judgments of some cases, where the defendant has been found guilty of infringement or the reverse. The judge has stated, *e.g.*, that there was piratical copying on the ground that in the case before him (say) three whole bars had been reproduced with practical identity. Such remarks have not been intended as a statement of any hard and fast rule of law as to quantity, but merely as pronouncing that that number of copied bars existed in the particular case, and that under the surrounding circumstances it amounted to an infringement.

It is hardly necessary to state that citations of phrases reproduced in a concert programme for the purpose of illustrating comments on the whole composition may be made with impunity; the same observation would apply to the case of extracts for the purpose of honest criticism, a point analogous to a similar rule in reference to literary matter which is thoroughly well settled. The writer is not, however, aware of any actual decision in reference to music.

(13) One might copy from certain compositions, and indeed from some classical ones, passages containing several bars, without actually laying oneself open to legal process. The symphonies of Haydn, and many pieces of Handel, and of other diffuse, though powerful composers, contain passages which merely reflect the feeling of the age, and are, so to speak, common form; and even assuming for the sake of illustration that the whole works in question were entitled to existing copyright, such isolated passages could be substantially reproduced with impunity. The copyist could successfully plead that the bars taken had not in themselves individuality, but were only significant and characteristic when taken with the context, and were inserted for the purpose of completing, from the point of view of construction, the symmetry of the movement. A common source is a good defence.

Saunders *versus* Smith, 3 Mylne and Craig 711.

Handel himself, writing in an age when musical composers' rights were hazily understood and languidly enforced, dipped deep into the fountains which Stephani, Purcell, and others had endowed with living water. Musical calculators and students say that even if a term of copyright were still running to protect *Israel in Egypt*, at least one-third of the themes contained in that noble work could be appropriated by *anyone* without danger of legal proceedings by the Great Saxon or his

representatives, inasmuch as he himself was not the first inventor, but only the marvellously skilful adaptor of those themes. This does not, however, apply to the contrapuntal development of the stolen motives which was Handel's own workmanship, which could not lawfully be copied, *certainly* not as applied to the same motives; *probably* not if substantially reproduced in connection with similar themes in a new piece.

This "eccentricity" of a giant is only mentioned here for the purpose of differentiating it from the common-form-passages before alluded to. A composition of considerable length from which the author has sought scrupulously to exclude every progression, every phrase which is not new and characteristic, conveys to the hearer the impression of laborious and over-loaded work. Relief in the form of appropriate arpeggio or varied scale-business is not only welcome, but almost necessary. The skill which is used by the classic writers in introducing conventional episodes in such a manner as to work them into the connected whole, is quite sufficient to put to silence any narrow-minded critic who should take out and condemn such passages as commonplace.

(14) Instances of these conventional interpolations usefully fitted into the whole mosaic, so as to round off a period, are easily given. One familiar one is a forte passage of about eight bars occurring in the early part of the finale in many of Haydn's, and in one or two of Mozart's symphonies, as a supplement to the *Haupt-satz* (first motive). This is mentioned here with particularity because it illustrates the sort of matter which, if copied, would not justify legal complaint, unless so large a quantity were taken as to amount to an appropriation of the composer's skilful design and structure. As opposed to this, it might well be that the unauthorised copying of three or four bars of the actual melodic theme of a symphony or sonata movement would amount to piracy, where they are stamped with individuality, and form part of the very foundation of the whole movement.

It is hardly necessary to observe that the copying of so small a quantity as the first eight notes of Beethoven's C minor symphony, which were intended to denote the knocking at the door by destiny, could hardly be copied without exposing the copyist to punishment for infringement. It is *assumed* in this, and the analogous illustra-

See Mozart's best-known Symphony in E♭, last movement, 16th bar and following eight bars. The arpeggios to fix the key at the commencement of the E♭ concerto for piano (Beethoven) are another instance. A pertinent instance of a few bars of mere verbidge occurs in the last movement of Schumann's symphony in B♭. (Allegro animato, bars 28 et seq.).

tions above, that there is a subsisting copyright, though, of course, *in fact*, the protection in Beethoven's time, if any, was of the most shadowy kind and would have long since expired. Music of the past is here cited because it furnishes more striking exemplification of what is intended to be here described, than modern compositions can do, for the modern school strains to avoid, as a disgrace, any single phrase which is not strikingly original, even to the extent of struggling to produce new chords, with what success, as regards the artistic results, may be questioned.

(15) In some cases great composers, other than Handel, have not hesitated, without acknowledgment, to utilise well-worn themes of unusual beauty as the leading subject of a work. To repeat a practical test given above, Bach or his representatives would have been ill-advised to sue a copyist of the first subject, telling and melodious as it is of the Fugue in E major, in the second book of "the forty-eight." The defendant would have thrown in his teeth that this charming phrase, so tempting to a contrapuntist, had been consecrated by Handel in his chorus, "Then round about the Starry Throne," and had gained new vigour from change of air when Mozart introduced it into the concert-hall, through the medium of the fugal movement, in his so-called "Jupiter Symphony."

(16) By way of pursuing the theme, "quantum *versus* value," one should bear in mind the pithy dictum of Lord Hatherley in the "Wandering Jew" case. "Part does not mean particle," *i.e.*, when the statutes or reported cases speak of "a part" copied being an infringement, they mean *a substantial part*. In the case in question, the scenic effect and stage business connected with the appearance of the "Wandering Jew," and the apotheosis which concluded the drama, were introduced by the defendant, from the drama of which the plaintiff in the case (one Lewis) was the author. These episodes were not held to be of sufficient importance to justify an action, and this on the ground of the unsubstantiality in quantum and value of the matter taken. The fact that the plagiarism was of situations and scenic effects was no factor in the decision, which assumed what is, no doubt, the law, that such matter, when copied, is as much a subject for an action as spoken words.

Chatterton *versus* Cave, 3 appeal cases 483.

The composer or his publisher will have no difficulty in applying the principle of this case to music.

(17) Colourable alterations, as the lawyers call them, that is to say, changes of words, or slight alterations of the order of narration in literature, are usually made for purposes of disguise, but rarely escape the scrutiny of the advocate, and intensify the crime of copying and its punishment.
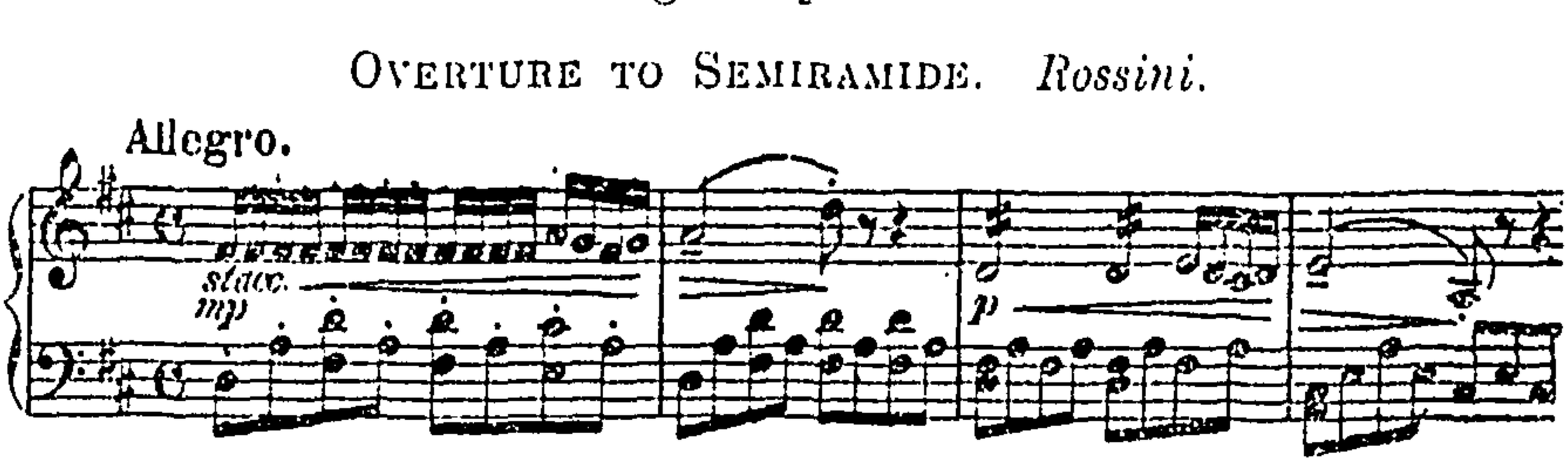
(18) In music the same principle applies; whether there is substantial identity is, in each case, a question of fact, and often a very difficult one. In a slow movement a change of time from ♯ to ♯ may hardly make any difference except to the eye; the sentiment may remain the same. In an allegro number, on the other hand, the whole feeling and character may be thus altered. In some of the airs with variations, in violin and piano sonatas by Beethoven and Mozart, a change of time and rhythm so disguise the theme as to produce a totally changed sentiment. Where such an alteration is made by an infringer in order to render detection more difficult by embarrassing the tribunal called on to decide the question, "is there, or not, substantial identity," what is the judge to do? The notes before him are mainly the same, but the effect is different; a new idea is introduced, which, if the use of the notes had been made with the permision of the owner, would have entitled the arranger to protect the musical treatment, added counterpoint, &c., constituting an original and ingenious development of the melody. It would seem that if the theme contains new and striking intervals and contains a characteristic and strongly marked progression, which is copied, no alteration, not absolutely fundamental, ought to protect the copyist, who ought to suffer for approaching too nearly the line where a fair use of old materials ends and servile imitation begins; but, as has been already pointed out, there are phrases consisting of arpeggios or fragments of scale passages, which are made out of materials so conventional that the composer who has written, or the publisher who has published, a piece founded on a theme so constructed, would be rarely safe in suing an infringer unless, indeed, the imitation were, *modo ac formâ*, identical with the original. He would be sure to find that his adversary would rout out old precedents as like, or nearly so, to the plaintiff's theme, as that theme was to his own.

(19) This is exactly what happened in the case of the music hall air, "*Oh! Marguerite*," which is, in great

measure, constructed of broken chords. The ostensible owner desired to sue an infringer who had taken *substantially the same notes*. It was pointed out to the owner by his counsel that, from the very construction and nature of the tune, it was certain that precedents would be found sufficiently like it to answer and forestall any argument founded on supposed originality. The owner persisted in suing, and the defendant at the trial unearthed more than one theme as like that of the plaintiff as was the defendant's piece. And the anticipating motive on which the case turned (though this did not actually come out before the Court) was a passage in a serious cantata, in slow time, and wholly different in feeling from the music hall ditty, but consisting of nearly the same notes.

(20) Examples of diffuse motives capable of compression, and formed out of such familiar materials that hardly any imitation, not involving absolute identity, of the whole or nearly so, would be punishable, might be multiplied indefinitely. A well known passage occurs to the writer as illustrating this practical truth.

OVERTURE TO SEMIRAMIDE. *Rossini.*



Supposing a copyist, either intentionally or not, gave to the world the following, either with the same, or an analogous, common form accompaniment.



This is Rossini's phrase with only the repetition notes given to the violins *played singly*, instead of eight times each. Would that be held an infringement?

If the writer's memory be not at fault the omission of the "*ron-ron*," brings the phrase into dangerous relationship to the old air, "Life Let Us Cherish." But

whether this similarity or not be well founded, the question remains, would the mere dropping of the brilliant violin conventional phrase (*i.e.*, musically speaking, the omission of a cypher) shelter the taker from punishment? The mutilated phrase would sound absolutely different from the original to an unedncated ear.

In every case where there is not absolute indentity, the infringement is a question of fact.
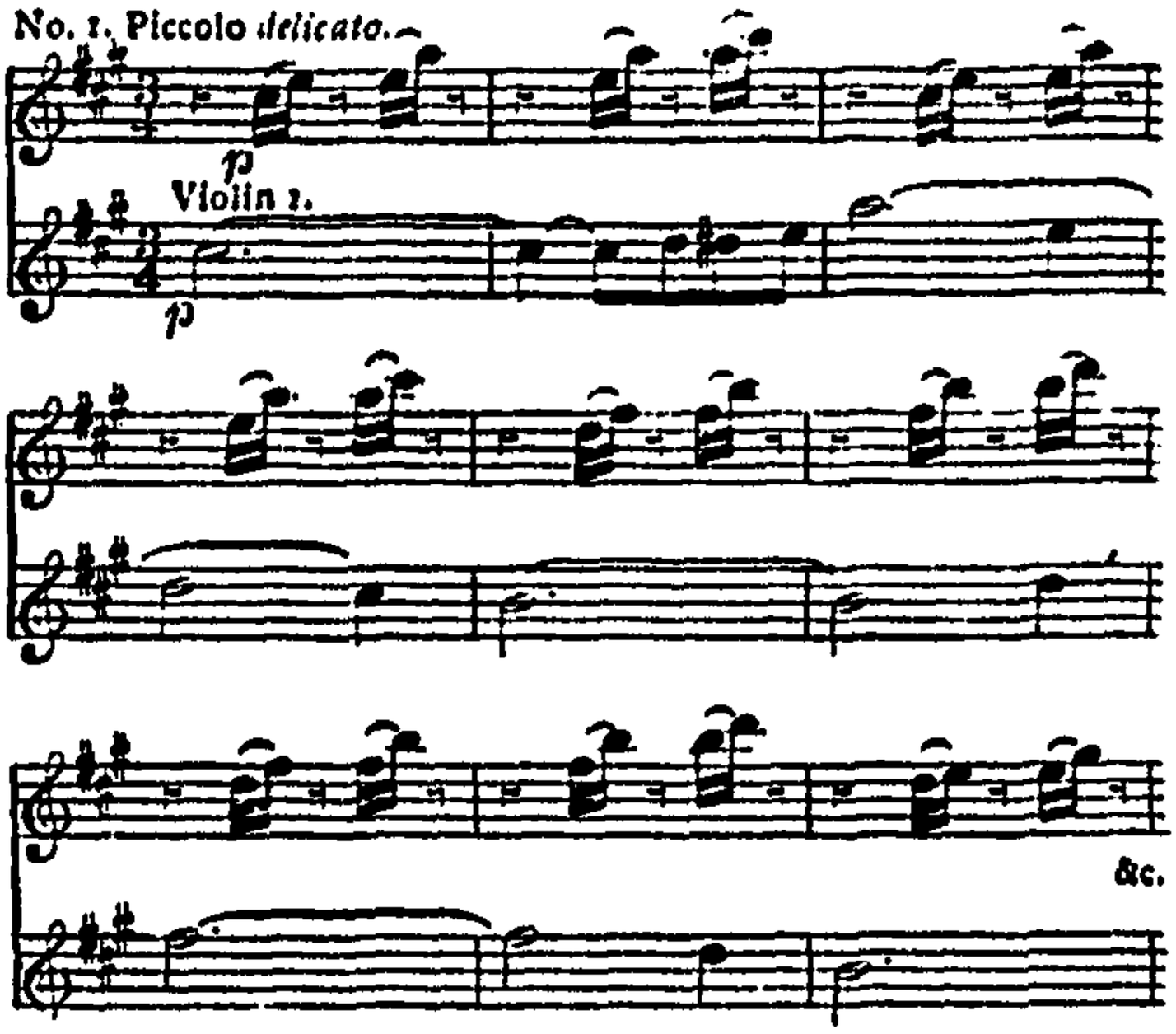
(21) One is often told in cases of literary copyright that the reproduction by a supposed copyist of a mistaken reference, or of a bad conclusion of law occurring in the original is a good *indicium* of piracy where the colourable disguise is otherwise difficult to penetrate. It is not quite certain that something of the same sort might not occur in music, where the unconscious reproduction in an otherwise doubtful case, of a rasping false relation, or an unresolved discord, might make conviction more easy. "Why he has actually copied the dreary consecutive fifths in the third bar of the original," one can fancy a musically-informed judge saying. "A man who perpetuates such excruciating false harmonies deserves at least to be refused his costs, even though the theft may be too unimportant for me to grant an injunction, or give the plaintiff damages."

D'Almaine *versus* Boosey, 1 Young and Collyer, 288.

(22) The writer cannot help repeating the important axiom that change of form is no defence if a substantial part in quantity or value be taken. An organ-piece may be infringed if its leading motive occur in a subsequently published song, a form of piracy of which the author was once a victim; so the airs of an opera used as quadrille-motives would be a valid cause of action The Russian National hymn has been published as a valse; also "The Lost Chord." A good many years ago an erudite musician, named de Lacy, composed a set of quadrilles founded on airs from Handel's sacred oratorios. In all these cases, if the term of copyright in the original had expired, or the arrangements were made with permission, there would be sufficient invention in the strangely new dress which the well-known subjects were made to don, to entitle the *pasticcio* to protection; but on the other hand, the use of the motives for the eccentric purposes mentioned if *unauthorised*, and the subject of unexpired copyright, would be an infringement of the original author's right.

(23) The following passages are taken from the interesting journal, *The Musical Times*, published at the premises of Messrs. Novello. They are only cited here as instances of the extent to which grotesque perversion of a motive from the intention of the original composer may be carried, and, collaterally, as illustrating the question of infringement of copyright (which had presumably expired, so that the perverted originals were no longer entitled to protection on that ground).

The following was apparently intended as a playful adaptation of the favourite "*Lied* in A, No. 30" (composed by Mendelssohn during one of his visits to London at Denmark Hill on June 1, 1842).



It is clear law that if the copyright had been still subsisting, the *unauthorised production of this melody* might have been restrained, notwithstanding the changes of time, rhythm and accompaniment, though they are so skilfully adapted to the original that even a musician hearing the composition in its altered form for the first time, and being ignorant of the original, might not suspect that it was a travesty.

The point is that the succession of notes forming the melody of the so-called "Spring Song" is reproduced, though in triple or valse, instead of quadruple time. On the other hand, if such an improbable thing can be sup-

posed as that Mendelssohn should have authorised the outrage on his "*Lied*," or if the copyright had expired, the *Musical Times*, or the arranger could have sued successfully any copyist of the phrase given above, as in legal contemplation there is sufficient invention in the change of form to merit protection.

(24) Quotations for the purpose of honest criticism are allowed; but, on the other hand, the innocent or praiseworthy character of the motive is not *generally* a defence to an action for infringement, nor is the absence of gain to the infringer. This is shown by a case where MS. copies of a copyright piece of music were distributed, *exclusively* and *gratuitously* among the members of a musical society, yet an injunction was granted.

Novello *versus* Sudlow 12 C. B. 177.

(25) Where an author has parted with his copyright in a piece of music the assignee may not substantially alter, much less mutilate it and so give it out to the world as the work of the author. An action will lie by the author against the assignee to protect the reputation of the former, which would be injured by the sale of inferior matter. Sometimes mutilation is the work of a pirate and not an assignee, and then the Court will act as severely as its procedure allows. A more difficult case would arise where an assignee, having made unauthorised and objectionable alterations, sells a piece *anonymously*. Such a combination of facts has occurred in practice but has not been litigated. The writer has a firm opinion that an action would lie, the piece might be recognised through individuality of style in the unaltered part, and the composer ought to be saved from the mortification of seeing a garbled version of his composition made public, though without the author's name being published. The miserable periodical called "Pianista," remembered by some of our readers, was a merciless hash of some popular operas, "*William Tell*," of Rossini, "*The Prophète*" of Meyerbeer, and other works. The Courts interfered to restrain this publication which combined piracy with murder.

Gilbert *versus* Boosey, The Law Times, Sep. 28, 1889.

(26) Though not strictly within the limits of a work or musical copyright, the question whether to make a translation of a copyright literary work is an infringement is so important to composers of songs that some mention must be made of it here. It cannot be said to be quite free from doubt, as there is some loose dicta of the judges pointing

to an opinion in the negative, but they were given at a time when the protection was more lax than at present, and the writer has personally little doubt that the general principle would apply, and that (as in the case of transposition from one key to another) the taking and *copying* substance, though in an altered form, would be held piracy.

In the Berne Convention the rights of an author to protect himself against infringement by way of translation have been jealously protected, subject to a limitation as to the duration of the right. The whole of the subject is dealt with in detail when international copyright is treated of hereafter.

(27) The piracy in recent years of copyright musical compositions and the musical anarchy which, unfortunately, still reigns in this respect, form a disgraceful epoch in the history of English jurisprudence.

Abuses have arisen which would be impossible in any other civilised state, and which hold Great Britain up to derision throughout the civilised world.

In the closing years of the last century some unscrupulous person invented a scheme for robbing the proprietors of copyright (whether composer or publisher) of their just gains.

Wretchedly-got-up versions of songs, carefully chosen from among those which have gained popular favour, are secretly printed and secretly stored in cellars. A few copies are handed out to irresponsible hawkers and are offered for sale by them at a penny or twopence a copy in populous thoroughfares. If interfered with, the dozen or so copies which each hawker has with him are given up. The loss to the thief is inconsiderable. Another hawker in the next street renews the stock and the same game is played out daily.

(28) Another form of the fraud is the house-to-house distribution of lists of pieces of music, from which the householder can choose, and the supply of the pieces chosen at low prices. No printers name or address is found on any of the pieces sold. The people who are responsible for the transaction remain in the background, and in this way many thousands of copies of any popularised pieces of music are got rid of and the legitimate sale of the publication almost, if not entirely, ceases. There appears to be an idea in many people's minds that

these pirates deserve some sort of questionable credit for their ingenious evasion of the law, thereby defeating a vicious monopoly. It is time to undeceive them in this respect. Audacious lying; concealment of addresses, and scuttling away are the laudable means by which these street buccaneers carry out their ends. Ingenious evasion or device there is none, and their boldness would not have succeeded but for the supineness of the Government, the unreasoning sympathy which appears to exist in the minds of a few short-sighted politicians, and the dishonesty of purchasers who knowingly buy the spurious articles. The effect of this wholesale robbery is disastrous.

The publishers (leaving out of the question the most wealthy and old established houses, whose capital enables them to stand the brunt of the competition on unequal terms) are many of them hardworking tradesmen who have invested their small capital in getting together a business, and in purchasing the copyright of one or two songs which offer a probability of success, and they are ruined wholesale. They pay singers to bring their songs before the public, and advertise very largely, only to find that they have been spending their money for the benefit of a pack of thieves, who filch the whole of their profits and entirely stop their sales. Unfortunately the votes of these deserving, but politically insignificant, sufferers can be treated as a "*quantité negligeable.*"

The copyright bill discussed before Lord Monkswell's Committee contained a clause inserted by the writer conferring upon the owner of copyright power to seize pirated copies of his works. It also gave him power, without applying to any Court, to authorise a police constable to seize the pirated copies which might be taken before a Court of summary jurisdiction and destroyed.

The writer's clause also contained words enabling the Court to act *ex parte*; (that is, on the evidence of the complainant alone, without the necessity of summoning the alleged infringer); to make an order for destruction in the absence of the latter. The clause also contained a provision inflicting a penalty for every piratical sale.

2 Edwd. VII. ch. 15.

Had these two last provisions been allowed to remain, the whole mischief caused by the street pirates would have been remedied; but the words inflicting penalties and giving power to make *ex parte* orders were struck

out, and the Bill eventually became law in a form which is useless. The Statute in question is printed verbatim in the appendix. In consequence of the utter failure of this admirable effort of the Legislature, a Bill was prepared and put into the hands of a private member containing clauses necessary to remedy the abuses. The measure was stifled by the efforts of a member for a Scotch district, who utilised the technicalities of Parliamentary procedure to throw the matter over another session. After endless efforts on the part of those who wished to see justice done, a Parliamentary Committee sat upon the matter, the Scotch member being nominated as one of the members; and again the real merits of the case were stifled, both in the proceedings before the Committee and before the House of Commons. In the latter place the procedure which stops short of the application of closure to a Private Members' Bill enabled the matter in question to be thrown over to yet another session.

(29) Unauthorised performance of copyright music either by singing or playing is not an infringement of the exclusive right of multiplication of copies or "copyright." Copyright and performing right are separate and distinct rights, belonging, it may be, to different persons.

(30) Following out this principle, it has always been the law that prior performance outside the British Dominions does not in any way affect the British copyright.

Compare the law of the United States in this respect; see the chapter on that subject *infra*.

Remedies.

(31) It will not be without its use to add a few words of practical advice to the inexperienced reader, whether composer or publisher, who happens to see or hear a song, piano-piece, or any other composition which appears to him piratically to resemble, or to contain one or more passages identical or nearly so with, a composition of his own or some part of it. He should first apply the axioms contained in the preceding chapters as to necessary *quantum* and value of matter taken; and then he should consider the importance to himself of the theft, having regard to the actual sales of his work and the probability of such sales being reduced by the rival publication.

Should the composer discover that the rival piece has been published since the appearance of his own, and

decide that it is worth his while to stop the sales of the former, he should carefully consider whether it is reasonably probable that friendly applications are likely to produce an amicable settlement. Should the facts, or his knowledge of his adversary, lead to the inference that the latter has infringed under an honest mistake, either of law or fact; or that any verbal communications, direct or through the medium of friends, might bring about concessions by which litigation might be avoided, the reader would do well to write a warning that a writ will be issued if the infringement be persisted in.

If, on the other hand, the offence is a repeated one, or is glaringly wilful, or appears to be founded on an obstinately wrongheaded view of rights, and if at the same time an application by letter might simply operate as a warning to the infringer to place the property in question out of reach of the law, or himself to elude service, the author is bound to advise the issue of a writ and notice of motion for an injunction before a Chancery Judge, without previously commencing a correspondence; that course often creates complications which embarrass when the letters come to be read at the hearing; offers are made to compromise, ingeniously illusory, yet plausible, confusing the issues between the parties, and making it difficult to sue without risk of defeat on the one hand, or to withdraw without substantial loss on the other. There is no hardship on a wilful defendant in striking a blow at once, as the latter can make any offer of submission after writ issued before substantial costs are incurred.

The authorities show that it is not necessary in point of law for an injured party to threaten in writing before suing, but if an action has been hastily brought, and the conduct of the plaintiff show an unduly litigious disposition, judges are apt to twist the law and use their discretionary power of dealing with the costs in such a manner as to make him regret his rashness. He must adapt the foregoing axioms to the circumstances of his case, weigh the merits, and act accordingly.

The writer cannot help adding that, when in practice, he pushed to its limits the desire to prevent litigation by advising correspondence before suing; but the retrospect convinces him that in some cases the result hardly did justice to his client. In some cases demand in writing is made obligatory by Statute.

Copyright Amendment Act, 1842, Section 23.

The young composer should carefully guard himself against the tempting hope that his compositions may gain in publicity by an action, as sooner or later the experienced judge would unfallibly scent out such a motive, and set his face against the Court being made the arena for a *malâ fide* contention.

(32) The experienced legal practitioner will, no doubt, endorse the opinion of the writer that except under very special circumstances an order for an injunction should not be applied for to the High Court *ex parte*, that is without citing the defendant to appear.

Assuming that our reader will not be so rash and suicidal as to conduct his case in person, we may safely leave him at this point.

(33) No delay short of the Statutory period of limitation will bar a plaintiff's remedy unless his conduct amounts to leave and license to the infringer.

The Copyright Amendment Act, 1842, enacts that all legal remedies thereunder shall be applied for within a year after the offence (with an exception not connected with music). The remedies in respect of unpublished music, or at all events some of them, are perpetual, and have no limit of duration, except the six years' limit under the ordinary Statute of limitation, where that applies.

Short of the statutory year in cases under the Copyright Amendment Act, 1842, and the six years in cases outside the Statute, no mere time will be a bar.

For instance, supposing that an infringer prints piratical copies during nine calendar months, even to the knowledge of the composer, the latter has three months, from the date of each separate offence, on which to bring his action, unless he has done some act amounting to *active* consent.

The same is the case, *mutatis mutandis*, with reference to offences not coming within one of the Sections of the Copyright Acts, as in the cases of non-published MS., to which the common law remedies apply.

The statutory bar runs from *the particular offence complained* of, irrespective of previous ones. A favourite maxim of the late eminent Master of the Rolls, Sir George Jessel, was that where the Legislature has prescribed a time for suing, the parties cannot shorten the time, or set up any extinguishment of right short of a

release or assignment by the person entitled to complain. As the late Mr. Justice Kay used to say, "if a man cuts sticks out of my wood no continuance of wrong doing will give him 'an easement (right to do so).' I may, after any merely passive delay, intervene to stop him."

Copyright Amendment Act, 1842, Section 23.

(34) All copyright music pieces, of which entry has been made in the register, and which are unlawfully printed or imported, without consent *in writing*, of the proprietor, are deemed his property, and he may, after demand in writing, recover them, or damages for the retention of them.

Sections 15 and 17.

(35) The two sections of the Copyright Amendment Act, 1842, which relate to importation and exportation, are full of difficulty and question. Section 15 applies:—

Firstly, to the case where any person shall print in any part of the British Dominions, for sale or exportation, any copyright book without the consent in writing of the proprietor.

It will be remembered that "book" includes "music."

Secondly. Where any person shall import, for sale or hire, any copyright book so having been unlawfully printed from parts beyond the seas.

Thirdly. Where any person shall, with knowledge that the book is unlawfully printed or imported, sell, publish, or expose to sale, or hire, or have in his possession for sale or hire, any such book so unlawfully printed or imported, without consent of the proprietors.

Such offender in either of these cases is liable to be sued by the proprietor.

Section 17.

Another Section provides that it shall not be lawful for any person, not being the proprietor of the copyright, or authorised by him, to import into any part of the British Dominions, for sale or hire, any printed copyright book first composed or written, or printed and published, in any part of the United Kingdom, and reprinted out of the British Dominions.

If any unauthorised person shall import, or bring for sale or hire, into any part of the British Dominions contrary to the intent of this Act, or shall knowingly sell, publish, or expose to sale, or let to hire, any such book—

(i.) Such book shall be forfeited.

(ii.) Such book shall be seized by any officer of Customs or excise for destruction.

(iii.) A penalty is imposed of ten pounds and double the value of every copy of such book.

There would seem to be nothing in Sections 15 and 17 to limit their scope to published works. It is, no doubt, the popular view of the Statute, as a foregone conclusion, to hold that none of the statutory remedies apply to unpublished matter, but only to those works which have passed out of the region of common law protection and become subject to the term of duration limited by Section 3. It is true that the remedies in Sections 15 and 17 only apply to a book in which there shall be "subsisting copyright;" but Section 2 recognises in terms "*the interest of an author in copyright before publication;*" and it may well be that the term of duration created by the Section 2 is made to start "*from first publication,*" merely as a convenient mode of fixing a commencement for the term, and is not intended to limit the statutory jurisdiction to published works. Section 17 applies to "any printed book first composed *or* written *or* printed and published," which can only be read grammatically as meaning that "printed and *published*" is one alternative, and "composed or written" (and therefore not published) another. A book may be one "in which there is subsisting copyright" and yet be unpublished, for the author may have "*an interest in its copyright before publication.*" This point may be of importance in cases of unauthorised importation of music, printed like some musical compositions of the late Prince Consort, and, indeed, many others, for the most restricted *private* circulation and therefore "unpublished." It would seem improbable that the Legislature should have intended to allow such works to be imported, or to have left the owner to a doubtful and obscure common law remedy. No doubt it may be argued that, having regard to the mode in which Statutes are put together piecemeal, no consistent intention at all ought to be imputed to the Legislature; but the Courts have not gone so far as to hold this. The point seems never to have been noticed.

Statute of 1842, Section 2.

If the writer's suggestion be correct that Sections 15 and 17 comprise unpublished works, the remedies under the 15th and 17th Sections would seem to be perpetual and not limited to the term created by Section 3.

The form of multiplication of copies contemplated by Section 15 and 17 is "printing" alone, and no other form of multiplication is an offence: in this respect the 15th Section differs from the 2nd, which defines copy-

right to mean "printing or *otherwise multiplying* copies" of any book, &c.

39 and 40 Vict., Sections 42, 44, 45.

(36) In the Customs Consolidation Act, 1876, Section 42, a list of books, of which the proprietor has given notice, is to be kept; and under Sections 44 and 45 any person having cause to complain of the entry of any book on such list may apply to a judge in chambers to have such entry expunged; such lists are to be publicly exposed in the Customs Houses in the several ports in the United Kingdom; and in case of the expiration of copyright in any of the works notice in writing is to be given to the Commissioners of Customs of the date of such expiration.

The books comprised in Section 42 are those "wherein *the copyright is still subsisting*, first composed or written in the United Kingdom, and printed or reprinted in any other country, as to which the proprietor" . . . shall have given to the Commissioners of Customs, a "notice in writing" stating *when the copyright expires*. Such books, if imported into the United Kingdom, may be forfeited and may be destroyed or otherwise dealt with as the Commissioners may direct.

The words requiring the notice to state "*when the copyright expires*," seem, at first sight, in this Section, to limit the scope to works subject to Section 3 of the Copyright Amendment Act, 1842, but are not conclusive, as they do not necessarily apply to *all books* as to which notice may be given, but may be only levelled at the cases where there *is terminable copyright* under Section 3. The phrase would then read as though the words were ("in cases where terminable copyright exists), then the notice must comprise a statement as to when such copyright expires." There would seem no reason why a notice should not be given in reference to an unpublished work, which is copyright, in a sense, as is shown by Section 2; the notice then would be silent as to the time of expiration, or would state that the copyright is perpetual.

The word "published" in Section 17 of the Act of 1842 is omitted in the table of prohibition, in the Customs Act. In the former the words are "any printed book first composed or written, *or* printed and published."

In the customs act the phrase reads "first composed, or written or printed."

The whole importation sections and the remedies have assumed great importance since the combination of the

greater number of European States, and of some others, in the matter of reciprocal copyright.

(37) The question how far the penalty annexed by Section 15 of the Copyright Amendment Act of 1842 excludes the jurisdiction under the earlier sections of the Statute, or under the inherent jurisdiction of the Court, has been noticed at the commencement of the chapter on "Infringements."

Similar questions arise with respect to Section 17. In all cases where a remedy by way of damages or penalty, or forfeiture and destruction of piratical wares, is given, the right to restrain by injunction the act which is thereby branded as illegal, follows automatically.

(38) A question, however, already alluded to in this chapter, which is raised by the language of both Sections 15 and 17, is whether where a remedy is given against an infringer *with guilty knowledge*, this excludes that remedy which would exist under other Sections against an infringer, without guilty knowledge. There is no decided case, it is believed, on this point, and Cooper *versus* Whittingham (previously cited) falls short of it. 15 Chancery Division, p. 501.

It would seem reasonably clear that the condition in Sections 15 and 17 of the Act of 1842 that "guilty knowledge is necessary in order to entitle an owner of copyright to sue in respect of certain given offences," is inconsistent with the view that an *innocent* seller could be struck at for similar offences under Sections merely conferring right in general terms, and saying nothing about guilty knowledge. The general must yield to the specific.

SECTIONS II. AND III. OF THE COPYRIGHT AMENDMENT ACT, 1842.

OFFENCES.

Without proprietor's consent given *in writing or otherwise* and	Printing or otherwise multiplying copies of	(1) Any unpublished music written by a British subject or an alien resident in British dominions,* and as to which the infringement shall have occurred within 12 calendar months next before the date of action brought.
		(2) Any music first published within the British dominions, or published simultaneously with publication abroad, not longer than 42 years last before the date of infringement, and as to which the infringement shall have occurred within 12 calendar months next before action brought.
		(3) Any music first published within the British dominions, or published simultaneously with publication abroad, not longer than the period of 7 years from the death of the author and as to which the infringement shall have occurred within 12 calendar months next before action brought.
		(4) Any music first published after the author's death and as to which the infringement occurred within 42 years from the date of publication and within 12 calendar months next before action brought.
With or without guilty knowledge		

REMEDIES.—Action for damages and injunction.

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* The limit as to the composer's nationality in the case of unpublished music is a general deduction from the principle of decided cases, and is not specifically laid down by any one in particular.

SECTIONS XV. AND XVII. OF THE COPYRIGHT AMENDMENT ACT, 1842.

OFFENCES.

Without proprietor's written consent.

(1) Printing within British dominions any copyright music for sale or exportation.
(2) Importing for sale or hire from parts beyond sea
(3) Selling or publishing
(4) Exposing or possessing for sale or hire

} With guilty knowledge } Any piece of music so printed, whether published or not.

(5) Importing into British dominions for sale or hire
(6) Selling or publishing
(7) Exposing or possessing for sale or hire

} With guilty knowledge } (A) Any printed music first composed or written in the United Kingdom and not published.
(B) Any piece of copyright music printed and published in the United Kingdom
and
(both as to A and B) reprinted out of the British dominions.

REMEDIES.

As to numbers (1) to (4) — Action for damages.

As to numbers (5) to (7) — Forfeiture and penalty of £10 for each offence and double the value of every book imported, or knowingly sold, published, or exposed to sale or let to hire.

As to all the numbers (1) to (7) an injunction.

CHAPTER V.

(1) Definition of performing right *simpliciter* not wanted. (2) In the case of unpublished work, it differs from copyright both as to its birth and death. (3) Origin of right: whether perpetual till performance. (4) When and how the right is cut down to a term. (5) First performance *here* does not affect copyright here: nor does first performance *abroad* do so. (6) First publication; effect of, on performing right. (7) Section 19 of the International Copyright Act, 1844, considered. Meaning of publication. (8) "The Colleen Bawn" case. (9) Boucicault *versus* Chatterton. (10) Whether performance of music must be in "a place of dramatic entertainment" to entitle the author to sue. (11) What is a public performance within the Statute. (12) Copyright (musical compositions) Act, 1882. (13) Copyright (musical compositions) Act, 1888. (14) Lessees and others, if liable for piratical performance. (15) Improvisations. (16) Registration before suing, to protect performing right. (17) Arguments against the necessity of this step. (18) Clark *versus* Bishop. (19) Assignment of performing right. (20) Assignment of performing right, will not pass copyright. (21) "Part *versus* particle" quâ performing right. (22) Tabular form of rights and remedies.

PERFORMING RIGHT.

(1) Performing right in dramatic literary property was created by the Dramatic Copyright Act, 1833 (3 Wm. IV. ch. 15). This enactment had no application to performing right in music.

5 and 6 Victoria, chap. 45.

By the 20th Section of the Copyright Amendment Act, 1842, after a recital that it was expedient to extend to musical compositions the benefits of the Dramatic Copyright Act, 1833, and of the now reciting Act, it was provided that "the sole liberty of representing or performing, or causing or permitting to be represented or performed, any musical composition should be the property of the author thereof.

The Legislature has not thought it necessary to define "performance" or "performing right," except by a wholly useless interpretation in the International Copy-

ht Act, 1886, in which Statute, indeed, the word never occurs elsewhere than in the definition itself. It might, at first sight, seem as if the absence of a definition were to be accounted for by the fact that the expression was too simple and too easily understood to make one necessary; but questions have from time to time been raised as to what degree of *publicity* must attach to an unauthorised *performance* before it constitutes an infringement of right; "performance" simpliciter no doubt speaks for itself, but what is "public performance" is a question of great difficulty. Perhaps the draughtsman of the Statute was wise in not defining "performance," as being too obvious a word to require it, and "public performance" as comprising varied facts impossible to foresee.

It is now settled law that performing right in a musical composition is infringed by any performance, whether public or not, if unauthorised by the proprietor of the right, provided that the performance is a substantial one, and is not too trivial for the law to take notice of without absurdity. The authority for this proposition is Wall *versus* Taylor. The point is discussed at length hereafter. 11 Queen's Bench Division, 102.

(2) Performing right in a work which has never been performed is essentially different from copyright: different in its birth, in the respects hereinafter stated, not necessarily contemporaneous in its term of duration; widely different in the incidents of its life from first to last. In spite of the wish of the writer to keep history out of the body of this work, and to give in the baldest form a statement of the rights and duties of composers and publishers, he has found it hardly possible to fulfil the task without introducing a sketch of the Statutes under which those rights arise. Before proceeding to this it is necessary to say that where the term "publication" appears, the present writer means the term to be understood in the strict sense of publication *as a book*.

The Legislature has frequently used the words "publish" and "publication" in circumstances which give rise to doubts whether those words are used in this strict sense, or whether they are meant to include performance.

(3) As soon as a bar of music is composed the author becomes automatically entitled to a perpetual right to

prevent anyone from playing or singing his composition without his authority.*

(4) If, and when the work is printed and published, the perpetual performing right still remains intact, subject to the Act of 1882 hereinafter mentioned; but if performance in public occurs the perpetual right is cut down to a term similar to the term of copyright, viz., forty-two years from the date of the first public performance, or the lifetime of the author and seven years from his death, whichever shall be the longer period. It will be noticed that while it is an infringement of the right to perform or represent a musical composition *anywhere*, performance *in public* is necessary to cut down the perpetual right to a term. This seems to be the result of a succession of clumsily-drawn enactments. The Dramatic Copyright Act, 1833, provides, with reference to dramatic pieces, that there shall be a perpetual exclusive right of performance in the case of a work not printed and published, and that when it is published the perpetual right shall be cut down to a term of twenty-eight years. The Copyright Amendment Act, 1842 (Section 20) recites that it is expedient to extend the term of "the sole liberty of representing dramatic pieces given by the Dramatic Copyright Act, 1833, to the full time by this Act provided for the continuance of copyright, and to extend to musical compositions the benefit of that Act and also of this Act," it enacts that "the provisions of the Dramatic Copyright Act, 1833, and also of this Act, shall apply to musical compositions" and "the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition shall endure, and be the property of the author thereof and his assigns, for the term in this Act provided for the duration of copyright in books, and the provisions hereinbefore enacted in respect of the property of such copyright and of registering the same shall apply to the

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* There would seem to be no ground for the view recently taken by Mr. Justice Wills, in the case of Hardacre *versus* Purcell, that performing right in an unperformed work is confined to the lifetime of the author. Until this case, in which the remarks of the learned judge were *obiter*, the proposition that performing right in an unperformed work is perpetual has been universally accepted and has never been questioned.

liberty of representing or performing any dramatic piece or musical composition as if the same were herein expressly re-enacted and applied thereto, save and except that the first *public* representation or performance of any dramatic piece or musical composition shall be deemed equivalent *in the construction of this Act* to the first publication of any book."

A few years ago a confusion existed in the minds of both legislators and judges between "publication" and "performance" in the case of dramatic and musical work. In construing the Statutes in connection with performing right the tendency of lawyers has generally been to read the phrase "in the construction of this Act" as though it were "in the construction of the Dramatic Copyright Act, 1833, *and of this Act*." The effect of this construction is, as above stated, viz., that on first performance (not as formerly, on first publication), the perpetual right is cut down to a term, in other words, first performance, in the case of a musical composition, has an operation on the performing right similar to that which publication of a book has on copyright.

In the Dramatic Copyright Act, 1833, it would seem, from the occurrence of the word "printing" in connec- with "publication," as if the latter word were intended to be taken in its strict sense, notwithstanding the anomaly of making the term in performing right dependent on an event wholly collateral to it and falling within the domain of copyright. In the Copyright Amendment Act, 1842, performance is, in clear terms, separated from copyright.

(5) A result of the complete separation of copyright from performing right is that a first performance of music, either in Great Britain or abroad, does not in any way affect copyright in this country.

Chappell *versus* Boosey, 21 Chancery Division, 232.

(6) First publication of music as a book, either in Great Britain or abroad, does not, in itself, affect performing right in Great Britain. Since, however, Wall's Act hereinafter stated any Copyright owner who wishes to retain performing right, is required to reserve, by notice printed on the title page of every published copy, that the right of public performance is reserved. No penal consequences are, in terms, imposed upon the author who fails to comply with this requirement; but according to the opinion of a learned judge in a recent case, the right cannot be retained if the direction in the Statute is not complied with.

Fuller *versus* Blackpool Winter Gardens Company, 1895, 2 Queen's Bench Division, 441.

(7) First performance of music abroad, unless in a country with which Great Britain has a Convention, destroys performing right in this country. Section 19, of 7 Vict., chap. 12, provides that neither the author of a book, nor the author or composer of any musical composition "*first published*" outside the British Dominions, "is to have any copyright, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act."

The meaning of the expression "*first published*" has been largely discussed. It can hardly be taken literally, for the legal decisions all clearly establish the proposition that publication in book form of a dramatic piece or musical composition has no effect upon performing right. It can hardly be suggested that it was intended that publication as a book outside the British Dominions should affect performing right within them, when it is unquestionable that publication as a book within them would not affect British performing right. It is probable that the word "publication" was used by that dignified abstraction "the Legislature," without due consideration of its limited meaning. In decided cases the word has been given a double meaning, according to the subject matter which was under consideration. In the case of a book it has been construed in its strict sense; in the case of a musical or dramatic piece it has been construed as performance.

1 Hemming and Miller, 597.

(8) In the "Colleen Bawn" case, Boucicault *versus* Delafield, where the subject was a play, which gained its enormous success mainly through the "tremendous header-scene," the well-known actor, the late Mr. Boucicault, sued to restrain the defendant from performing his play, the "Colleen Bawn," in England. He had played it for the first time in the United States, and it had been published as a book in England, but until the performance by the defendant, it had never been played in the British Dominions. No point was made of the fact that there had been a *publication* (as a book) in England, which, as will have been observed from the preceding Sections, had no effect upon performing right. It was held that the effect of Section 19 of the Statute 7 Vict., chap. 12, just before stated was to disentitle Mr. Boucicault to any relief. At first sight, and to the eye

of a casual reader, there seems to be no obscurity in the wording of this enactment as regards the question before the Court. Ingenuity, however, is never wanting in a Court of Justice, and it was strenuously argued on behalf of the plaintiff that "the Legislature was not attempting to deal with the rights of a native-born Briton, but that the universality of the language was to be limited to the case of an alien." The learned judge, Vice-Chancellor Wood (who subsequently became Lord Hatherly), held that "first publication" (to use his Honour's own expression) of a new work, outside the British Dominions, and in a country like the United States, between which country and Great Britain there is no convention, destroyed the plaintiff's right to exclusive representation or performance here.

(9) In the case of Boucicault *versus* Chatterton, the facts were very similar except that the play had never been printed or published as a book. The case arose in connection with a play called "The Shaughraun." For the plaintiff it was argued, both before Vice-Chancellor Malins and the Court of Appeal, that the word "publication" in the 19th Section of 7, Vict., chapter 12, could not apply to a dramatic composition unless it had been printed. 5 Chancery Division, 272.

The learned judges, while admitting the difficulties of interpretation arising on the Copyright Acts, decided against the plaintiff, holding that for the purposes of the Statute a dramatic piece was made public so soon as it was represented or acted. The singular confusion which existed in the past between performing right and copyright is strikingly shown from the argument as stated in the Law Reports of plaintiff's Counsel in this case. "This play," he is reported as saying, "has never been printed or published, though it has been acted, and therefore the plaintiff is entitled to '*copyright*.'" It is unnecessary, perhaps, to add that the plaintiff was not seeking to enforce *copyright*, but performing right. Very little weight was given to the fact that the play had never been printed. Indeed, the fact that it had not been so seems to weaken, instead of strengthening, the case against Chatterton, for the Courts have taken the view that the policy of the Statute is to give a monopoly to him who first offers his work to inhabitants of this country.

(10) Generally it may be taken that what it is piratical to copy, it is illegal to perform.

The last observation is made with reference to *subject matter:* questions, however, have been raised whether what is now undoubtedly true of dramatic performances extends to music, viz., *that the character of the locality* where performance occurs is a factor in deciding the question whether there is any infringement and remedy.

Wall *versus* Taylor, 1883, 11 Queen's Bench Division, 102.

It must be taken as settled by high authority that in order to confer a valid claim for an injunction and damages on the proprietor of *musical* performing right, it is not necessary that the unauthorised performance should have occurred in a public place of entertainment.

(11) It is obvious that no Statutory definition could shut the door to all question as to whether the place and circumstances of any particular case make the performance so insignificant and harmless as to take it out of the scope and spirit of the Statute and to disentitle the proprietor to any legal remedy. The words in the Copyright Amendment Act, 1842 (Section 20), which for the first time confer a sole right of performance of music, say nothing about *publicity:* what is given is "the sole liberty of representing, or performing, or causing or permitting to be represented or performed, any . . . musical piece," so that, taken literally, "a representation in a nursery by children, or by grown up persons in a drawing-room" would be an infringement. These were instances given by a learned judge of what would not be piratical in the case of a *dramatic entertainment* as being "obviously domestic and private." But could a proprietor sue to restrain a performance of *music* given in a nursery or drawing-room? The words of the Statute are wide, and include as far as language goes *any performance whatever?* The instances given in the hospital case, Duck *versus* Bates, are a guide to some extent; but there must remain an element of uncertainty in many cases which are near the line. The words of the Statute are clear: the question will be, whether the facts coming within the words also come within the spirit, for the words of a Statute are not always conclusive, and are sometimes controlled by the general intention of the legislator as shown by the context.*

Duck *versus* Bates, 13 Queen's Bench Division, 843.

* The words of the Section creating the right of performance of a musical piece are "the sole liberty of representing or performing,

(12) The story of the plaintiff in Wall *versus* Taylor is probably too well known to readers of this treatise to require more than a passing allusion. This historical personage was in the habit of acquiring, for a trifling sum, performing-right in musical compositions, such as songs, and exacting for infringements, however slight, the full amount of the heavy penalties imposed by the Statutes then in force, the payment of which the unwilling Courts were compelled to order, together with double costs. The state of the law enabled persons to interfere with performances, having the object of providing, by the aid of generous musicians, funds for the sick and indigent.

The abuse of the remedies provided for, even nominal infringement, required a statutory antidote, and an Act was passed for the protection of the public from vexatious proceedings.

Under the Copyright Musical Compositions Act, 1882 (popularly known as "Wall's Act"), as mentioned a few pages back in a different connection, the proprietor of the copyright in any musical composition first published after the passing of the Act, or the assignee, who shall be entitled to and be desirous of retaining, in his own hands exclusively, the right of public performance thereof, must print, or cause to be printed, upon the title page of every published copy of such musical composition, a notice to the effect that the right of public performance is reserved. 45 & 46 Vict., ch. 40.

If, subsequently to the passing of the Act, and before publication (which here means publication in book form) performing right and copyright become vested in different persons, the owner of the performing right, if he desire to retain the same, must, before publication of any copy, give notice to the proprietor of the copyright requiring him to print upon every copy a notice to the effect that the right of public performance is reserved.

If, after publication, and after the passing of the Act, copyright and performing right become vested in different owners, and if a notice reserving public performance has been printed upon copies published before the severance

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or causing or permitting to be represented or performed, any . . . musical composition." The qualification of *publicity* only occurs in the enactment which follows: "The first public representation or performance of any . . . musical composition shall be deemed equivalent in the construction of this Act to the first publication of any book."

of ownership of copyright from performing right, then the owner of the performing right, if he desire to retain the same, must give notice to the owner of the copyright before the publication of any further copies, requiring him to print a notice of the reservation of the right on all copies to be thereafter published. If the owner of the copyright neglect to comply with the requirements of the owner of the performing right, he is liable to forfeit to the owner thereof the sum of £20, to be recovered in any Court of competent jurisdiction.

This singularly drawn enactment does not say what shall be the result of failure on the part of a copyright owner to comply with the demand of the performing right owner, on the performing right itself. Nor does it say what is to be the fate of that right if its proprietor neglects to call for the insertion of the reservation. It would seem reasonable to hold, in the latter case, that the performing right owner should suffer from his negligence, though the absolute extinction of the right might operate harshly where it becomes vested in him without his knowledge as, *e.g.*, by bequest during his absence abroad. But in the first case, that of the copyright owner omitting to insert the reservation after being duly called upon to do so, a strong judge would probably read within the lines of the Statute an enactment that the right should only be extinguished as against persons buying the uninscribed copies, and remain in force as against those who purchase copies duly bearing the reservation, whether printed before the severance of the rights, or at a future time. The £20 penalty would be an illusory compensation for the loss of a right which might be worth thousands of pounds.

It does not seem quite clear what would be the result of the printing and publishing of copies piratically without the insertion of any reservation. The question may become important if the Legislature continue, for their own reasons, to connive at the wholesale robbery of the street pirates. It certainly ought not to be admitted, as a defence to an action for piratical performance, that a copy issued by a flagrant wrongdoer, without a reservation of a right inscribed on it, came into the hands of the defendant innocently, in ignorance of the illegality. The right of the proprietor who might not have failed to comply with the statutory requirement, would seem to

Fuller *versus* Blackpool Winter Gardens, 1895, 2 Queen's Bench, 429. Moul *versus* Coronet Theatre, Times, Feb. 4, 1893.

be the stronger, and he ought to be entitled to all the statutory remedies and to be indemnified against the costs of the suit.

If there were no authority on the question, it would have seemed doubtful whether the clause requiring the owner of performing right to print the reservation is not merely a meaningless direction to do so, and whether the failure to do so on the first copies would extinguish the right; or whether such failure would only be a defence in the mouth of persons without notice that performing right is reserved at all.

(13) The Copyright (Musical Compositions) Act, 1888, enacts that (in effect) :— **51 & 52 Vict., ch. 17.**

Notwithstanding the provision of the Dramatic Copyright Act, 1833, or any other Act in which those provisions are incorporated, the penalty or damages to be awarded upon any action or proceedings in respect of each and every unauthorised representation or performance of any musical composition whether published before or after the passing of the now reciting Act, shall be such a sum as in the discretion of the Court shall be reasonable; and the Court may award less than 40s. in respect of each such performance, or a nominal penalty or nominal damages.

By Section 2 it was enacted that the costs should be in the absolute discretion of the judge.

(14) The question sometimes arises in cases of piratical performance, "who is responsible": "who caused or permitted" the performance so as to fix a liability. This occurs often in cases where the manager of a theatre or music hall lets it for a musical entertainment. The test is who actually by himself or his *employé* takes part in the performance. It is not enough to make a manager, still less a lessee or mere occupier, liable for a piratical performance of music, that he supplied the theatre, lights, supernumeraries and check-takers, if he did not hire and bring the executants. The farthest point to which the Courts have gone in this direction was in a case where the proprietor of the Grecian Theatre was held liable for an unauthorised performance of a dramatic piece on the ground that the actors were in his permanent employ, although his son hired from him the whole troupe for the one night, together with the theatre and lights, for £30. No doubt the relationship between the **Marsh *versus* Conquest, 17 Common Bench Reports, new series, 418.**

parties, and the fact that the son was stage manager of his father's undertaking, showed a sort of privity between the parties which may have influenced the Court; but the case is peculiar in the fact that the actors were unquestionably in the son's employ for the one night.

See Parsons *versus* Chapman, 15, Carington and Payne, 33.

Though the piece performed was a dramatic one, the principle applies to music; and with reference to musical compositions the "Copyright Musical Composition Act, 1888," enacts that the proprietor tenant, or occupier of any place of dramatic entertainment, at which any unauthorised performance of music, whether published before or after the passing of the now reciting Act should take place, should not be liable to any penalty or damages in respect thereof, unless he should wilfully cause or permit such unauthorised performance, knowing it to be so.

Russell *versus* Briant, 8 Common Bench, 830.

Russell *versus* Smith, 12 Queen's Bench, 217.

Lyon *versus* Knowles, 3. Best and Smith, 556.

By Section 4 the provisions of the now reciting Act were not to apply to any proceedings in respect of any opera in any theatre or other place of public entertainment duly licensed in that respect.*

Reported in the Daily Telegraph Newspaper of the 4th February, 1903.

The case of Moul *versus* Coronet Theatre (Limited) greatly enlarges the opportunities for infringement of performing right by unscrupulous persons. The defendants, the owners of the theatre, were sued by the proprietor of the performing right to the "*Valse bleue*," a French composition. The case was considered to turn on the Section stated just above, and the defence was the alleged ignorance of the persons assumed to be responsible, viz., the musical director (who was not made a defendant, but appeared as a witness) and the managing director.

The Court held that the oath of those persons that they did not know that the performance was unauthorised, and that they had not seen a copy of the music containing a reservation of the performing right, was an answer to the action.

The case is an eminently unsatisfactory one, and may place future tribunals in difficulty.

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* Marsh *versus* Conquest, 17 Common Bench (N.S.), 418. Monahan *versus* Taylor, 1886, 2 Times Law Reports, 685. French *versus* Day, 1893, 9 Times Law Reports, 548. Kelly's Directories *versus* Gavin, 1901, 1 Chancery, 374.

It does not appear from the report how it was that the piece, being a French one, fell under the British Statute of 1888, and not under the Berne Convention, Article 9, which deals with performing right in countries of the Union.

The Lord Chancellor dealt with the case on the ground that there might be no copyright at all attached to the music, and that the musical director could not be assumed to know that there was; but the real point was, or should have been, what authority had been given to the proprietors of the theatre, either by themselves or their musical director, to perform the "Valse bleue"? They must have *collectively* known that no one had authorised them or either of them, and if this had been brought out the defence would have failed.

Ignorance whether the piece was or not copyright is not the defence contemplated by the Statute, which can hardly be intended to reverse the universal rule that a man is bound to enquire as to what he plays, and is levelled at a different object, viz., that of relieving the owners of premises (especially absentees) from punitive orders of the Court, where they have not wilfully connived at a performance behind the back of the owner of performing right. The case could not turn on the presence or absence of a reservation of performing right on the copies of the music, for such a reservation is consistent with either theory, viz., that the proprietor has given, or refused, authority to perform.*

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* This case was treated as coming under the British Statute, but it would seem questionable whether the law of the forum applies, and whether it should not rather be mentioned in this work under the head of international rights. The piece was French in its origin, and the author was entitled to the rights which the law of Great Britain gives to natives of Great Britain, subject to the formalities obtaining in the country of origin, *i.e.*, France; but there is nothing anywhere which fixes the owner of foreign copy- or performing-right with all the burdens and obligations attaching to British rights; and it is not unreasonable to hold that a member of a country of the Union, other than the country of the forum, should not be bound to fix the proprietor of a theatre with knowledge whether a performance is authorised or not, generally a most difficult, often an impossible, task. **Berne Convention, Article 2.**

The broad question has never been noticed as existing, either in judicial decisions, or by text-book writers, and discussion may be looked for with interest. No doubt a very convenient decision would be to hold that Section 3 of the Act of 1888 applies to foreign

See American cases analogous to this point, in Drone on copyright (American), edition of 1870, p. 500.

(15) The point as to protecting improvisations has always been lost sight of, eclipsed as it has been by burning questions of more pressing importance at the moment. The subject is shortly dealt with here as especially pertinent to the realm of performing right.

It is a less difficult matter than would at first sight appear to a non-musician, to retain in the memory, and to write down, a substantial portion of an improvised organ solo, where the improviser is a master of form and clearness, and observes a regular plan of constructing his sonata-like or fugal composition, as is the case with Monsieur Guilmant or Monsieur Widor, or as was formerly to be found in the extemporisations of Sir Frederick Ouseley; it is an injustice to the composer that some adroit copyist with a retentive memory should carry away and flourish about as his own, either by performing or transcribing, the motive and plan of another, and in the latter case possibly sell what he has so transcribed. The matter is not imaginary, and the trick has been done platonically by the present writer. It seems to be doubtful whether the law as to unpublished compositions would apply, and give the protection which the justice of the case demands.

(16) No registration is necessary as a condition of suing in respect of piratical performance of music; there is no word in the Statutes imposing this duty on the plaintiff.*

In the 3 and 4 Wm. 4, c. 15, there is nothing said about registration.

In the 5 and 6 Vict., c. 45, Section 20, it is recited that

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members of the Union, but it would be the convenience of managers and lessees, and the reverse of convenient to foreign authors.

The questions which have to be answered in connection with this subject are (1) into what contract has Great Britain entered into with other countries? and (2) was the contract *intra* or *ultra vires*, having regard to the Statutes of 1844 and 1886 hereinafter stated in detail?

* The writer thought that this point was firmly settled, and did not hesitate to state it as unquestionable in a treatise dated some twelve years since; but in the learned work so often quoted here of Mr. MacGillivray, the question is treated as being a doubtful one. He only gives, however, the well-known arguments in favour of the exemption, almost every one of which alone would be sufficient to remove any doubt; the reader may judge for himself from the sections stated above.

it is "expedient to extend to music the *benefits* of 3 and 4 Wm. 4, c. 15, and also of the 5 and 6 Vict., c. 45, and it is enacted that the provisions of these two Acts "shall apply to musical compositions"; and "the sole liberty of performing any . . . musical composition shall be the property of the author" for the term provided in the new reciting Act for books. And "the provisions *hereinbefore enacted* in" respect of the property of such copyright, and of registering the same shall apply to the liberty of "performing any . . . musical composition."

The clause (Section 24) which enforces registering any copyright as a condition before suing is not one of the provisions "*hereinbefore enacted*" mentioned in Section 20; and, short of negative words, it is hardly possible to conceive a stronger expression of intention that a provision *hereinafter enacted* is not intended to apply. But the legislator was not satisfied even with this, for he says in Section 21 that the proprietor of exclusively performing a musical composition shall enjoy the "*remedies*" *given by the* 3 *and* 4 *Wm.* 4, c. 15 (which does not mention registration), as fully as if they were re-enacted, and there is not a word imposing upon him *the obligations created by the* 5 *and* 6 *Vict.*, c. 45. This is another strong case of *expressio unius est exclusio alterius*; and to wind up the whole he provides in Section 24 (after enacting that no proprietor of "*copyright*" shall sue without registering) that "nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any '*dramatic piece*' shall have under 3 and 4 Wm. 4, although no entry be made on the register."

(17) The only shred of argument in favour of the necessity of registering music before suing in respect of performing rights is found in this clause, which only mentions a dramatic piece and does not couple music with it in terms; but the definition clause includes "musical *entertainments*," under the head of "dramatic piece"; and, moreover, the legislator, after coupling music with drama all through the Sections as to registering, provides expressly that the "provisions . . . of this Act shall apply to music"; and it is inconceivable that it should be intended whimsically to sever music from the drama, and impose affirmatively such an important obligation as registering, by a mere omission of a word, and that word only necessary for symmetry and not for sense.

No argument in favour of a necessity of registration before suing in respect of performing right can be founded on the words in 5 and 6 Vict., c. 45, Section 20, to the effect that the "provisions hereinbefore enacted in respect of registering shall apply to performing right"; those words are satisfied and have their proper scope, though such registering be optional, for—

(i.) Certified copies of the entries are provided at Stationers' Hall, on payment of 5s., and such copies are received in Courts as *primâ facie* evidence of the proprietorship of copyright or license and of performing right in music, subject to be rebutted. The registration provisions are useful and have their proper mission; moreover,

(ii.) The register supplies a convenient record of dates and means of identifying the author and proprietor, and besides may be useful as supplying a mode of assignment. They are, therefore, not surplusage *qua* music, even though registration be not compulsory. This was ably and clearly pointed out by Mr. Justice Wills in the case of Hardcastle *versus* Purcell already quoted.

(18) In Mr. MacGillivray's comment on the question (which he considers open) whether registration of a musical work is a condition precedent to suing to enforce performing right, he quotes Clark *versus* Bishop as having a bearing. That case, however, was one restraining printing and publishing only, and is not material, on the question of suing to restrain or punish piratical performance.

Ubi supra. 25 Law Times, 008.

He also adduces an observation of J. Crompton, in another case, that "if it were not for the proviso above quoted in Section 24 there would be a doubt whether registration is not obligatory before suing." With great respect and deference to the memory of that eminent judge, his remark might be paraphrased by the following truism: "If it were not that the Statute has *nowhere* said that registration is obligatory, and if there had *not* been the strongest provisos for making exemption clear, the proprietor of performing right might be held bound to register."

Lacy *versus* Rhys, 4 B and S, 873: 33 Law Journal, Queen's Bench, 157.

(19) Assignment of performing right must either be by writing or entry on the register. The 22nd Section of the 5 and 6 Vict., c. 45, provides that an assignment

of musical copyright shall not pass the performing-right, unless an entry is made on the register expressing the intention of the parties that such right should pass by the deed (*sic*). The reason of this singular enactment (which seems to have dropped from the skies into the middle of the Statute, and which is an uncalled-for interference with the rule, that without a very special necessity the legislator should not take upon himself to make men's contracts for them) was, that in one case it had been held that an assignor of copyright had parted with his performing right. Neither the case, on the one hand, nor Section 22 on the other, have had much influence on the transactions with which they purport to deal. It is unquestionable law that an assignment, with words sufficiently large and precise, will comprise the right of performance as well as that of multiplying copies.

Cutler Smith and Weatherly, p. 41.

(20) The converse of Section 22 is also an undisputed truth, viz., that an assignment of performing right will not comprise copyright. In fact, the Section is as much a truism as a section of a real property Statute, which should enact that "a conveyance of whiteacre shall not include blackacre."

Of course, the moment a work is composed the author may assign his performing right, which vests in him *seriatim* as each note, or chord, is suggested by his imagination. Licenses can be granted, limited either in time or in area, but must be in writing.

Ex pte. Hutchins, Law Reports, 4 Queen's Bench Division, 483.

(21) The law hereinbefore stated, with reference to copyright, to the effect that "a part is not a particle" applies to performing right; and, indeed, the case, herein and usually, cited to prove the axiom was decided upon Section 2 of the 3 and 4 Wm. 4, c. 15, which imposes penalties upon any person who shall *represent*, without leave, "any such production (as aforesaid) or *any part thereof*."

Chatterton *versus* Cave, 3 Appeal Cases, 483.

(For performing right, in cases subject to international law, see the following chapter on international right).

(For performing right, in cases between Great Britain and the United States, see the last chapter in this work.)

PERFORMING RIGHT.

Piece of Music	Term of protection	Area of protection	Offences	Remedies
Any musical composition of a British subject, or an alien resident in the King's dominions, whether vocal, instrumental, dramatico-lyrical, or otherwise, whether printed and published or not, which has never been performed publicly.	Arises on the piece being composed, and continues in perpetuity, or until public performance.	The British Dominions.*	Performance without license of the proprietor in the King's dominions.	Injunction and damages to be such as the Court, in its discretion, shall think right, such damages not necessarily confined to the sum of 40s. for each representation, and costs of suit, also in the discretion of the Court. (Copyright Musical Composition Act, 1888.)
Any musical composition of a British subject, or an alien resident in the King's dominions, whether vocal, instrumental, dramatico-lyrical, or otherwise, whether printed and published by the author or any other person, or not, which has been first publicly performed in the King's dominions.	The life of the author, and the further term of seven years, commencing at the time of his death: or if the term of seven years shall expire before the end of forty-two years from first performance then for such period of forty-two years.	*Ibid.*	*Ibid.*	*Ibid.*

* In addition to those rights, the owner is entitled to protection in countries, parties to a convention—a subject which is treated of hereafter.

CHAPTER VI.

(1) Extra-territorial copyright, purely a creation of Statute. International Copyright, 1844. (2) Works allowed to lapse for want of registration. (3) Fifteen and sixteen Vict., chapter 12, Section 6, as to fair imitations, and International Copyright Act, 1886. (4) Order in Council of November 28, 1887. (5) Berne Convention, when ratified. The like as to the Additional Act of Paris, 1896. (6) "Country of Origin," meaning of, in the Berne Convention and Act of Paris. Also of "Country of the Forum" as used in this treatise. (7) Rights and obligations under Article 2 of the Berne Convention, as regards an unpublished work. (8) As regards a work first published in the United Kingdom, or any other British possession. (9) Registration, whether required in the case of a work entitled to copy- or performing-right in the United Kingdom under the Berne Convention. (10) Rights of the foreigner suing here, similar to those of natives of Great Britain suing abroad. (11) Order in Council not entirely co-extensive with the Convention. (12) As to the rights of composers not natives of a country of the Union. (13) Translations of works by an author native of a country of the Union, not protected unless the original work had been first published in a country of the Union. (14) "*Traductions licites*," badly translated by "authorised." A translation may be protected as an original work would be. (15) Performing right under the Berne Convention; extended to translations of libretti. (16) Questions arising on the reservation of performing right. (17) Arrangements and other modes of reproducing musical pieces in a changed form. (18) Composer's name, when to be stated on the work. (19) Seizure of piratical works. (20) Pitts *versus* George, 1896, 2 Chancery, 866. (21) Mechanical instruments under the Berne Convention. (22) Article 14 of Berne Convention. Retrospective rights. (23) The Austrian Convention, differs in what respects from that of Berne. (24) Procedure governed by the *lex loci*. (25) "Morocco Bound" Syndicate *versus* Harris, 1895, 1 Chancery, 534. Tabular form.

INTERNATIONAL COPYRIGHT.

(1) THE subject of international rights in reference to musical compositions has only assumed importance in recent years.

Blunted as is the moral sense of the present generation by the thefts of the street pirates with the connivance of

the authorities, it would have contemplated with amazement the wholesale appropriation of French, German, and Italian musical works by unauthorised reproduction in Great Britain which was formerly complacently acquiesced in, and not regarded in any way as an offence against honesty.

Apart from Statute there is no protection given by English law to works first published or performed outside the British dominions.

The state of things which existed fifty or sixty years ago was, however, found to be unsuited to the exigencies of society, and accordingly (after an unsuccessful attempt to legislate on the matter in 1838 by a Statute of 1 and 2 Vict., chapter 59) the International Copyright Act, 1844, was passed, which is still in force, and is the basis of International Copyright Law, though it has been supplemented by later legislation.

7 and 8 Vict., ch. 12.

By virtue of this Statute and Orders in Council made under it, a number of conventions were from time to time entered into between Great Britain and certain Continental states.

7 and 8 Vict., ch. 12, sect. 19.

The Statute of 1844 contains a Section (already discussed in the preceding chapter) which provides that no author, whether British or foreign, is entitled to protection in the British dominions for musical compositions first published outside them, "otherwise than such (if any) as he may become entitled to under this Act."

The same Act empowered Her late Majesty by Order in Council to direct that as respects all or any particular class or classes of (*inter alia*) books (including sheets of music) to be defined in such order, which should after a future time, to be specified in such order be first published in any foreign country to be named in such order, the authors therof should have the privilege of copyright therein, during such period as should be defined in such order, not exceeding the term which authors of like works first published in the United Kingdom might be entitled to under the then existing or future copyright Acts.

It was also provided that it should be lawful to direct, by Order in Council, that the authors of musical compositions which should after a future time to be specified in such order, be first publicly performed in any foreign

country to be named in such order, should have the sole liberty of performing in any part of the British dominions such musical compositions during such period as should be defined in such order, not exceeding the period during which authors of musical compositions first publicly performed in the United Kingdom might for the time being be entitled by law to the sole liberty of performing the same; that the provisions of any Act for the time being in force with relation to such liberty of performance should apply to the musical compositions to which such order should extend, and which should have been registered as thereinafter provided, in the same manner as if such musical compositions had been first publicly performed in the British dominions.

It was further enacted that no author of any musical composition should be entitled to the benefit of the Act, unless, within a time to be prescribed in such Order in Council, such musical composition should have been so registered as is in the Statute mentioned.

The Statute then contains minute directions as to registration.

The Statute defines "book" as including a sheet of music.

(2) The Statute just recited, and the Orders in Council made under it, had but a very limited operation in practice for a good many years.

Thousands of musical compositions by French and German composers were allowed to fall into the public domain, for want of registration in compliance with the precise terms of the Section in that behalf. The fate of such compositions will be mentioned later on.

(3) A subsequent Act relating to international musical copyright was passed in the year 1852. This Act, however, deals only with matters of detail. The general aspect of international copyright law on the subject of music remained the same until the year 1886 when the International Copyright Act, 1886, was passed.

15 and 16 Vict., ch. 12.

40 and 50 Vict., ch. 33.

The Statute of 1852 enacts that nothing therein shall be construed so as "to prevent fair imitations or adaptations to the English stage" of any . . . . "musical composition published in any foreign country."

15 and 16 Vict., ch. 12, sect. 6.

(4) At length the most important States in Europe agreed to join in a federation, having for its object a union abolishing geographical limits as far as authors'

rights were concerned. The Statute of 1886 was passed to supplement that of 1844, and to enable Great Britain to combine with other Powers and improve the machinery, which had been found defective and unpractical under the Act of 1844.

The all-powerful intervention of Parliament was necessary to enable the Government of Great Britain to contract; and with the legislative sanction, the great international treaty known as "the Berne Convention" was entered into.

Roughly stated, and without anticipating matters of detail, the object and scope of this treaty was to give reciprocal rights to the authors of one country in the dominions of the others.

49 and 50 Vict., ch. 33. 7 and 8 Vict., ch. 12.

Under the Statute of 1886, in combination with the International Copyright Act, 1844, an Order in Council may be made as provided by the earlier of the two Acts. Such order may exclude or limit the rights conferred by the International Copyright Acts in the case of authors who are not subjects, or citizens, of the foreign countries named or described in that or any other order.

It was recited that a draft of the Berne Convention had been agreed to: It is enacted that the Act of 1886, and the previous International Copyright Acts should be construed together: There are several provisions which are practically repeated in the Berne Convention, and there are other provisions hereinafter stated which do not cover the same ground as any clause in the Convention, and also there is a third class of provisions which relate exclusively to home or colonial legislation, and do not touch international rights.

Without referring to them, or to any section which has not a direct bearing upon the branch of the subject now before us, and without travelling over ground covered by both the Statute and the Convention, we ought to state that it is enacted by Section 4 as follows (in effect).

49 and 50 Vict., ch. 33, sect. 4, placitum 1.

Where an order respecting any foreign country is made under the International Copyright Acts, the provisions of those Acts with respect to the registry and delivery of copies of works shall not apply to works produced in such country except so far as provided by the order.

Section 10, placitum 1.

It is also enacted that it shall be lawful for the Crown to make Orders in Council for the purposes of the Inter-

national Copyright Acts, and the now stating Act, for revoking or altering any Order in Council previously made, and further that any such Order in Council shall not affect prejudicially any rights acquired or accrued at the date of such order coming into operation, and shall provide for the protection of such rights. Pinoltum 2.

An Order in Council, dated November 28, 1887, recited the Berne Convention, and provided that it should have as from the commencement of the order, viz., December 6, 1887, full effect throughout the King's dominions.

(5) The Berne Convention, which is recited in the Order in Council of November 28, 1887, was ratified at Berne on September 5, 1887. The Convention was amended by the additional Act of Paris, 1896, which was sealed on September 9, 1897.

These documents extend to the countries following, with the exceptions stated below:—

Germany,	Switzerland,
Belgium,	Tunis,
Spain,	Norway.
France,	Haiti,
Great Britain,	Japan,
Italy,	Denmark and the Faroe Islands,
Luxembourg,	Sweden.
Monaco,	

Sweden and Norway have not joined in the additional Act of Paris.

(6) The subjoined definitions will facilitate the reader's task. The term "country of origin" in the Berne Convention and the additional Act of Paris, 1896, means (*a*) the country in which a work is first published, "or if any such publication takes place simultaneously in several countries of the Union, then that one of them in which the shortest term of protection is granted by law"; or (*b*) in case of unpublished works, the country to which the author belongs." Berne Convention, Article 2.

This is not only the definition of "country of origin" in the Berne Convention and Act of Paris; it is also the sense in which the term is used in this work.

Where "works" are spoken of in this treatise in connection with the Berne Convention and Act of Paris, the expression comprises dramatico-musical, or lyric compositions, as well as musical ones pure and simple.

It is convenient to notice here that "country of the

forum" is the term used in this work to denote the country where any exclusive right has to be enforced.

"Country of the Union" in the Berne Convention and additional Act of Paris, 1896, and in this work, means any State which has signed and entered into the Berne Convention.

Berne Convention, Article 2.

(7) Under the foregoing Convention and Act, as to a work which has never been published in any State, and which has not expired or otherwise fallen into the public domain, either in the country of origin, or in the country of the forum,* a British composer, or one being a native of any British possession, has exclusive copy- and performing-right, and may sue an infringer in any country of the Union.

Article 9.

The rights granted are those "which the respective laws do now, or may hereafter, grant to natives," *i.e.*, natives of the country of the forum. These words are large enough to comprise not merely the nature, but the duration also of the right; the term, however, cannot exceed that granted in the country of origin (in this case, the United Kingdom, or some other British possession), that being the country "to which the author belongs." The result of this will be that in the case of a work which has never been published, and which would be in Great Britain entitled to protection for an unlimited time, the term of protection under Article II. would be limited by that conferred by the laws of the forum; *e.g.*, if France were the forum, the term would be fifty years after the death of the composer, that being, roughly speaking, the term conferred on musical composers by French law. It would exceed the limits of this work to give all the niceties of French law as to duration and devolution of term. For these particulars the reader should consult the admirable work of Mr. Copinger, fourth edition.

See Chapter II. on Rights before Publication.

(8) As to a work which has been first published in the United Kingdom, or any other British possession, and in which copy- or performing-right has not expired either in the British Dominions or in the country of the forum, a British composer, or one being a native of any British

See Appendix,

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* As to works, which, in the country of origin have not fallen into the public domain, but have done so in the country of the forum, see later on (Appendix).

possession, has exclusive copy- and performing-right, and may sue an infringer in any country of the Union, he having first (if his claim be in respect of copyright) registered in the prescribed forms at Stationers' Hall; and if he wishes to retain performing right, having declared on the title page or commencement of his work that he forbids public performance. In this case the French term (to continue the reference to France by way of illustration) would be limited by the shorter British one of the composer's life and seven years after his death, or forty-two years from first publication in any country of the Union (see Section 3 of the Copyright Amendment Act, 1842).*

Additional Act of Paris, 1896, Art. 12.

(9) In the case of a foreigner suing in this country in respect of a work published abroad, it is necessary for him to show that the formalities prescribed by the laws of "the country of origin" have been complied with.

It is, however, not necessary for him to register at Stationers' Hall.

Hanfstaenglo *versus* American Tobacco Company, 1895, 1 Queen's Bench, 347.

(10) With the exception of his immunity from the obligation to register, the right of the foreigner suing here is similar, *mutatis mutandis*, to those hereinbefore and hereinafter stated, both as to published and unpublished works, with reference to natives of Great Britain.

(11) The Act of 1886 and the Order in Council of November 28, 1887, are not always co-extensive with the Berne Convention in reference to a given subject. Section 2, Placitum 3, of the Statute, enacts that "the International Copyright Acts, and an order made thereunder, shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the country of origin." The Order in Council contains words (Section 3) in pursuance of this enactment, and to a similar effect.

The Berne Convention does not restrict the right enjoyed in the country of the forum in this manner; it purports to confer the rights enjoyed by "natives," *i.e.*,

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* This would seem to be the result of the Statute of 1886 and the Conventions; it cannot be said, however, to be quite free from doubt from what period the forty-two years would be dated; whether from first publication anywhere, or first publication in a country of the Union. The text-books all ignore this point.

natives of the forum, without reference to the *nature* of the right enjoyed in the country of origin; only the *term* is limited to a duration not exceeding that granted in the country of origin.

This discrepancy between the Convention and the Legislative Acts which empower the nation to contract might have some importance in several combinations of circumstances. Suppose a work of French origin, reproduced in Great Britain; the French owner sues in London, purporting to act under the Convention. It would be a good defence in the English Court that the work, though not illegal here, was tainted with some political or other vice which would prevent it being a subject of protection in France. If the French owner were allowed to sue successfully in the English Court in respect of such a work so tainted, he would enjoy a greater right in the country of the forum than that "enjoyed in the country of origin" (France), where he would have no right at all. Again, in the converse case of an action brought in Paris on a work of British origin, and of a defence founded on immorality according to English views, the French Courts would enquire into British law and allow the defence if well founded in fact, though from a French point of view the work might be unobjectionable.

Additional Act of Paris, Article 2.

(12) As regards works published for the first time in a country of the Union, the position of the composer not being a native of one of those countries is now assimilated to one who is.*

Article 3, Additional Act of Paris, 1896; Act of 1886, sect. 5.

(13) The authors of Great Britain enjoy in the other countries of the Union the exclusive right of making or authorising the translation of their works first produced in a country of the Union during the entire period of their right over the original work.

This right ceases to exist if, during a period of ten years from the date of the first publication of the original work, the author shall not have availed himself of it by publishing in one of the countries of the Union a translation in the language for which protection is to be claimed.

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* In this respect the Act of Paris has altered the status of the author under the Order in Council of November 28, 1887, which provided that in the case last mentioned the publisher should be substituted for the author (see Section 4).

The words of the Section which confers the right of translation are in effect as follows: "Where a book is first produced" in a country of the Union, "the author shall, unless otherwise directed by the order, have the same right of preventing the production in, and importation into, the United Kingdom of any translation not authorised by him of the said work as he has of preventing the production and importation of the original work." Act of 1886, sect. 5.

The article on this subject in the Berne Convention is, in effect, as follows: "Authors of any of the countries of the Union shall enjoy in the other countries the exclusive right of making or authorising the translation of their works until the expiration of ten years from the publication of the original in "a country of the Union." Article 5.

In Article 5 of the Berne Convention nothing is said as to the place where the original publication of the "book" must have taken place for the exclusive right of translation to attach.

The general effect of the Section 5 and Article 5 would seem to be, *e.g.*, that Mr. Gilbert, an Englishman, publishing for the first time in Russia or America (which are not countries of the Union) one of his libretti, could not interfere in Great Britain with an unauthorised translation of that libretto, because the Statute of 1886 restricts the operation of Section 5 to a work first produced in a country of the Union.

On the other hand, Article 5 is, in another respect, narrower in its scope than Section 5, as it restricts the right of translation to works by "authors of any of the countries of the Union." Section 5 of the Act of 1886, standing alone would apply to a work by an author of any nationality.

Under the additional Act of Paris, the conventional period of translation is extended to the full term "of copyright" in the original work. The proviso in the Statute as to cesser of the right unless a translation be produced within ten years, of course, remains, and would prevail as against a member of any country of the Union suing in Great Britain.

(14) Authorised translations are treated for purposes of protection as original works. The word "authorised" is not a happy translation of the adjective "*licites*" in the original French of the Berne Convention. The word "authorised" obviously has reference to the fact of Article 6.

authority given to translate by the author: *vide* Article 5. Whereas "Traductions licites" in the original French would comprise not only "*authorised*" translations, but those made where the copyright in the original work has expired, or had not existed at all, as in the case of a Russian work.

Article 6 provides against the possibility of it being supposed that one "*traducteur licite*" could prevent another from making a translation of the same work. The second translator must not, however, borrow or imitate the translation of the first in the field.

Article 9. (15) The description before given of the mode in which Article 2 would operate with reference to copyright is applied to the *performance* of dramatico-musical or lyric works, whether unpublished or not.

As regards *musical* works, *pures et simples*, the same remark applies; but if such works are published, the author must have "expressly declared on the title page or commencement of his work that he forbids public performance."

The distinction here taken between lyric works on the one hand, and mere musical ones on the other, would seem to have some connection with the enactment excluding operas from the scope of the "Copyright Amendment Act, 1888." In both cases the operatic composer is treated with greater favour than the mere musical one.

51 & 52 Victoria, ch. 17.

During the existence (see *supra*) of the exclusive right of translation the unauthorised public *performance* of translations of lyric works is forbidden.

(16) There are great difficulties in the way of giving effect to the notice reserving the exclusive right of performance. It has been held that the passage in the "Copyright Amendment Act, 1882," making a similar reservation necessary, is not merely directory, but is a condition precedent to the existence of performing right. But supposing an issue is made of some copies without the reservation, are the persons who have only seen those copies and have never seen any containing the reservation provided with a good defence against an action for wrongful performance? Again, would it be a good reply to such a defence that they had verbal notice, or actual knowledge that there are in existence copies containing the reservation? Again, supposing a piratical print of copies which print omits the reservation, would

45 & 46 Victoria, ch. 40. Fuller *versus* Blackpool Winter Gardens, 1895, 2 Queen's Bench, 429.

a person, having seen those copies and no others, be fixed with the costs of an action for injunction to restrain performance by him? The injunction would certainly be granted; but the writer thinks the Court would struggle to relieve the innocent transgressor from any further punitive consequences. This immunity, however, if it exists, could not be successfully invoked by a person buying under suspicious circumstances, as, for instance, from a hawker selling in the street cheap copies of popular music.

(17) Protection is granted to arrangements of music of which unauthorised reproduction is forbidden, where the infringement consists in "the 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." Articlo 10.

In the application of this article, tribunals may, if there is occasion, conform themselves to the provisions of their respective laws.

Article 10 is a divergence from Article 2, as regards a member of some other country of the Union suing in great Britain. Article 10 permits impliedly the reproduction of a work with alterations so made as *to confer the character of an original work*. Article 2 gives the enjoyment of the rights which the law of the forum gives to *natives*. The law of Great Britain does not permit its natives to make such a reproduction; as we have seen, if the melody or theme be reproduced, it is an infringement, however original be the new dress in which the arranger may have clothed it. See chapter on infringements.

(18) The name of the alleged composer should be indicated on his composition, the result of which will be that in the absence of proof to the contrary, he will be permitted to sue pirates in the countries of the Union. This does away with the necessity of proof of title *prima facie*, and throws the burden of proof on the defence. Article 11.

In the case of anonymous or pseudonymous works, the publisher whose name is indicated on the work is entitled to protect the author's rights without further proof. The tribunals may, however, require the production of a certificate as to the accomplishment of the formalities required by the country of origin.

Article 12, as amended by additional Act of Paris, 1896.

(19) Pirated works may be seized on importation by the competent authorities of the countries of the Union where the original work is entitled to legal protection.

The seizure must take place conformably to the domestic law of each State.

Pitts *versus* George and Company, 1890, 3 ch., 800, 5 & 6 Vict., ch. 45, sect. 17.

(20) Under the cases decided upon the 17th Section of the Copyright Amendment Act, 1842, it is illegal to import into the British Dominions any piece of music printed and published in any country of the Union (though lawfully purchased in that country) as against the owner of the British Copyright conferred by the Berne Convention.

The case in which this question was decided was one in which Raff's well-known piano-piece, "*La Fileuse*," first published at Leipsic, had been assigned to Patey and Willis for all British copy- and performing-right. Copies of the piece had been lawfully printed at Leipsic, by Franz Ries, the original publisher, and the defendants, George and Co., had imported into the United Kingdom some of these copies. An injunction was granted by the Court of Appeal to restrain the importation into, and sale in this country of any such copies.

The Court of first instance decided that the case was governed by Section 10 of the International Copyright Act, 1844; and it must be confessed that the decision of the Court of Appeal, consisting of Lords Justices Lindley and Rigby (Lord Justice Lopes dissenting) came as a surprise to the profession. Any one (except a lawyer) reading Section 10 would suppose that the enactment therein contained making illegal the importation of copies of copyright music printed or reprinted in any foreign country, except that in which such books were first published, formed a complete code as to the importation from abroad of music subject to a British International Copyright. It is difficult to resist the impression that that enactment tacitly renders legal the importation of copies lawfully printed *in the country of origin*; but Lord Justice Lindley was probably influenced by a wish to prevent the glaring injustice of a foreign publisher assigning the copyright of music, the subject of a convention between the country of origin and Great Britain, and not taking care to stipulate in subsequent assignments or sales that the second assignee or purchaser shall not flood the English market in derogation of the first assignment; and his Lordship forced the hand of the Legislature so

See Copinger, 4th edition, p. 462.

to speak, and utilised the generality of the Copyright Amendment Act, 1842, Section 17, to control the more directly applicable language of the International Copyright Act, 1844, and prevent the hardship to the first assignee, whose purchase of the British rights might be rendered worthless.

An analogous point has arisen with reference to music entitled to British copyright works lawfully reprinted in America (which is not a country of the Union), and imported into the United Kingdom in competition with the home editions. In this case the highest authority short of the Judicial Bench advised, that the importation might be restrained under Section 17 of the Copyright Amendment Act, 1842. If this were not the law, the British copyright would be rendered worthless, as the market might be flooded with cheap editions printed in the United States.

(21) A clause of practical importance is contained in the final protocol. The clause is as follows:—

"It is understood that the manufacture and sale of instruments for the mechanical reproduction of musical airs which are Copyright, shall not be considered as constituting an infringement of musical Copyright."

This clause, no doubt, would be held to extend, to legalise, not merely the manufacture and sale of the instruments in question, but the stamping without authorisation copyright music on the barrels or perforated rolls or discs.

It by no means follows, however, that the clause legalises *unauthorised performance* in public of music, as to which the composer has taken the precaution of reserving the performing right. The language of the clause, which in terms only includes copyright, would seem carefully framed so as to refer only to *copyright in the strict sense*, and not according to the loose construction of many British documents which mix up the two rights.

It will be remembered that in the English case of Boosey *versus* Whight, a firm of publishers claimed to restrain the unauthorised use of their copyright music by its reproduction on mechanical instruments, but their action was dismissed. (1900) 1 Chancery, 122.

The decision of Mr. Justice Stirling, in Boosey *versus* Whight, and that of the Court of Appeal, were based, in

great measure, on the words of the Copyright Amendment Act, 1842, which was passed at a period when mechanical musical instruments were all but unknown. The legislator, therefore, could not, it was held, have contemplated the discs and rolls which fed them in using the phrase "sheet of music."

The French Courts have held, not inconsistently with this principle, that the reproduction on the discs or cylinders of phonographs and gramaphones, followed by publication and sale, of copyright words, is an infringement of the exclusive right of the proprietors (in this case Messrs. Enoch, the Parisian musical publishers), and an injunction, damages, and seizure of the piratical discs were decreed. The judgment dealt, in this sense, with copyright *words*, whether set to music or not, but exempted the reproduction of *music*, though copyright, on the ground of the *loi* of May 16, 1866, which declares "that the manufacture and sale of instruments used for the reproduction mechanically of copyright musical airs do not constitute piracy, as contemplated by the previous existing law of July 19, 1793, combined with the Articles 425 and following ones in the penal code."

Article 14.

(22) Article 14 is the clause upon which the most serious and difficult questions have been raised. It deals with the nature of works, *qua* date, which will fall within the scope of the Convention; Article 14 must be read in combination with Clause 4 of the final protocol and with Article 2, Clause 2, of the additional Act of Paris, 1896.

Lauri *versus* Renad, 1892, 3 Ch., 402.

It is clear, on authority, that Article 14 does not revive copy- or performing-right which has once ceased to exist from effluxion of time. It has been held that a copyright which has been allowed to lapse, from neglect to comply with the provisions for registration contained in the International Copyright Act, 1844, is revived by Article 14 of the Berne Convention and Section 6 of the International Copyright Act, 1886. The author ventures to differ respectfully from the decision for the reasons given in the Appendix.

Hanfstaengle *versus* Holloway, 1893, 2 Queen's Bench, 1.

(23) An Order in Council, of April 30, 1894, was made for the purpose of giving force to a treaty between Great Britain and Austria-Hungary. This Order came into operation on May 11, 1894.

By this Convention authors and their legal representatives, including publishers, enjoy reciprocally in the

dominions of the contracting parties the advantages which are, or may be, granted by law there for the protection of "works of literature or art" defined as comprehending dramatic musical works and musical compositions with or without words. Consequently authors of works first published in the dominion of one of the contracting parties have, in the dominions of the other, the same protection and legal remedy against infringement, as if the work had been first published in the country where the infringement may have taken place.

In the same manner the authors and their legal representatives, who are subjects of one of the contracting States, or who reside within its dominions, enjoy in the dominions of the other the same protection and the same legal remedies against infringement as though they were subjects of, or resident in, the State in which the infringement has taken place.

These advantages shall only be guaranteed when the work is protected by the laws of the State where the work was first published, and the duration of protection in the other countries shall not exceed that which is granted to authors in the country of origin.

Article 2. The right of translation forming part of the copyright protection is assured to it under these conditions. If, at the end of ten years after the expiry of the year in which a work to be protected in British dominions, on the basis of this Convention, has first appeared, no translation into English has been published, "the right of translating the work into English shall no longer, within those dominions, belong exclusively to the author."

Article 3. The Article with reference to authorised translations is similar to that contained in the Berne Convention.

With reference to the retrospective effect of this Convention the clause (Article 3) will be found, together with a comment upon its tenor, in the appendix *infra*.

Article 9. This Convention applies to all "colonies and foreign possessions" of Great Britain except

The Dominion of Canada.
The Cape.
New South Wales.

See Statutary Orders in Council of February 2, 1895 (No. 35), and May 11, 1895 (No. 247).

It will be seen that the above clauses give, in most respects, the same protection as that conferred by Article 2

of the Berne Convention, supplemented by the additional Article of Paris, 1896, but in some respects the Austrian document goes farther, as it allows the same protection in the dominions of each contracting party to those residing within the dominions of the other, as if the person claiming protection *were a subject of, or resident in*, the State where the *infringement may have taken place* (called herein "the country of the forum").

A condition is annexed which does not, in terms, occur in the Berne Convention, viz., the work must be entitled to protection in the country of origin.

Special exception is made in the case of Hungary, from the rule that only the formalities required by the law of the country or origin shall be necessary. The enjoyment of right in Hungary is to be subject to the conditions required by both Hungarian and British law.

(24) The procedure in any action arising on international rights does not generally differ from the forms of litigation, in cases where the whole subject-matter is intraterritorial. It is a maxim of international law that the *lex fori* governs procedure.

"Morocco Bound" Syndicate *versus* Harris, 1895, 1 Ch., 534.

(25) A decision somewhat connected with this axiom was made by the Court of first instance in England, to the effect that the English Court could not interfere at the instance of the English proprietor of the performing right of music by an English composer, to restrain unauthorised performance in Berlin, a town in a country of the Union. According to this decision, proceedings to restrain such infringement, though the infringer be a British subject, must be taken in the foreign Court, and according to the foreign procedure.

There would seem to be a doubt whether this decision is correct. It is submitted that where an action is purely *in personam*, not involving any question as to anything to be done to an "*immeuble*" on foreign soil, and the defendant is resident in England, an injunction may be obtained against him.

Foote, 3rd edition, p. 503.

The general rule cited, in an able treatise on private international jurisprudence is, that an English Court has jurisdiction to try actions based on torts to the person, though committed abroad, and the case just cited fell within that description. There is no jurisdiction, however, to try actions relating to title, or to torts arising in respect of foreign immovables.

This seems to be the recognised distinction, but the decision in the case of "Morocco Bound" Syndicate *versus* Harris may, perhaps, be supported on the ground that it was doubtful whether the injunction could have been enforced against absent defendants. The general rule of practice is one of convenience rather than of law, namely, that the defendant is sued in the country where he is resident.

Nature of Work	Person entitled	Nature of right in Great Britain and British Possessions	Remedies	Area of Protection	Term of Protection
(I.) Any original literary or musical composition, including a dramatic-musical work, an authorised adaptation or arrangement of a musical work, any new combination of non-copyright words with non-copyright music: any authorised combination of copyright words with non-copyright music: or of non-copyright words with copyright music, or authorised translation by an author, member of a country of the Union; such composition being protected in, and published in and with the formalities required by a country of the Union	The author, his representatives and assigns	Exclusive right of multiplication of copies, adaptation, arrangement, and performance without necessity of registration, (in the case of a literary work) the exclusive right of translation	Injunction to enforce these rights: Damages. Penalties. Seizure of imported spurious wares	Great Britain, other British Possessions (other countries of the Union)	The period accorded by the law of the State where the right has to be enforced, which law is herein called "lex fori," or such portion of that period as shall not exceed that accorded by the country of origin. In the case of the right of translation, 10 years from the date of publication of the original work; and if before the expiration of such 10 years the author shall have published, in one of the countries of the Union, a translation in the language for which protection is to be claimed, then the translation is protected for the same period as the original work.
(II.) Any such original literary or musical composition (including as aforesaid) by an author, member of a country of the Union, but unpublished	*Ibid.*	*Ibid.*	*Ibid.*, and police protection against theft: as to remedy in case of importation of copies of an unpublished MS. See Chap. iv., p. 53, par. 35.	*Ibid.*	The period accorded by the "lex fori." Note, where the forum is British, the period is that accorded by the country of origin: this is the only limit, the British right in case of unpublished works being perpetual.

(III.) Any such composition of which the author is an outsider, but which is published in and with the formalities required by any country of the Union	*Ibid.*	*Ibid.*	Injunction, damages, penalties, seizure of imported copies	*Ibid.*	As above in the case of (I.).
(IV.) Any such composition as mentioned in Class I., but where the date of publication is subsequent to the 25th day of June, 1886 (the date of the 49 and 50 Victoria, chap. 33), but is prior to any order authorising a convention with the country of origin	*Ibid.*	*Ibid.*	*Ibid.*	*Ibid.*	As above in the case of (I.).
(V.) Any such composition as mentioned in (I.), and published previously to the 25th day of June, 1886, but which is entitled to protection in the country of origin, and also in Great Britain	*Ibid.*	*Ibid.*	*Ibid.*	*Ibid.*	As above in the case of (I.).
(VI.) According to some opinions, any such composition as mentioned in (I.) and published previously to the 25th day of June, 1886, and entitled to protection in the country of origin, but which have lost their British right, owing to non-compliance with formalities under a previous convention	*Ibid.*	*Ibid.*	*Ibid.*	*Ibid.*	The writer is not aware what term of copyright is attributed to works in this class (whether a new term of 42 years; or whether the time expired since publication is to count) by those who hold that such works are included and brought in by section 6 of the Stat. of 1886.

CHAPTER VII.

SHORT SCHEME OF ARRANGEMENT OF CHAPTER VII.

AS TO ALL COLONIES EXCEPT CANADA.

Copyright.

Copyright under Act of 1842.
Routledge *versus* Low.
Statute of 1886. Sections 8 and 9.
Berne Convention, accession for the colonies.

Importation of Foreign Reprints.

The question of foreign reprints; importation, where unauthorised by Statute, is piracy. Section 17 of the Statute of 1842 practically ignored. Foreign Reprints Act. The Customs Consolidation Acts, 1876 and 1889: how the duties are levied, and, if levied, to whom paid over.

A short statement of the various statutes made under the foreign reprints by different colonies, for regulating the payment of duties to be collected as the price of suspending the prohibition to import.

AS TO CANADA.

Copyright.

Canadian Statute of 1875.
The Imperial Statute of same date.
Smiles *versus* Belford.
The Imperial Book Company *versus* Adam and Charles Black.

Importation of Foreign Reprints.

Foreign Reprints Act adopted by Canada.
Question of importation *quâ* Canada.
Announcement of cesser to levy the 12½ per cent. duty.
Tariff of 1894.
The Imperial Book Company *versus* Black, from the point of view of importation.

CONTENTS OF CHAPTER VII. IN DETAIL.

Colonial Copyright.

(1) Colonial copy and performing right. State of the law under the Copyright Amendment Act, 1842.

(2) Change in the law by the Statute of 1886; definition of "British possessions"; registration not necessary, when.

(3) Power to adapt imperial Statutes to the existing law of any colony.

(4) Bearing of the Berne and future Conventions on Colonial copyright. Article 19 of Berne Convention. *Note*, meaning of the term "country of origin" as between the mother country and the colonies.

(5) The question of importation of foreign reprints generally. Colonial Importation.
(6) Abuses. Section 17 of the Statute of 1842 ignored in practice.
(7) Foreign Reprints Act.
(8) Question whether the Colonial Statutes comprise music.
(9) Stamping copyright works on importation not always required.
(10) How the duties are levied. (Customs Consolidation Acts, 1876 and 1880).
(11) How the duties are dealt with, if and when levied.
(12) The result discreditable to the colonial public and the supine British Government.
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(15) A table of the less important Colonial Statutes, having for their main object to fulfil the requirements of the Foreign Reprints Act.
(16) Copyright in Canada. Canadian Copyright.
(17) Canadian Statute of 1875.
(18) The Imperial Statute of 1875 giving force to the latter.
(19) Smiles *versus* Belford.
(20) That case discussed in the Imperial Book Company *versus* Black and another, from the point of view of the right generally.
(21) Foreign Reprints Act adopted by Canada.
(22) Question of prohibition on importation *qua* Canada. Canadian Importation.
(23) Tariff of 1894.
(24) The Imperial Book Company *versus* Black from the point of view of importation.

COLONIAL COPY- AND PERFORMING RIGHT.

(1) SINCE the passing of the Statute of 1842, and previously to the International Copyright Act, 1886, music first published or performed in the United Kingdom, or simultaneously published or performed there and in any British possession, was protected (as it still is) over an area which includes all the British dominions. Routledge *versus* Low, 3 English and Irish Appeals, 100.

Prior publication or performance in any British possession other than the United Kingdom gave no right of protection in the United Kingdom, or in any British possession, except possibly in the State of origin under some local law.

(2) The International Copyright Act, 1886, contains a Section enacting in effect that the Copyright Acts apply to a musical work "first published or performed in a British possession other than the United Kingdom, in like manner as they apply to a work first published or performed in the United Kingdom." 49 & 50 Vict., ch. 33, sects. 8, 9.

Certain provisions follow as to registration and technical points of legislation, which are mentioned later.

Section 11. "British possession" in this Statute includes any part of His Majesty's dominions exclusive of the United Kingdom.

Where parts of such dominions are under both a central and a local Legislature, all parts under one central Legislature are deemed one British possession.

The effect of this legislation is that a piece of music first published or performed in any part of His Majesty's dominions, or simultaneously there and in any other country, will be entitled to protection throughout the whole area of such dominions.

Section 8. If the law of the British possession, being the country of origin, provides for registration, no other registration is necessary, nor is the statutory delivery of copies required in any case. It follows as a deduction that if there is no registration in the country of origin, registration at Stationers' Hall is required, in the manner hereinbefore stated with reference to home compositions.

(3) Power is given to His Majesty by Order in Council to modify the home Statutes relating to copyright and performing right with reference to musical compositions first published or performed in any British possession where an existing local Act or ordinance exists. The right of a British possession to pass domestic Statutes is not interfered with.

Section 9. (4) The International Copyright Act, 1886, enacts that an Order in Council may, by declaration, exclude the application of imperial legislative enactments under the International Copyright Acts and orders to any British possession, except so far as is necessary for preventing prejudice to previously acquired rights; but save, as provided by such declaration, the International Copyright Acts shall apply to every British possession, as if it were part of the United Kingdom.

Those parts of the Statute of 1886 which do not relate specially to British possessions (other than the United Kingdom) have been already stated, so far as necessary, and the reader is referred to Chapter VI. for them, also to the discussion of the Berne Convention in the same chapter.

Order of November 28, 1887. The order which sets forth the Berne Convention in effect confers upon the composers of music first published or performed in a country of the Copyright Union the same right of copyright (*sic*), and for the same period, as

if the work had been first produced in the United Kingdom, and this right is to have effect throughout all British possessions.

Article 19 of the Berne Convention confers the right for their colonies or foreign possessions to accede thereto at any time upon all countries of the Union.

They may do this either by a general declaration comprehending all their colonies or possessions within the accession, or by specially naming those comprised therein, or by simply indicating those which are excluded.

In the *procés* verbal of signature the British plenipotentiaries stated that the accession of Great Britain comprised all the colonies and foreign possessions of the Crown.

At the same time they reserved the power of announcing the denunciation of the Convention at any time by one or several of the following colonies or possessions, viz., India, Canada, Newfoundland, the Cape, Natal, New South Wales, Victoria, Queensland, Tasmania, South Australia, Western Australia and New Zealand.

(5) These facts raise a question never before raised, until it was suggested in the work so often before quoted on musical and dramatic copyright, viz., what is "the country of origin" of a work first published in, *e.g.*, Melbourne, and which it is desired to protect in Paris? In popular parlance Victoria would be the country of origin, but it may be argued that as she comes in passively under the wing of the mother country, the latter fills that character.

Outler, Smith and Weatherly, p. 103.

See Copinger, 4th edition, p. 505.

The Berne Convention (Article 2) subjects the enjoyment of copy- and performing-right "to the accomplishment of the conditions and formalities prescribed by law *in the country of origin*."

In order to sue in France, must the author observe the formalities required by British or Victorian law?

In the case of works having their origin in the United Kingdom, the name and place of abode *of the proprietor* is required to be entered on the register before suing; the place of abode *of the publisher* is not required. Suppose the latter item to be necessary in Victoria and to be omitted by accident. If the law be that the Victorian forms must be followed, that is, that Victoria, and not the United Kingdom, is the country of origin, the action would fail in France, as the Victorian formalities had not been complied with.

It will be seen that Section 8 of the International Copyright Act, 1886, has no application to a case of *international procedure*, but only to cases arising between a colony and the mother country. If the latter be held to be "the country of origin" (which would be rather a far-fetched conclusion in the case of a work first published so far off as Australia), the registration would have to be according to forms at Stationers' Hall, whether the colony in question had the same forms, different forms, or no registry at all.

Cutler, Smith and Weatherly, musical and dramatic copyright, 104.

Another question arises on the point of "origin." Supposing any British possession to have passed a law conferring on domestic authors copyright for a longer period than that which prevails in the mother country, say fifty years from death. The right of the colonial author in a country of the Union is limited by Article 2 of the Berne Convention to a period not exceeding that granted by the law of the country of origin. If Great Britain is the country of origin the term of copy- and performing-right in France is cut down to forty-two years or seven years after the author's death; if the colony fills that character, the term will be that of France (and also of the colony), viz., fifty years from the author's death.

See Copinger, 4th edition, p. 505.

(6) The subject of piratical importation into the Colonies of works enjoying copy- and performing-right in the United Kingdom has been a fertile source of heart-burning between British authors and the colonial public, and the Legislature has made so many—in many cases half-hearted—efforts to control abuses in this connection that the matter deserves separate treatment, even in a work of such modest dimensions as the present.

In collecting materials the writer has been largely aided by a work published for the Copyright Association, and containing the Colonial Statutes bearing on the subject of importation; and he has received valuable assistance from the terse and admirable preface of the late Mr. Frederick Daldy, who had consecrated a large part of an active and intellectual life to the study of colonial—especially of Canadian—legislation in the matter of copyright, and had made himself one of the first authorities on the subject.

In colonies with reference to which no Statute authorising importation has been passed, and with refer-

ence to which no Order in Council has been made, the introduction without leave of the proprietor, of books protected by British Copyright Statutes is defensible by no principle of law, equity or justice. In the case of many colonies, however, the Imperial Legislature has interposed, and attempted to regulate the difficult questions arising between British authors and the colonial public, as to copyright in works published in the United Kingdom.

The reader will remember that by Section 17 of the Act of 1842 (in effect), importation was forbidden into any part of the British dominions for sale or hire of any printed copyright book first composed or written, or printed and published, in the United Kingdom, and reprinted out of the British dominions; and if any person, not being the proprietor or authorised, should import for sale or hire, or should knowingly sell, publish or expose for sale or let to hire, or have in his possession for sale or hire, any such book, the same might be forfeited, seized and destroyed by an officer of Customs, and a penalty is imposed.

The prohibition in this Section, and the enactment against importation contained in the Customs Consolidation Act, 1876, hereinafter stated, were practically ignored in the colonies; and foreign reprints of British books were poured wholesale into the British possessions to the great injury of the authors, who were made to supply gratuitously the colonial public with literature to such an extent that even the supineness of the British Government where authors are concerned was somewhat shaken, and plans were devised for remedying the evil. A paradoxical one which has met with no greater success than it deserved was put into execution by the Statute stated in the next paragraph.

(7) This Statute is entitled: "An Act to amend the law relating to the protection in the Colonies of works entitled to copyright in the United Kingdom." This Act empowered the Crown to pass Orders in Council declaring (in effect) that the prohibitions contained in any Imperial Acts against the importing, selling, letting out to hire, exposing for sale or hire, or possessing foreign reprints of books composed, written, printed, or published in the United Kingdom and entitled to copyright therein, should be suspended as regards any given colony. This

10 & 11 Vict., ch. 95.

suspension was subject to a proviso that the colony in question should pass a local law making due provision for protection of the rights of British authors within its limits, and should transmit the same in the proper manner to the Secretary of State. The Statutes are in many cases framed on the models of the home copyright Acts, *but* are *nevertheless* often rightly conceived in principle; and if properly administered would fairly protect the copyright owners' rights, but the laxity with which the law has been enforced, or rather neglected to be enforced, has left matters much worse than they were before legislation.

The general scheme of document which, with differences of form and detail, has been passed in the several colonies, comprised in substance these items, viz., a recital of the Statute of the 10th and 11th Vict., c. 95, and the Order in Council applying to the case, and enactments: (1) That "it shall be lawful to import into the colony all books being reprints of works first composed or written, or printed or published in the United Kingdom"; (2) that there shall be paid an *ad valorem* duty therein specified in favour of the copyright owner on every such importation; (3) that it shall not be lawful to import any reprint "hereby made liable to duty, *contrary to the true intent and meaning hereof*, or knowingly to sell, publish, or expose for sale, or let to hire or have in his or her possession for use, sale or hire any such reprint as aforesaid."

A further allusion to the Statute in each case will be found later on, and this, it is hoped, will prove sufficient for practical purposes. It would have been impossible to set out the whole of each Statute *verbatim* from want of space; and there are many clauses which would be useless to the student of musical copyright law.

(8) In a few cases only are musical compositions brought *in terms* within the purview of the local act; in the majority of instances, the term "books" is used without any definition extending the sense to "sheets of music" as is done in the Imperial Copyright Amendment Act, 1842; but the general policy and course of Imperial legislation, and the references in the Colonial Acts to the Act of 1842, make it sufficiently clear in most cases that musical compositions would be construed to be included as "books."

The exceptional cases in which music is referred to in terms are those of Newfoundland, Canada, Trinidad and Victoria.

In the Statute applying to Saint Vincent some embarrassment is caused by the language of the interpretation clause. "Book" is to mean "volume, sheet of letter press and dramatic piece"; "dramatic piece" includes "tragedy, comedy," &c., or "other *musical* or dramatic *entertainment*." The definition of book in its enumeration of items omits "sheet of music" (as if on purpose), and "dramatic piece" nowhere occurs in the Act except in the interpretation clause. A *musical entertainment* has been judicially held not to include an isolated piece of music. The special mention of "dramatic piece," and the careful omission of any reference to "a sheet of music," does look at first sight as if the latter subject-matter had been forgotten by the Legislature, or purposely excluded; but the writer doubts whether this difficulty would not be got over, and whether music would not be treated as constructively brought within the scope of the Act.

(9) In the case of seventeen colonies the local Statutes require all copies legally imported into the colony to be stamped, in order that all unstamped copies may bear negative evidence of being contraband. This to some extent operates as a check on smuggling. In the Bahamas, Mauritius and Canada the Statutes contain no enactment making stamping compulsory, and the absence of this precaution has facilitated the unrestrained lawlessness which in the Dominion robs the British author of his just dues.

In all cases in which the Colonial Governments have by imposing duties complied with the conditions required to be fulfilled before the prohibition on importation is to be suspended, those duties are not to be levied or collected until the copyright to be protected is duly entered at the London Custom House.

(10) Under the Customs Consolidation Acts of 1876 and 1889:

(i.) Copyright books first composed or written or printed *in the United Kingdom*, and printed and reprinted in any other country, as to which the proprietor or his agent "shall have given to the Commissioners of Customs a notice" in writing, duly

39 & 40 Vict., ch. 36, sect. 42.

declared, that such copyright exists, and stating when it will expire.

Act of 1880, part 1, sect. 1.

(ii.) *Books*, first published *in any State other than the United Kingdom*, copyrighted in the United Kingdom under the International Copyright Act, 1886, or Orders in Council thereunder, printed or reprinted in any State other than that in which they were first published, and as to which the owner or his agent shall have given such notice, with a declaration subscribed before a collector of Customs or a Justice of the Peace that the notice is true;

are prohibited to be imported into the United Kingdom.

Act of 1876, sect. 152.

(iii.) Any copyright books first composed, printed or written in the United Kingdom, and printed or reprinted in any other country, as to which the owner or his agent shall have given such notice,

are prohibited to be imported into the British possessions *abroad*; if imported, all books falling within classes (i.), (ii.), and (iii.), shall be forfeited, and books falling within classes (i.) and (ii.) may be destroyed, or otherwise disposed of as the Commissioners may direct.

By Section 151 "The Customs Acts" including that now being stated, are not to extend to any such possession as shall by local Act or ordinance have provided, or may thereafter with the owners' sanction make entire provision for the management and regulation of the Customs of such possession.

Lists of copyright books as to which the notices shall have been given are to be publicly exposed at the Custom Houses in the several ports in Great Britain and in the Colonies.

Sect. 45.

The Act of 1876 contains machinery for dealing with the complaint of any person who may be damnified by a wrong insertion in a list. The Colonial Customs Officer has under this *régime* to search a long and fragmentary register made up of notices sent from London from time to time which are unclassified, and not even alphabetically arranged. There is no machinery for giving the copyright owner notice as to duties which may have been levied for his benefit, and he is at the mercy of others whose zeal and conscientiousness may or may not outweigh their natural supineness, and who may or may not

spasmodically make an effort to do their duty by a person —the British author—whom patriotism teaches them to regard with a certain hostility.

(11) Moreover, under fourteen Colonial Statutes the duties have to be remitted to Her Majesty's Customs in London. In two cases they are to be dealt with as the Crown may direct, and the writer believes that no directions respecting them have been given.

In one case nine-tenths of the duties are to be held for the owner till claimed; and the owner presumably does not know when and what duties are held for him.

Under fourteen Statutes registration at Stationers' Hall in London is a condition precedent to collection of any duties, a wholly useless and expensive formality.

(12) Under these circumstances, forming a typical instance of the manner "how not to do it," and a striking example of the *modus operandi* of the circumlocution office, the luckless British author has to put up with loss of his just remuneration for the works which form the staple of literary recreation for the colonials, whose Statutes are referred to hereafter. In practice, when any duties are levied, a lump sum is remitted to a publisher, who has to dissect and apportion it as he can.

The above details are given on the authority of the late Mr. Daldy, and of other experienced publishers, whose knowledge of the facts is practical and melancholy.

(13) A suggestion has been made by Mr. Daldy which is entitled to all the respect attaching to anything coming from him, to the effect that matters might be less unsatisfactory if the London Custom House were to transmit to each colony an alphabetical register, made up to the end of any given year, with annual supplements for the use of Colonial Custom House officers. Every five years this register should be rearranged and reprinted up to date. This suggestion, which was published by the maker in 1889, has not ever been adopted. At all events, in the whole of the year 1903 one of the largest London publishers states that he only received colonial duties to the amount of a few shillings; and unstamped copies continue to be imported without any duties being levied, much less paid over to the owners.

The list to be transmitted, as suggested by Mr. Daldy, would hardly be a practical remedy, unless publishers habitually registered their copyright at Stationers' Hall.

See Mr. Daldy's preface to the Collection of Statutes printed for the Copyright Association in 1889.

That, at least, is the opinion of some very experienced London publishers.

(14) The following is a synopsis of the Colonial Statutes purporting to provide for the payment of duties to British authors, and so to satisfy the conditions required by the British legislation to be fulfilled as the price for the permission to import into the British possessions.

In some important instances a short analysis of the Statute is given; in others, merely the title, general object and the dates.

The writer hopes to be excused for inserting a *résumé* of the Indian and Victorian Copyright Statutes, on account of their great importance and of the questions arising on the former with reference to music; moreover, the Indian Statute is difficult to procure. He admits that they do not fall strictly within the scope of this paragraph, which is more particularly intended to deal with the importation question.

Cited from the Collection of Statutes published for the Copyright Association in 1889.

Copyright in India is still governed mainly by an Act passed by the Right Honourable the Governor-General, on December 18, 1847. No mention is made of music, the subject-matter of copyright is simply described as a "book," undefined by any interpretation clause. It appears to be the opinion of Mr. Copinger, in his treatise (which is unequalled for research and pains in collecting data), that music is unprotected in British India, and no doubt there is much to be said in favour of this view from the legal side of the question, especially as the Statute, with some apparent intention, omits every section of the Statute of 1842 dealing with music and regulating the rights and obligations of musical composers. The present writer, however, inclines to the opinion that the reference to the Imperial Act of 1842 (see *infra*) in a recital is sufficient to connect the Indian Act with the course of Imperial copyright legislation, and that the intention of the framers was to assimilate the subject-matter to that of the home copyright Statutes. It cannot, however, be said that there is anything pointing to an intention to confer exclusive *performing right* over music.

Fourth edition, p. 533.

The Statute recites that it is doubtful (1) whether the right called "Copyright" can be enforced by the common law of England in territories subject to the East India Company into which the law has been introduced; and

(2) whether Copyright can be enforced by virtue of equity in other parts of those territories; (3) that it is desirable that Copyright should be enforceable in those territories universally; and (4) that it is doubtful whether the Copyright Amendment Act of 1842 has made provision for the enforcement of the said right in every part of the said territories subject to the Government of the East India Company.

Section 1. The Copyright in every book published in the author's lifetime shall endure for a term therein mentioned being similar to that provided by the Imperial Act of 1842; and in every book published after the author's death for the term of forty-two years from first publication. In the first case the right is to be the author's property; in the second case that of the proprietor of the MS., from which such book is first published.

Sections 3, 4, 5, and 6 deal with the registration machinery, in a mode similar, *mutatis mutandis*, to the analogous Sections in the Act of 1842; and Section 14 follows the useless British procedure making registration previously to suing a condition precedent.

Section 5, moreover, perpetuates the discrepancy between the body of the Statute and the scheduled form, the one requiring the abode of the publisher to be entered; the other the place of publication.

Section 7 makes it a punishable offence to "print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting Copyright" without consent; or to have in possession, for sale or hire, any "such book so unlawfully printed" without consent; and the Section defines the nature of liability to an action for damages according to the precise jurisdiction of the territory where the Act was committed.

Section 8 relates to procedure, and is similar to Section 26 of the Statute of 1842.

Under Section 12 piratical copies are to be the property of the Copyright owner, see Section 23 of the Statute of 1842.

Section 16 limits the time for suing to twelve months next after the offence is committed.

In the collection of Statutes published in 1889 from which the above are copied, there is a note appended by Mr. Daldy expressing his belief that the above Act will

soon be repealed, and a consolidation Act passed, a prophecy which, however, has not been fulfilled. In an Indian Act dated in 1867 (which does define "book" as including music), and which regulates the press, it is enacted, in Section 3, that the printer's name and place of printing, and, if the book be published, the publisher's name and residence, are to be printed on each copy; and in Section 9, that three printed or lithographed copies of every book, printed or lithographed in British India, shall be delivered by the printer within one calendar month after the day in which any book shall be delivered out of the press, notwithstanding any agreement between the printer and publisher, at such place and to such officer as the local government shall from time to time direct; and by Section 18, which deals with registration entries, assignments of copyright by entry on the register, are made free of duty by the Indian Stamp Act of 1879, Schedule II. No. 5.

See the Statute more fully set out in Copinger, 4th edition, p. 529.

Injunctions to restrain infringement of Copyright depend upon the civil procedure code of 1882. Law number 14, of 1882.

Copyright in Victoria is governed by a Statute of that colony, entitled "The Copyright Act, 1869," and which came into operation December 1, 1869.

The word "book" in this Statute includes "sheet of music." This Statute, which is very lengthy and verbose, substantially resembles the Imperial one of 1842 in the following particulars.

(i.) The definition of Copyright.

(ii.) The term of Copyright (*verbatim*).

(iii.) (Section 19.) The regulations as to keeping a book of registry (nearly *verbatim*). The Section perpetuates the discrepancy between the Section 13, of the Act of 1842, and the scheduled form. Section 13 requires the "*place of abode* of the publisher" to be entered; the schedule requires "place of publication."

(iv.) (Section 20.) The entries to be made in such registry (nearly *verbatim*).

(v.) (Section 21.) The remedy for piracy: the offences mentioned in Section 15 of the Act of 1842, printing, &c., in any part of the British dominions, are by the Colonial Act punishable where committed in the Colony of Victoria, and entail a penalty of £10 for each offence besides liability to damages.

(vi.) (Section 22.) This is with a trifling addition a copy of Section 16 of the Act of 1842, and deals with a question of practice in the action for damages.

(vii.) (Section 23.) This is a copy of Section 17 of the Act of 1842, with the substitution of "the Colony of Victoria" for the United Kingdom. It deals with the offences of piratical importation, and consequential sale, publication, and exposure for sale or hire of piratically imported wares.

(Section 26.) No assignment of musical copyright is to carry performing right without an entry in the registry. See Section 22 of the Act of 1842.

(Section 27.) This is a copy of Section 23 of the Act of 1842, and enacts that pirated books shall become the property of the owner.

(Section 28.) This is in the same terms as Section 24 of the Act of 1842, and makes registration a condition precedent to suing or taking any proceeding.

(Section 29.) This confers sole liberty of performance in Victoria upon the author of a musical production, whether printed and published or not, for the term provided for copyright in books. The provisions in the Act in respect of copyright, where not inconsistent with Sections 29 and 30, are to apply to performing right, save that the first public performance is to be equivalent to the first publication.

It is only to be necessary to register the title of the piece, the name and place of abode of the publisher, the composer and of the owner, and the time and place of first publication.

(Section 30.) This enacts penalties for the infringement of performing right.

(Section 46.) This deals with the offence of making false entries in a register book, and adds as punishment imprisonment in addition to a section similar to the punitive clause in Section 12 of the Act of 1842.

(Section 47.) Assignments and licences are to be in writing.

(Section 48.) Limitation of actions to twelve calendar months next after the offence.

(Section 50.) This relates to the amendment of the register.

(15) In the following cases only the dates or reference numbers of the Statutes are given, with the dates of

the Orders in Council made under the Foreign Reprints Act, and in effect reciting that the required conditions have been fulfilled by the Colonial Statute.

BARBADOS.

"An Act to authorise the importation into this island of books, being foreign reprints of books first composed or written, or printed or published, in the United Kingdom, and in which there shall be copyright." No. 936.

Prohibition against importation suspended by Order in Council of December 16, 1848.

Date of *London Gazette*, December 29, 1848.

BERMUDA.

"An Act to regulate the importation of books, and to protect the British author." No. 699.

Prohibition against importation suspended by Order in Council of February 13, 1849.

Date of *London Gazette*, March 2, 1849.

BAHAMAS.

"An Act for protecting in the Bahamas the rights of British authors." No. 1,208.

Prohibition against importation suspended by the Crown by Order in Council of May 21, 1849 (see *London Gazette*, June 5, 1849).

Date of *London Gazette*, June 5, 1849.

NEWFOUNDLAND.

"An Act to regulate the importation of books into this Colony and to protect the British author." No. 74.

Prohibition against importation suspended by Order in Council, dated July 30th, 1849.

Date of *London Gazette*, August 7, 1849.

SAINT CHRISTOPHER.

"An Act to authorise the importation into this Island of books, being foreign reprints of books first composed or written, or printed or published, in the United Kingdom, and in which there shall be a copyright."

Prohibition against importation suspended by Order in Council, dated November 6, 1849.

Date of *London Gazette*, November 20, 1849.

Antigua.

"An Act to authorise the importation into this Island of foreign reprints of books entitled to copyright in the United Kingdom." No. 601.

Prohibition against importation suspended by Order in Council of June 19, 1850.

Date of *London Gazette*, June 25, 1850.

St. Lucia.

"An ordinance authorising the importation of books, being foreign reprints of books first composed or written, or printed or published, in the United Kingdom, and in which there shall be copyright." No. 8.

Prohibition against importation suspended by Order in Council, dated November 13, 1850.

Date of *London Gazette*, November 19, 1850.

British Guiana.

"An ordinance to authorise the importation into the Colony of British Guiana of books, being foreign reprints of books first composed or written, or printed or published, in the United Kingdom of Great Britain and Ireland, in which there shall be copyright." No. 14, of 1851 (June 20, 1851).

Prohibition against importation suspended by the Crown, by Order in Council, October 23, 1851.

Date of *London Gazette*, November 4, 1851.

St. Vincent.

"An Act to authorise the importation into the Government of the Island of St. Vincent and its dependencies, of books, being foreign reprints of books first composed or written, or printed or reprinted, or published, in the United Kingdom of Great Britain and Ireland, and in which there may be any copyright." No. 602.

Prohibition against importation suspended by Order in Council, dated August 18, 1852.

Date of *London Gazette*, August 27, 1852.

Mauritius and Dependencies.

"An ordinance for securing in this colony the rights on works entitled to copyright in the United Kingdom." No. 24 of 1851.

Prohibition against importation suspended by Order in Council, April 1, 1853.
Date of *London Gazette*, April 15, 1853.

GRENADA.

"An Act to authorise the importation into Grenada of books, being foreign reprints of books first composed or written, or printed or published, in the United Kingdom of Great Britain and Ireland, and in which there shall be copyright." No. 477.
Prohibition against importation suspended by Order in Council, dated December 29, 1853.
Date in *London Gazette*, January 13, 1854.

CAPE OF GOOD HOPE.

"An Act for authorising the importation into the Colony of the Cape of Good Hope of books, being foreign reprints of books first composed or written, or printed or published, in the United Kingdom, and in which there shall be copyright." No. 4 of 1854.
Prohibition against importation suspended by Order in Council, dated March 10, 1855.
Date in *London Gazette*, March 16, 1855.

NEVIS.

"An Act to authorise the importation into the Island of Nevis of foreign reprints of British books wherein there shall be copyright." No. 237.
Prohibition against importation suspended by Order in Council, dated March 10, 1855.
Date of *London Gazette*, March 16, 1855.

NATAL.

"An ordinance authorising importation into the Colony of Natal of books, being foreign reprints of books first composed or written, and printed or published, in the United Kingdom, and in which there shall be copyright." No. 14 of 1856.
Prohibition against importation suspended by Order in Council, dated May 16, 1857.
Date of *London Gazette*, May 22, 1857.

JAMAICA.

"An Act to secure and protect in this island the rights of British authors, and for carrying into effect the pro-

visions of the Act of the Imperial Parliament, passed in the Session of Parliament holden in the tenth and eleventh years of the reign of Her present Majesty." Chapter 95. No. 3,924.

Prohibition against importation suspended by Order in Council, dated May 29, 1858.

Date in *London Gazette*, January 13, 1858.

Trinidad.

"An Act to authorise the importation of certain foreign reprints." No. 14, of October 1, 1874.

Prohibition against importation suspended by Order in Council, dated March 17, 1875.

Canada.

(16) The questions raised during the last fifty years in the matter of copyright between the mother country and Canada have been so much more numerous and intricate than in the case of the other British possessions, that a separate class of paragraphs has been devoted to the subject. Of course the first five paragraphs of this chapter, stating generally the law as to colonial copyright, apply to Canada and are not repeated here, as the reader may easily refer to them. The principle of Routledge *versus* Low regulates the area of protection as to all British possessions. The Statute of 1886, Section 8, cures the want of reciprocity between the United Kingdom and Canada, in the same manner as that Section removed all ground of complaint in the case of other British possessions. The foreign reprint question has been more acute with Canada than in other cases, and the bitterness increased to such an extent that the Dominion Government found itself in a manner driven to make some concession, and a local Statute was passed in 1875, which is abridged in the following paragraph. An Act of Canada, "the Copyright Act," was passed subsequently which substantially re-enacts that of 1875. A few differences of detail have been embodied here.

3 English and Irish Appeals, p. 100.

38 Vict., ch. 88

(17) By the Canadian Statute of 1875 before alluded to, and which comprises in terms musical compositions, a remedy is given in damages against any person who prints or publishes any MS. whatever not before printed in Canada or elsewhere, *without consent of the author or legal proprietor*.

Sect. 3.

It would seem that the words in italics, being un-

restricted in their scope, would include authors of any State and are not to be confined to Canadian authors.

Sect. 4. As to any musical compositions and translations printed and published, or reprinted and republished in Canada, whether so published for the first time, or contemporaneously with, or subsequently to, "publication or production" elsewhere, the sole right of printing, reprinting, publishing, reproducing or vending for twenty-eight years from the time of recording the work is conferred in respect of:

Musical compositions and translations of which the author is domiciled in a British possession, or is a citizen of any country having a copyright treaty with the United Kingdom.

Provided that:—

(i.) The work has been printed and published, or reprinted or republished in Canada, whether it has been so published for the first time, or contemporaneously with, or subsequently to, publication elsewhere.

(ii.) Exclusive privilege shall not have expired anywhere else.

See "The Copyright Act" (Canada), 38 Vict., ch. 88, sect. 31.

(iii.) That two copies have been deposited in the Department of Agriculture.

(iv.) That the words, "Entered according to Act of Parliament of Canada in the year—by A. B. —at the Department of Agriculture," be inserted in the several copies of every edition published during the term secured on the title page or the page following.

The Minister of Agriculture is to cause the copyright to be recorded.

Sect. 5. If at the expiration of the term of twenty-eight years the author, or any of the authors if more than one, be living, or, being dead, has (*sic*) left a widow or a child or children living, the copyright may be renewed in favour of the author, or his widow, or his child and children, as the case may be, for fourteen years, as in the Act is mentioned.

Interim copyright may be obtained from date
Sect. 10. of original publication elsewhere, by causing certain forms to be observed.

"Printing, publishing, reprinting or republish-
Sects. 11 and 13. ing, or importing" any copy or translation during

the term of interim registration; and, printing or reprinting or importing for sale after the recording, without the consent of the proprietor, entail forfeiture of copies and certain penalties.

Sect. 15. Works entitled to protection in the United Kingdom, but not specially copyrighted under the Canadian law shall be entitled to copyright in Canada upon being printed and published there, but nothing in the Act is to prevent importation from the United Kingdom of such works legally printed there.

Imported copies previously to such a work becoming entitled to protection in Canada may be sold or otherwise disposed of.

It is not easy to see the intended scope of this Section, unless it is meant to take in works excluded from Section 4 by reason of the author not falling within the description of "any person domiciled in Canada, or in any part of the British possessions, or being a citizen of any country having an international treaty with the United Kingdom"; and if it be so meant, then there would seem to be no limit on the score of the nationality of the author at all.

Sect. 7. Section 15 does not do away with the necessity for recording copyright; for without that formality "no person is to be entitled to the benefit of the Act."

Sect. 23. In a clause, which might, *mutatis mutandis*, have been well introduced into some British Statutes, the Act provides that any fraudulent assumption of authority to register a work shall be punishable by fine and imprisonment.

The Statute appears to ignore performing right in a musical composition altogether, resembling in this respect the law of the United States at that time.

The burdensome provision in this Statute that works were to be printed and published in Canada prevents the Act being largely utilised.

(18) "The Canada Copyright Act, 1875" (Imperial), was passed in order to empower the Crown to give the assent (which was afterwards duly given) to the last recited colonial Statute. It was further enacted that

where any British copyright book becomes entitled to copyright in Canada in pursuance of the last recited Act, unauthorised importation into the United Kingdom of any copies of such book reprinted and republished in Canada is prohibited, and the 17th Section of the Copyright Amendment Act, 1842, is to apply to such books as if they had been reprinted out of the British Dominions.

(19) A question was raised in Canada by the local publishers whether the Act of 1875 was not inconsistent with the Copyright Amendment Act, 1842.

The later Act in that case, said they, must be paramount, and be taken to have repealed the earlier one where the two did not harmonise. It would be useless to follow in detail the hopeless arguments by which they sought to establish this conclusion that a colonial Act could over-rule an Imperial one.

Suffice it to say that they contended that as the local Act required printing and publication in Canada, works which had not complied with that condition were unprotected in the Colony, although they purported to have copyright there under the Act of 1842.

Smiles *versus* Belford, 1 Tupp, App. 436.

A work called "Thrift," first published and copyrighted in Great Britain, was piratically published in Canada by a house of publishers named Belford and Co. The English proprietor had not availed himself of the Statute of 1875 by reprinting and republishing in the Colony. The British copyright owner sued the Belfords in Canada to protect his copyright under the Act of 1842.

The Canadian Vice-Chancellor and Canadian Court of Appeal decided in favour of the plaintiff. They held that the author of a book entitled to copyright under the Act of 1842 may sue to restrain a reprint of it in Canada, but in order to restrain *importation* into Canada of foreign reprints made without his consent, he must print and publish, or reprint and republish, in Canada.

They also negatived the alleged right of the Dominion to legislate as against the Imperial Statute book, and held that the Dominion could only regulate domestic questions by their home legislation.

They also held that there was no inconsistency between the Acts of 1842 and 1875, a point, however, unnecessary for disposal of the case, for as the book, the subject of the action, was not reprinted or republished in Canada,

it would have been impossible for the plaintiff to have founded his case on the local Statute of 1875, and it was necessary for him to rely on the Statute of 1842 (Imperial).

(20) The case of the Imperial Book Company *versus* Adam and Charles Black and another was discussed by the High Court of Justice for Ontario, where it was held that the Imperial Statute of 1842 was still in force in the Dominion, and an injunction was granted to restrain importing and selling a British copyright book (presumably not republished in Canada). The Court of Appeal for Ontario, and afterwards the Supreme Court of Canada by a judgment of January 31, 1905, affirmed the decision.

5 & 6 Vict., ch. 45, sect. 17.

The judgment of the Court, delivered by Mr. Justice Sedgwick, contained a disclaimer of any intention to negative the jurisdiction of the Canadian Parliament "to over-ride legislation" (presumably Imperial legislation) "antecedent to the British North American Act, 1867"; but it is difficult to see the force of that disclaimer in the teeth of the fact that the injunction was granted on the footing that the Imperial Act of 1842 was still in force, which was the *ratio decidendi* in Smiles *versus* Belford. An application for leave to appeal to the Imperial Privy Council was dismissed with costs on May 24, 1905. The case in this stage is discussed again *infra*, page 118.

(21) The flow of American reprints of British copyright works from the United States into Canada largely exceeded the same abuse in other British possessions. As has been recently stated, the Statute of 1847 was passed by the Imperial Legislature enabling the Crown by Order in Council to suspend the prohibitions against importation into British Colonies of foreign reprints, provided the Colonies respectively chose to accept its benefits by passing a local law which made due provision for protecting the rights of British authors there.

The Foreign Reprints Act, 10 & 11 Vict., ch. 95.

Canada accepted the benefits offered by the Act, and in the year 1850 passed an Act by virtue of which the local Government imposed an *ad valorem* duty of 12½ per cent. on foreign reprints of British works for the benefit of the authors.

By some intermediate legislation, culminating in a Canadian Statute of 1868, and an English Order in

Council of the same year, the imposition of the duty in question was confirmed, and the prohibition against importation permanently suspended.

(22) The piratical importation, however, still continued under a legal fiction that the author was recompensed by the duty being properly collected and paid over, but this was not done, and those British authors, who were not willing to incur the trouble and expense of printing and publishing in Canada, remained without legal remuneration for the literature, the offspring of their intellect and the mental food of the Canadians. It was, therefore, little more than matter of form when, in April, 1894, the Canadian Government notified the British Colonial Office Imperial authorities that the collection of the 12½ per cent. royalty on foreign reprints of British copyright works for the benefit of the authors would cease.

See Daily Telegraph newspaper of April 11, 1894.

(23) In the same year, 1894, the Canadian Parliament, purporting to exercise the power conferred on it by the British North American Act, 1867, enacted the Custom's tariff, 1894, *regulating* the importation into Canada of foreign reprints of British copyright works. It contained the following provisions:—

57 & 58 Vict., ch. 33, item 101.

> "(iv.) Subject to the provisions of this Act and to the requirements of the Customs Act (Chapter 32 of the revised Statutes, as amended), there shall be levied, collected, and paid upon all goods enumerated, or referred to as not enumerated, in Schedule A to this Act, the several rates of duties of Customs set forth and described in the said Schedule, and set opposite to each item respectively, or charged thereon, as not enumerated, when such goods are imported into Canada or taken out of warehouse for consumption therein." Schedule A contained the following clause: "Goods subject to duties, books and paper. 101. British copyright works, reprints, of 6 cents. per lb.; and, in addition thereto, 12½ per cent. *ad valorem*, until the end of the next Session of Parliament, and thereafter 6 cents. per lb." Section 6 provided that "the importation into Canada of any goods enumerated, described, or referred to in Schedule C to this Act is prohibited, and any such goods, if imported, shall thereby become forfeited to the Crown and shall be destroyed, and any person importing any such prohibited goods, or causing or

permitting them to be imported, shall for each offence incur a penalty of 200 dols." Schedule C contained the following clause: "Prohibited goods. Seven hundred and eighty reprints of Canadian copyright works and reprints of British copyright works, which have been also copyrighted in Canada." The above Sections were re-enacted in 1897 (60 and 61 Vict., c. 16) in substantially the same form, except that item 101, in Schedule A, of the Act of 1894, was replaced in the Act of 1897 by item 125 reading as follows: "125. Books printed, periodicals and pamphlets, or parts thereof, not elsewhere specified, not to include blank account books, copybooks, or books to be written or drawn up, 10 per cent. *ad valorem*."

This Statute was merely passed for fiscal purposes in Canada, and had no reference to the claims or remuneration of British authors.

(24) Until the above-mentioned notice of cesser it was assumed in the Dominion that Section 152 of the Customs Consolidation Act, 1876 (which, in terms, prohibited importation into British possessions of foreign reprints of British copyright works only on the condition that notice was given to the Commissioners of Customs), applied to Canada. In the case just cited on the question of right (the Imperial Book Company *versus* Adam Black, &c.) the question seems to have been raised for the first time whether Canada, having made regulation for the management of her Customs by the tariff of 1894, was not, by Section 151 of the Customs Consolidation Act, 1876 (Imperial), exempted from the operation of Section 152 of the same Act.

Section 151 of the Customs Consolidation Act, 1876, is as follows: "The Customs Act shall extend to and be of full force and effect in the several British possessions abroad, except where otherwise expressly provided for by the said Acts, or limited by express reference to the United Kingdom, or the Channel Islands, and except also as to any such possession as shall, by local Act or Ordinance have provided, or may hereafter, with the sanction and approbation of Her Majesty and her successors, make entire provision for the management and regulation of the Customs of any such possession, or make, in

like manner, express provisions in lieu or variation of any of the clauses of the said Act for the purposes of such possession."

In the case in question the Imperial Book Company sued the defendants, Adam and Charles Black, and Clarke Company, Limited, being an assignee or licensee from Adam and Charles Black, to restrain importation into the colony of foreign reprints (presumably not republished or reprinted in Canada) of a British encyclopædia. It was held by the Court of first instance in Ontario, on January 26, 1903, that the production of a certified copy of the entry in the Book of Registry at Stationers' Hall was all that was necessary to make out a *primâ facie* proprietorship; that the agreement under which the Clarke Company (Limited) claimed was a licence and not an assignment and was not required to be registered; that Section 152 of the Customs Consolidation Act, 1876, had, in virtue of Section 151 of the same Act, never been in force in Canada, and that Section 17 of the Imperial Copyright Act of 1842 was alone applicable.

39 & 40 Vict., ch. 36.

The significance of the last point arose from the necessity of giving notice, under Section 152, to the Commissioners of Customs of the existence of copyright in the work sought to be protected, and from the further obligation of stating when such notice will expire. It was alleged in the case that the notice had been incorrectly given, and it was argued by the defendants that this omission destroyed the colonial copyright, or, at all events, destroyed the right of the plaintiffs to restrain importation.

The defendants also argued that Section 17 of the the Copyright Amendment Act, 1842, must be read as modified by Section 152 of the Customs Consolidation Act; or if that was not so, and if Section 152 was not in force in Canada, that Section 17 of the Imperial Copyright Act of 1842 was validly repealed by the Canadian Legislature by their Act of 1894.

The question whether Section 151 removed Canada from the scope of Section 152 turned on the fact, had she, or had she not, made "entire provision for the management and regulation for her customs." The plaintiffs said that she had; the defendants could but faintly deny it, and, indeed, practically admitted that she had done so by her tariff of 1894, hereinbefore stated. The

Court of Appeal in Canada granted an injunction against importation. They considered that Section 17 applied *simpliciter*, that the plaintiff was not hampered in the case of Canada by any necessity to observe the formalities required by the Customs Act, 1876, Section 152.

An application to the Imperial Privy Council for leave to appeal was refused with costs.

It does not seem to have been doubted by any of those engaged in the case, that the necessity to give the notice required by Section 152 being out of the way, the refusal of Canada to levy further duties in favour of British authors put an end to the suspense of prohibition against importation and restored the law as it stood under the Imperial Act of 1842, previously to the Foreign Reprints Act. At all events, the contrary was not suggested in the report, and this result may be taken for granted. British authors, therefore, are now entitled to restrain importation into the Dominion of foreign reprints of their books, whether reprinted or republished in Canada or not; and, as the case is ruled by the Act of 1842, the expression "books" includes music.

CHAPTER VIII.

(1) How British, and other non-American authors can obtain copyright in the United States. (2) Residential proclamation in that connection. (3) Terms of the Section conferring upon authors American copyright. (4) Cases arising in connection with it. (5) Performing right, how acquired. Cases in connection therewith. (6) Term of copyright. (7) Prolongation of term. (8) Copyright, assignable. (9) Formalities to be observed as a necessary condition to the existence of copyright. Cases arising in connection with them. (10) Necessary fees. (11) Reservation of right on each copy, penalty for wrongful insertion of such a reservation. (12) Penalties for infringement. (13) Punishment for piracy. (14) Simultaneous publication. (15) How performing right arises in the United States, with reference to the different state of law in Great Britain.

COPYRIGHT IN THE UNITED STATES.

(1) Before considering in detail the conditions under which British composers are able to obtain copyright for their compositions in the United States of America, it would seem advisable to correct a misapprehension which appears to be pretty generally entertained as to the precise nature of the concessions made by the American Government, when it decided in 1891 to admit foreigners to the benefits of its new legislation on the subject. Prior to July 1, 1891, American copyright was by the law of that country reserved exclusively in favour of American subjects and domiciled citizens. With a view, however, to foster the native publishing and printing industries, the American Government, on March 3, 1891, passed a Statute which extended the protection of its copyright laws to foreigners, under certain conditions, which will be hereafter referred to in detail; and on July 1, 1891, as regards some countries, and on subsequent dates as regards others, many foreign States became entitled to enjoy the benefits of the copyright laws which America afforded to her own citizens. It is true that this extension of its copyright protection was

based upon a reciprocity of treatment on the part of each nation towards American citizens within their respective territories. But there was in no case (except that of Germany) any preparatory bargaining as to terms and conditions. And there was in no case (except that of Germany) a treaty or convention containing mutual concessions on the subject. The copyright therefore that certain foreigners now enjoy in America is a purely American copyright, and is in no sense an international one. In fact, there is little to distinguish the copyright which British composers now enjoy in America from the copyright which American subjects do and always could enjoy in Great Britain. As, for many years, Americans could obtain copyright for their works in Great Britain by conforming to the British law, so now (since July 1, 1891) British and many other composers can obtain American copyright by conforming to the American law.

The consideration of this feature of the altered law of America on the subject becomes of greater importance than is at first sight obvious, because of frequent correspondence in the British Press on the subject; complaint is made of the *unfairness* of the American conditions as contrasted with the British. The British Government is accused of having made a bad bargain with America, and retaliation is suggested, with the result that the public, and especially the student who has not followed the history of the development of the American law on the subject very closely, are misled. The British Government has really made no bargain of any sort; retaliation, now that America has become much more liberal than she ever was before, seems somewhat ill-timed. The American position merely amounts to this: that whereas prior to July 1, 1891, she would not grant any copyright at all to any foreigner, she has since that date so altered her own laws on the subject, that many foreign States *have* obtained, and all foreign States *can*, if they will, obtain, a very large measure of protection for their authors in American territory; and that very large measure is precisely as much as American citizens themselves can obtain.

(2) Since July 1, 1891, authors not being American citizens are admitted to copyright, on the same basis as to American citizens, in two cases. Firstly, when the

Sect. 13 of the Act of the United States of March 3, 1891.

nation of the non-American author permits copyright to American citizens on substantially the same terms as to its own citizens; secondly, when the nation of the foreigner is a party to an international agreement providing for reciprocity in copyright, by the terms of which the United States can become a party thereto at its pleasure. The existence of either of these conditions is to be determined by the President of the United States by proclamation.

(3) On July 1, 1891, the President of the United States issued a proclamation declaring that the first of the conditions above-mentioned was fulfilled in respect of the citizens or subjects of Great Britain and her possessions.

The following States have also been the subject of a similar proclamation:—

July 1, 1891.—Belgium, France, Switzerland.
April 15, 1892.—Germany.
October 31, 1892.—Italy.
May 8, 1893.—Denmark.
July 20, 1893.—Portugal.
July 10, 1895.—Spain.
February 27, 1896.—Mexico.
May 25, 1896.—Chili.
October 19, 1899.—Costa Rica.
November 20, 1899.—The Netherlands and her possessions.
November 17, 1903.—Cuba.

Act of March 3, 1891, Sect. 1, number 4952.

(4) The enactment which gives copyright is to the following effect as regards music: That the author or proprietor of any book or musical composition, and his executors, administrators or assigns, should, upon complying with the provisions of the now reciting chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same.

Press Publishing Company *versus* Monroe, 73 Federal Reports, 196.

The enactment granting copyright has not abrogated the common law right of an author to his unpublished MS.

Kipling *versus* Fenno, 106 Federal Reports, 692.

An author whose work has been published, but not copyrighted, has no right to control the mode in which any member of the public may reproduce it, as regards title, arrangement, or grouping. This is not inconsistent with the English decisions which (independently of copyright) forbid any *actual mutilation*

of a melody; or any reproduction of it, in a form which would tend to bring the composer's reputation into contempt.

(5) Performing right in music was not protected by the above-stated Section, but by an Act of January 6, 1897. Any person publicly performing any musical composition, "*for which a copyright has been obtained*," without the consent of the proprietor, shall be liable to damages, to be assessed at such sum not less than 100 dols. for the first, and 50 dols. for every subsequent performance, as to the Court shall seem just. If the performance be wilful and for profit, such person shall be guilty of a misdemeanour, and upon conviction be imprisoned for a term not exceeding one year.

Sect. 4966 of Revised Statutes amended.

Under a New York Statute "any person who causes to be publicly performed for profit any unpublished, undedicated or copyrighted (dramatic composition or) musical composition known as an opera, without the consent of its owner, or who, knowing that such (dramatic or) musical composition is unpublished, undedicated, or copyrighted, and without the consent of its owner, permits, aids, or takes part in such a performance, shall be guilty of a misdemeanour."

Penal Code, Section 720, added: L., 1899, c. 475. See Copyright Cases; Arthur S. Hamlin, p. 101.

It has been held by the Circuit Court that the following facts did not bring the defendant within the terms of the first of these two enactments.

Bloom *versus* Nixon, 125 Federal Reports, 977.

Miss Fay Templeton, playing in "The Runaways," gave an imitation of Miss Faust singing a song called "Sammy," the copyright of which was the property of the plaintiff. The personality of Miss Faust, her gestures and tones, were the main subject of the performance; and though a few lines of the test were reproduced, and the *chorus itself* was repeated, the fact that Miss Templeton did not sing it (this was presumably meant, as negativing her having sung it in the artistic sense), but merely imitated the singing it by another, induced the Court to find that the imitation was what caused the interest of the performance, and the injunction was refused.

The author has been assisted by the admirable collection of cases compiled by Arthur S. Hamlin, and published by the American Publishers' Copyright League.

In the case of Wagner *versus* Conried in the Circuit Court, southern district of New York, November, 1903, the exclusive right of publication, and absolute possession of the libretto, of *Parsifal* had been assigned by Richard Wagner to B. Schott and Sons (presumably for all

125 Federal Reports, 708.

lands). The contract reserved the acting rights in regard to theatres to Richard Wagner, whose representatives brought an action to restrain the defendant from producing the work upon the stage in America. A notice was printed in the published work purporting to effect such reservation of acting rights. It was agreed that such a notice would have been sufficient under the law of Germany (where the contract was made) to protect the author's performing right. An edition printed in 1902 had not been copyrighted in America, but copies had been sold there. The reservation of right was treated by the Court as a nullity. The effect of publication was to dedicate the work to the public, and it was held that such a notice was ineffective to protect performing right. It is not easy to understand this case. If the work, as is probable, had been copyrighted in America previously to the edition of 1902 (which is not stated in the report), that edition would not have destroyed the exclusive performing right which the acquisition of copyright carried with it. If the work had never been copyrighted in America the case would not seem arguable at all events as against a stranger to the contract; it seems doubtful whether the plaintiff could have succeeded even if the question had arisen whether the reservation of right could be enforced as between the parties to the contract themselves; that is to say, supposing that B. Schott and Sons, or persons claiming under them, had acted in derogation of the reservation of acting right and performed *Parsifal* in a theatre, it is difficult to see how the American Court could have interfered to enforce specific performance of the contract.

Revised Statutes, Sect. 4960.

Revised Statutes, Sect. 4953.

Sect. 4954.

(6) Copyrights are granted in America for twenty-eight years from the time of recording title.

The mode of recording is stated a few lines lower down.

(7) The author "if he be still living, or his widow or children if he be dead, shall have the same exclusive right continued for the 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; and such persons shall within two months from the date of such renewal cause a copy of the record thereof to be published in one or more newspapers printed in the United States for four weeks."

(8) Copyrights are assignable in law by any instrument of writing (*sic*), and such assignment shall be recorded in the office of the Librarian of the Congress within sixty days after its execution; in default of which it shall be void against any subsequent purchaser or mortgagee for a valuable consideration, without notice. Sect. 4955.

(9) No person shall be entitled to a copyright unless he shall, on or before the day of publication in the United States or any other 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, District of Columbia, a printed copy of the title of the "book or musical composition"; nor unless he shall also, *not later than the day of publication thereof* in the United States or any other country, deliver at the office of the Librarian of Congress aforesaid, or deposit in the mail within the United States, addressed as aforesaid, two copies of such copyright book or musical composition. Sect. 3 of Act of 1891.

It has been held in the United States that, in the absence of direct enactment, the publication must take place within a reasonable time after recording the title; and the interval between October 24 and the following February was held to be an unreasonable time, and the copyright was lost. Boucicault *versus* Hart: 13 Blatchford: 47 Drone, p. 244.

A case of some importance on the subject of publication was decided upon Farine's well-known operetta named "Falka." After publication of the musical score, but before publication of the libretto, the defendants performed the opera in California. In a suit for an account of profits, defendant attempted to show that the work had been published from the fact that the book had been printed for the use of actors in learning their parts; it had never been put in circulation. French *versus* Kreling, 63 Federal Reports, 621.

The judge held that this was not publication, and that there had not been any dedication of the book by the plaintiff to the use of the public, and the plaintiff's right to an account was established.

It is not quite clear how the previous dedication to the public by the plaintiff would have been a good defence; presumably the Court considered that that step would have *destroyed the common law right of protection*; and, on the other hand, there would be no exclusive right of performance under Statute law, as copyright had not Revised Statutes, 4956.

been obtained by compliance with the enactments requiring the deposit of copies and record of title. It is shown *infra* that under American law exclusive performing right does not arise unless copyright has been obtained.

Sect. 3 of the Act of 1891, Sect. 4956 of the Revised Statutes.

It is afterwards provided that in the case of a book the two copies required to be delivered or deposited shall be printed from type set within the limits of the United States, or from plates made therefrom. During the existence of such copyright the importation into the United States of any *book* . . . so copyrighted, or any edition thereof, or of any plates of the same not made from type set within the United States, shall be prohibited, except in the cases mentioned below, viz. :—

Act of Congress, Oct. 1, 1890, Sect. 2, paras. 512-516.

Books printed and bound, or manufactured more than twenty years at the date of importation.

Books and pamphlets printed exclusively in languages other than English; also books . . . in raised print used exclusively by the blind.

Books imported "by authority" (*sic*), or for the use of the United States (*sic*), or for the use of the library of Congress.

Books . . . specially imported, not more than two copies in one invoice, in good faith for the use of any society established for educational, philosophical, literary, or religious purposes, or the encouragement of the fine arts, or for the use or by the order of any college, academy, school, or seminary of learning in the United States, subject to regulations prescribed by the Secretary of State.

Books . . . of persons of families from foreign countries, if actually used abroad by them not less than one year, and not intended for any other person or persons, nor for sale. Except also the case of persons purchasing for use and not for sale, who import, subject to duty, not more than two copies of a book at any one time.

The prohibition of importation is not to extend to books in foreign languages, of which the translations only are copyrighted, and is only to extend to such translations.

A question arose upon this whether "book" included "musical composition," in the absence of an interpretation clause similar to that contained in the Copyright

Amendment Act, 1842 (Great Britain). This doubt has been authoritatively set at rest by the American tribunals, who have decided, in accordance with the practice from the first in the librarian's office, that musical compositions as such, and not being books in outward form, were not included in the enactment as to printing from local type, or from plates made therefrom. This decision has been affirmed on appeal.

Littleton versus Oliver Ditson Company, 62 Federal Reports, 507.

The proviso at the conclusion of Section 4956, as to printing from type set up in America, or from plates made therefrom, does not apply to music, but the writer has nevertheless set out the proviso because it is of importance where questions arise as to the words of lyrical works. The difficulty now about to be stated with its solution, shows the nature of some of such questions.

A large London musical firm wished to import into the States a cantata, of which the words had been previously copyrighted in America, and in which the copyright was still subsisting. The copies desired to be imported (and put on sale) contained vocal score, *i.e.*, words and music printed together. The music was copyrighted in America. The proviso requires that in the case of a book (as opposed to a musical composition) not only must the two copies required to be deposited be printed from type set in the United States, but *any copyright book*, or any plates of the same not made from type set in the United States, are prohibited to be imported, with the exceptions hereinbefore mentioned, which do not apply to the case with which we are dealing. The music being inseparable from the words in this case, in other words, forming part of the same *book*, was practically, though not legally, subject to the same disability, and the whole would be subject to be seized at the Custom House.

Under well-known American advice the would-be importers determined to abandon the copyright of the words, as there is no prohibition against importation of a non-copyright book. This was purported to be done by printing and publishing a few copies of the libretto alone, without the insertion on the title page of the words required by Section 4962 of the revised Statutes, "entered according to Act of Congress in 'the year' —, &c., &c."

It appears to have been considered that this removed the copyright shackle, and the book consisting of words and music has been imported without let or hindrance.

Scot. 4962. Nothing succeeds like success, but the writer cannot help suggesting that the soundness of the advice so given was open to doubt.

The Section relied upon, as annihilating the copyright in the words, only enacts that "no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition" the words "entered according," &c. This enactment would not seem to resemble in its effect the other Sections which make the compliance with certain requirements a necessary condition to the existence of Copyright Section 4962, but only imposes a condition on the person wishing to sue and does not affect the other incidents of copyright.

It would seem safer on a future occasion to adopt some other mode of purging a book from its copyright, as by public advertisement in the newspapers, or execution of a deed poll. That course at all events is effective in the United Kingdom.

Henderson *versus* Tomkins, 60 Federal Reports, 758. It has been decided that in suing for infringement of copyright the plaintiff must distinguish between the words and the music, and state in his pleadings whether he claims the right in respect of the one, or the other, or both.

See Revised Statutes, 4958. (10) The Act of 1891 deals with the fees payable to the Librarian of Congress; in respect of recording the title of any article 50 cents. are payable.

For a copy of such record under seal, 50 cents.

For recording and certifying any instrument of writing for the assignment of a copyright, one dollar.

The charge for recording the title of any production of a person not a citizen or resident of the United States is one dollar.

Revised Statutes, 4962. (11) No person is to maintain an action for the infringement of his "*copyright*" unless he shall give notice thereof by inserting in the several copies of every edition published of a musical composition, by inscribing on some visible portion thereof the words: "Entered according to Act of Congress in the year —, by A. B., in the office of the Librarian of Congress, at Washington," or at his option, the word "copyright,"

together with the year the copyright was entered, and the name of the party by whom it was taken, thus "copyright 18—*(sic)* by A. B." The latter form is most commonly used.

Music publishers sometimes put the notice on the title-page. This, however, would hardly seem to be the right course, as it would be more appropriately inscribed on one of the music plates.*

It has been held in the Circuit Court, southern district of New York, that the direction above stated, to enter "the name of the *party*" by whom the copyright is taken out, is satisfied by giving the name of his business firm. The copyright was taken out in the name of "Charles Scribner's Sons." This was held sufficient, though that name was a fictitious one, Charles Scribner being the sole person interested.

Scribner *versus* Hunry G. Allen Company, 49 Federal Reports, 864.

It has also been held that it was sufficient to enter a notice which was as follows: "Copyright 93, by Bolles of Brooklyn." It was not shown by defendant that there was more than one person named "Bolles," and the omission of the first name was considered immaterial.

Bolles *versus* Outing Company, 77 Federal Reports, 966.

The actual words of this Section (4962) do not extend to performing right, but as the Section which annexed penalty to performing right infringed is limited to musical compositions, for which "a copyright has been obtained," it would seem probable that it would be held that such penalty cannot be enforced without the notice being inscribed on some visible portion of the musical composition, as hereinbefore stated. Every person who shall insert or impress such notice, or words of the same purport, in or upon any musical composition, whether subject to copyright or otherwise, for which he has not obtained a copyright, is liable to a penalty of 100 dollars, recoverable, one-half for the person who shall sue for such penalty, and one-half to the use of the United States.

Sect. 4966 of the Act, Jan. 6, 1897.

Sect. 6 of the Act of 1891 amended by Act of March, 1897, 4963 of Revised Statutes.

(12) An enactment in the revised Statutes as amended, provides that if any person after the recording of the title "of any musical composition, shall, contrary to the provisions of this act, within the term limited, and with-

Sect. 4965 amended by the Act of March 2, 1895.

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* This suggestion was made to the writer by Mr. Henry Clayton, a Member of the English Bar, and of the firm of Novello and Co., to whom the writer is under deep obligations for valuable assistance.

out consent of the proprietor, in writing, signed in the presence of two or more witnesses, copy, print, publish or import, either in the whole or in part, or knowing the same to be so printed, published, or imported, shall sell or expose to sale any copy thereof, he shall forfeit to such proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed and shall further forfeit one dollar for every sheet of the same found in his possession, either printed, copied, published, imported, sold or exposed for sale," one-half thereof to the proprietor, and the other half to the use of the United States.

Bolles *versus* Outing Company, 77 Federal Reports, 966.

It has been held on Section 4965 of the revised Statutes that the penal clause of the forfeiture of one dollar per sheet "found in the possession" of the defendant, must be strictly construed, and is limited to such copies as are literally "found in his possession," and does not extend to copies put into circulation, but which may be traced as having been in his possession.

17 Appeals District of Columbia, 562.

In the case of Stern *versus* Rosey, heard in the Court of Appeals District of Columbia, in February, 1901, the defendant had taken two songs (copyright): "Take back your Gold," and "Whisper your Mother's Name," and had procured them to be sung into a phonograph, thereby obtaining a "master-record," from which other records were made. Plaintiff contended that this was "copying" his song under the section last stated.

It was held that the records did not effect a copy, as the marks upon the wax cylinders conveyed no meaning to the eye, even of an expert musician, and were only part of a machine. There was no substantial difference between them and the metal cylinder of the ancient musical box.

The grounds of this decision are very similar to those upon which Lord Justice (then Mr. Justice) Stirling decided the English case of Boosey *versus* Whight.

Sect. 9 of the Act of 1891, amending Act 4967 of the Revised Statutes.

(13) Every person who shall print or publish any MS. whatever, without the consent of the author or proprietor first obtained, shall be liable to the author or proprietor for all damages occasioned by such injury.

Wall *versus* Gordon; Drone, 206.

(14) As in Great Britain, so in the United States, first publication must not be abroad; if it is, the author cannot acquire copyright. Also, as in Great Britain, simultaneous publication is considered sufficient to establish the

author's right. See this subject treated of in the former chapter on "Rights after Publication." In order, therefore to obtain copyright in the two countries it is usual for British publishers to deliver copies of title, and of the work previously to publication, but within a reasonable time before that step, and to arrange by telegrams or otherwise that publication shall take place simultaneously in Great Britain and the States.

(15) An important divergence between British and American copyright law occurs in the case of performing right. In Great Britain a prior performance by order of the proprietor of a musical work abroad destroys exclusive performing right in Great Britain, as has been already seen. It would seem clear that prior performance abroad would not have that effect in the United States. The section which relates to this right, and which alone confers it, imposes a penalty on unauthorised public performance of any musical composition "for which a copyright has been obtained." There is nothing restricting the operation of the section to works not previously performed abroad.

Revised Statutes amended by the Act of Jan. 6, Sect. 4966.

APPENDIX A.

THE RETROSPECTIVE EFFECT OF THE INTERNATIONAL COPYRIGHT ACT, 1886.

It has been stated in the body of this work that the most difficult points have arisen in connection with Section 6 of the Statute of 1886. These points are more important in connection with musical copy- or performing-right than with any other subject-matter. This arises partly from the fact that many musical works of foreign origin (especially lyrico-dramatic ones) have fallen into the public domain, the title to protection under conventions between Great Britain and other States having lapsed through non-compliance with the necessity for registration arising on those documents.

It has been asserted by some that it was the intention of the Legislature to "stretch backwards" (to use the homely, but vigorous phrase of a late eminent judge) the scope of the Convention of Berne so as to benefit authors who had lost their right by negligence; and to wake up again copyrights forty years old, it may be, a strange exemplification of the French proverb, "*Le bien vient en dormant.*"

There are several different periods to which, it may be argued, the statutory scope ought to be carried back, as will be hereafter seen. In the case of conventions with States which do not wish to join that of Berne, there must be some limit in point of antiquity to the claim of works to be swept in; and what that limit is to be under every combination of circumstances is not finally decided. Indeed, this doubt is not entirely set at rest even with reference to the Berne Convention itself, though there has been already considerable litigation.

Section 6 of the Statute is as follows:—

"Where an order is made under the International Copyright Acts with respect to any foreign country, the author and publisher of any literary or artistic work *first produced before the date at which such order comes into operation* shall be

entitled to the same rights and remedies as if the said Acts, and this Act, and the said order, had applied to the said foreign country at the date of such production, provided that where any person has *before the date of the publication of an Order in Council* lawfully produced any work in the United Kingdom, nothing in this Section shall diminish or prejudice any rights or interests arising from or in connection with such production which are subsisting and valuable at the said date."

By Section 10—(1) Power is given "to make Orders in Council for the purpose of the International Acts, and this Act for revoking or altering any Order in Council previously made in pursuance of the said Acts or any of them.

(2) "Any such Order in Council shall not affect prejudicially any rights acquired or accrued *at the date of such order coming into operation*, and shall provide for the protection of such rights."

Section 12.—(*a*) "Where an Order in Council has been made before the passing of this Act, under the said Acts, as respects any foreign country, the enactments *by the now reciting Act repealed* shall continue in full force as respects that country until the said order is revoked.

(*b*) "The said repeal and revocation shall not prejudice any rights acquired previously to such repeal or revocation, and such rights shall continue and may be enforced in like manner as if the said repeal or revocation had not been enacted or made."

The Order in Council of December 6, 1887, has the following provision:—

Section 3.—"The author of any" . . . "artistic work" (which includes musical composition) "first produced *before the commencement of this order* shall have the rights and remedies to which he is entitled under Section 6 of the International Copyright Act, 1886."

Section 7 provides (in effect) that the orders under which the conventions previously existing with foreign States took their force be revoked; and the order continued as follows: "Provided that neither such revocation nor anything else in this order shall prejudicially affect any right acquired or accrued before the commencement of this order by virtue of any order hereby revoked; and any person entitled to such right shall continue entitled thereto, and to the remedies for the same, in like manner as if this order had not been made."

The now reciting order is to be construed as if it formed part of the International Copyright Act, 1886.

The Berne Convention, Article 14:—

"Under the reserves and conditions to be determined by common agreement the present Convention applies to all

works which at the moment of its coming into force have not yet fallen into the public domain in the country of origin."

And the *protocol de cloture*, Article 4 :—

"The common agreement alluded to in Article 14 of the Convention as modified by the Additional Act of Paris, 1896, Article 2, Placitum 2, is as follows :—

"The application of the Convention to works which have not fallen into the public domain in the country of origin at the time when the convention and Act came into force shall operate according to the stipulations on this head which may be contained in special conventions either actually existing, or to be concluded hereafter.

"In the absence of such stipulations between any countries of the Union, the respective countries shall regulate, each for itself, by its domestic legislation, the manner in which the principle contained in Article 14, is to be applied."

Article 11, No. 4, of the additional act of Paris adds : "The temporary stipulations noted above shall be applicable to countries which may hereafter accede to the Union."

It will have been seen that the most important of the existing copyright treaties with other nations are revoked by the order of December, 1887, but the rights acquired under them, where still subsisting, are continued by the saving-clauses in Section 10 and 12 of the Statute of 1886, and in Section 7 of the Order in Council of December 6, 1887, and are recognised by the protocol, and the status of the parties interested would continue to be regulated by the orders and treaties as if they had not been revoked.

Many works which would otherwise have been entitled to protection in Great Britain by virtue of those treaties have long since fallen into the public domain through neglect to register within the prescribed time.

What, then, is the retrospective scope of Section 6 of the Statute of 1886? Does it sweep in all copyright works produced in countries of the Union, even though the copyright has expired by effluxion of time, or the work has been thrown into the public domain as aforesaid by neglect of formalities within the prescribed time, on the one hand (the widest possible construction), or does it include no work except those produced after the date of the Statute, and of the Order in Council affecting the state in question, which would be the narrowest scope possible? Of these two extreme views, the first would seem extravagant, and would cause the greatest confusion among parties who had entered into contracts and regulated their affairs, and mounted plays, &c., on the faith of the works being public property. The narrowest view is equally impossible, as it would make useless the proviso in

Section 6 purporting to save interests arising from production of any work. There is a third middle view (which has received judicial sanction), namely, that Section 6 of the Act only applies to works produced between the date of the Act of 1886 coming into operation and that of an Order in Council to be made under the International Copyright Acts.

The hopeless character of some of the arguments adduced by those who support the first or ultra-retrospective view looks as if they thought that, if their construction were not adopted, many existing copyrights would come to an untimely end, as falling between two Statutes, and not being protected by either. The clauses saving right hereinbefore stated are an answer to this. No vested right would be injured by the middle view. Nothing else could account for the strenuous efforts of the retro-activists, some of them men of undoubted ability, who simply reiterate their opinion that things are as they say, without a word of reasoning to prove it.

There is *not a word* in Section 6, nor indeed in the other Sections of the Statute of 1886, nor in the Order in Council made thereunder, which militates against the "middle view": and there is a firmly settled rule of law, and a decision of the Court of Appeal in favour of it.

The rule of law is that "words in a Statute shall not be held to be retrospective unless that meaning is *the only one which the words will bear*"; and that "if some retrospective meaning is imperative, that meaning shall be limited to the extent which the language actually requires"; in other words, that the description of matters to be affected by an Act will not include past items, unless that description admits of no other construction.

If the 6th Section be read following this rule, the words "*a work* first produced before the date at which such order comes into operation" will be taken to refer, not to works produced before the date of *the Statute becoming law, but only to works produced after that date.*

(*a*) According to (somewhat inaccurate) English phraseology "a work first produced," &c., may have either a past or future scope; in the first part of the Section the words "where an Order in Council is made," &c., must, from the necessity of the case, be future.

(*b*) The Legislature is quite consistent with the rule above stated, when it uses the words "the author" . . . of "any work first produced before the date at which such order comes into operation, shall be entitled to the same rights and remedies as if the said Acts and this Act (*sic*) and the said order, had applied to the said foreign country at the date of the said production."

Those words, no doubt, suppose the possibility of their corre-

sponding negative, viz., of a period when, subsequently to production, a given foreign country will not have become subject to the Acts in question; but the phrase creates no difficulty.

That period will *occur in every case where an Order in* Council is made under the International Acts; for those Acts do not apply to any country (except, indeed, potentially, if at all) until the order is made with reference to it.

(*c*) That "the said order" will not apply to the foreign country till it is itself made, is, perhaps, a useless truism, but is as consistent with one construction of the clause as with another.

(*d*) The indemnity proviso which concludes Section 6 fails to adjust the rights of parties on the ultra-retrospective theory, and is practically inconsistent with any but the middle view.

If works in which copyright had expired long before the date of the Statute, either through effluxion of time, or through the neglect to register under the old conventions, were held to be revived, persons, who on the faith of that expiry, had expended large sums on staging operas, printing and preparing costly books, &c., would have no redress for their loss if the works were not actually produced (*i.e.*, produced in the country of the forum), for *the proviso strictly confines its indemnity to the case of a produced* work; and this, although the person expending the money would have no constructive knowledge, and very probably no actual knowledge, that a Statute was going to pass which would prevent production, and, *ex post facto*, render his expenditure useless. The Legislature would have come down upon him with an unexpected stroke and punish him for acting on a state of law and fact which he was entitled to consider finally settled, and which had brought the work within the public domain, so that he was free to deal with it as he pleased.

On the other hand, if the scope of the Section be held only to include works subsequent in date of production to that of the Statute being promulgated there would be no injustice and the proviso would be sufficient for all purposes.

They would know that they would spend their money in preparing the way for production, *at their peril*, with the Statute of 1886 hanging over them.

Provisos for indemnity are often thrown in by draftsmen without any very definite idea of the precise case in which they will be required, but with an intention of covering every possible case of hardship, foreseen or otherwise. It is unprecedented that the legislator should, going into the opposite extreme, have intended to produce a case of such injustice as that which would occur if the Statute of 1886 were held to resuscitate dead copyrights, without making the indemnity clause large enough to

cover all reasonable loss, not merely loss on production of a work, but also loss in respect of expenditure reasonably incurred (though without actual production of the piece), on the faith of a tacit assurance by Parliament that a dead monopoly will not be revived by a sensational and unnecessary alteration of the Statute Book.

A concrete example makes this reasoning clear. The following facts resemble substantially a case which occurred, the dates only are somewhat altered.

Assume "Faust" (Gounod) produced in France, in January, 1860.

The right to British protection expired in April, 1860, for want of registration within three months.

Mr. Mapleson spends £5,000 in preparing a revival in 1885. The Statute passes in 1886 *before he has produced the work.*

Gounod's assignees could, if the Statute is to receive the ultra-retrospective construction, restrain production, and the indemnity clause would not apply. Yet Mr. Mapleson would have been rightly relying on the Statute of 1814, and orders under it, which entitled him to consider British protection gone for ever, *qua* Faust. No legal adviser, however learned, no foresight, could have saved him from taking a course, not even imprudent, far less illegal.

On the other hand, the proviso would be amply sufficient to meet all cases which might arise, if the Statute of 1886 be held to apply to works published after its date.

Taking the facts already stated, Mr. Mapleson could reap the fruits of his labour and expenditure before the passing of the Statute, by producing after that date Gounod's work in England, as the work would remain public property, not being comprised in the scope of the Statute of 1886, the proviso then would not be wanted. From the time of that Statute passing impresarios and publishers would be fixed with notice that the Statute Book contained clauses, under which, without any alteration of the law of the land, a mere interchange of diplomatic notes with a given State, would put the Privy Council in motion to pass an order giving protection in Great Britain. If, after having that notice, they were to risk money in preparing "Faust" for production, they would have only themselves to thank when such production was restrained.

(*e*) *It is not unworthy of comment that special emphasis* is more than once laid by both Statute and Order on the interval "before the date of the Order coming into operation," and it is natural to ask why, if matters prior in date to the passing of the Statute are to be brought in, are the words "produced before the date of this Act becoming law," or some similar words, never to be found in either the Statute or the Order? Such words would avoid all question and would not

have been omitted by a draftsman, presumably acquainted with the rule of law above stated, viz.:—

That "a Statute is not to be construed retrospectively unless and to a greater extent than the words require."

The present writer in the first edition of a work frequently herein referred to, before any judicial or other notice of the question had been taken, suggested as a sound construction, and one making the whole Statute consistent with this rule of law and with itself, the middle view noticed already; namely, that "the retrospective clause was only intended to apply to works produced between the date of the Statute of 1886 coming into operation, and that of any Order in Council (that of December, 1887, or any future ones) being issued"; and the Court of Appeal held that this was the right view.

Cutler, Smith and Weatherby, first (not revised) edition. International chapter, p. 75, *et seqitur.*

Laurie versus Rouad, 1892 3 Chancery, 402.

It is said, however, by objectors that this decision clashes with the Berne Convention, Article 14, which purports to bring in all the works not yet fallen "*into the public domain in the country of origin*"; that this clause must outweigh any construction of Section 6 which militates with it, without reference to what might have been held the right construction if the Berne Convention had not been on the *tapis*: that the Berne Convention and no future ones are to be the guide; and that Section 6 is to be taken to bring in all works alive in the country of origin whatever their date, whatever the circumstances which may have deprived them of any right to protection.

There are obvious answers to this:—

(1) The protocol, which is so undeservedly ignored by the champions of the ultra-retrospective view, provides that Article 14 shall "operate according to the stipulations which may be contained in special conventions either existing or to be concluded." It is doing no violence to language to hold that a convention revoked in form, but kept alive in substance, is contemplated by this phrase, especially when it is not shown that any conventions *unrevoked* were in existence to account for the words.

Now the old convention with France of 1852 (to take one country as an illustration) made registration within three months a condition of obtaining copyright in Great Britain. This convention (like many others) was kept alive *in substance* by Section 12, Placitum 13, of the Statute of 1886. It would seem that in each case the terms of the "special convention" applying to it ought to be considered in construing Article 14. At all events, that Article ought not to be read without due weight being given to the protocol which forms part of it.

(2) The Statute must be construed according to the well-settled rules of construction; and its scope cannot be widened

even if the Privy Council, purporting to Act under the Statute, have exceeded their powers.

(3) All those who oppose the writer's view seem to forget that the Berne Convention is by no means the only one which is contemplated by the Statutes of 1844 and 1886. Many *others may follow*, and some *have followed*, but *Section 6 will remain*. Supposing that a convention with Russia or America contained a clause differing from Article 14 of the Berne Convention, and in terms excluding works fallen into the public domain in the country of the forum! Would the objectors veer round and give a totally different meaning to the inflexible Section 6, by a sort of *opportunisme?* It is said by those whose arguments are only applicable to the case of *one* convention, that the writer's view would give too insignificant a scope in point of time and importance to the proviso at the end of Section 6; but this is disposed of by the fact that there may be an interval of thirty years, or perhaps much more, between the date of the Statute of 1886 and future Orders in Council to be made under that Statute and the one of 1844; and that many important "rights and interests" may arise in the interim and call for protection.

(4) It is by no means certain that the draft convention, as referred to by the Act, may not have been modified in some details after the Statute became law; and in this connection it is worthy of notice that the Statute of 1886 only speaks of a "*draft*" having been agreed to, that is to say, a thing *in fieri* and incomplete in its nature; and what is still more pertinent, the Order confirming the Berne Convention and giving it force did not come into operation till December 6, 1887, and refers to the Berne Convention as made on "the 5th September, 1887," till which date it was only an inchoate instrument.

Hanfstaengle *versus* American Tobacco Company, 1895, 1 Queen's Bench, 353.

It is true that in one case Lord Esher declined to look into the point whether the draft of the Berne Convention differed from the document which was signed, but he evidently was ignoring the fact that the Berne Convention is only one of many which may occur, not under the Act of 1886 alone, but under that Act in conjunction with the Statute of 1844. Indeed, the whole case seems to have been argued and to have proceeded on the same fallacy; viz., that the Act of 1886 and the Berne Convention were co-extensive and inseparable, and that were that convention out of the way, the Statute would have no *raison d'être:* so far, however, from this being so, Section 8 (the enactment applying the Copyright Acts to works produced in the Colonies) is at least as important a factor in the necessity for passing the Act as the international subject-matter.

The Berne Convention takes its validity from the Act of

1844; the Act of 1886 supplies some matters of detail by way of supplement; and no doubt the convention containing those details "could not be carried into effect without the authority of Parliament," but this is no reason why the Statute should be moulded to suit the Berne Convention, rather than the Austrian Convention or any future ones.

It would be interesting to see how far Lord Esher would have carried his doctrine that the Statute must yield to the Convention. Would he have adhered to it not merely where the rule of law requires a particular construction, but also where the words of the Statute are *hopelessly inconsistent* with those of the Convention, which is actually the case with reference to copyright in translations.

(5) The Article 14, moreover, is not final in its form and contemplates future "reserves and conditions," and the manner in which it is to be applied is to be regulated by *domestic legislation*.

This is a very different case from the short abridgment of Article 14, usually put prominently forward in argument, and which wholly ignores the final protocol, Section 4.

The case of Lauri *versus* Renad dealt with a right of translation arising in 1879, under the Statute 15 and 16 Vict., chapter 12, Sections 4 and 11, and the Order in Council of November 3, 1851, which is confirmed by that Statute. The joint effect of these instruments was to give dramatic authors a right of translation for five years, and no more, from the date of publication. This right was subject to an obligation to register within three months from the publication of such translation, which had not been done. 1892, 3 Chancery 402.

After the right of translation had expired, the plaintiff (the well-known acrobat, Lauri) sued for an injunction to restrain performance (and incidentally, infringement of copyright) of the piece "*Le voyage en Suisse*," the subject of the translation in question.

The Master of the Rolls, Sir N. Lindley, and Lords Justices Bowen and Kay, held unanimously after full argument and a long and careful hearing, that the term of exclusive translation right having expired could not be revived by the Statute of 1886, and Order in Council; that a copyright no longer in force at the date of the Statute coming into operation could not be resuscitated; and that the operation of the 6th Section was confined to the interval between the date of the Statute of 1886 and that of any Order in Council to be made under it, or rather under the Statutes of 1844 and 1886 combined.

A clearer enunciation of the principle confining the scope of Section 6 to "the middle view," or a stronger Court pronouncing it, cannot be conceived; but Mr. Justice Charles, profess-

ing to act in accordance with that principle, gave a decision flatly in contradiction with it.

Hanfstaengle *versus* Holloway, 1893, 2 Queen's Bench Division, 1.

The case before him was one of International Copyright in a painting made in 1884, and first published in Germany in 1886. The defendants had it photographed. The painting having been made and published before the passing of the Statute of 1886, Mr. Justice Charles held that Section 6 applied "to all works produced before the Order in Council came into operation, whether they were produced before or after the passing of the Act."

This is the actual language of the learned judge.

4th edition.

In his valuable treatise Mr. Scrutton comments on Lauri *versus* Renad as follows: "It is respectfully submitted that the decision was wrong. The piece in question had not in 1887 fallen into the public domain in France, its country of origin; the fact that it could in 1886 have been translated in England, which was not its country of origin, appears immaterial, except to justify the proviso to Section 6 of the Act of 1886, which was not applicable in Lauri *versus* Renad. It appears from the same reasoning to be immaterial that the author of a work produced before 1886, had not acquired English copyright by failing to register within a year of first publication, as required by the earlier Copyright Act and Orders in Council; provided that in 1887 his work was the subject of copyright in the country of origin, so as to come within Section 14 of the Convention. This, indeed, was the state of facts in Hanfstaengle *versus* Holloway, 1893, 2 Q. B., 1."

It will be seen that Mr. Scrutton simply lays down the law as to what facts were "immaterial," without a scrap of argument to show why. He tells us what "appears from the same reasoning" without having reasoned at all about the matter. The writer has humbly endeavoured to show that reasoning points in the other direction.

Lauri *versus* Renad was a case of effluxion of time: to say "the decision was wrong," therefore, amounts to saying that, even in the case of copyrights expired by effluxion of time in the country of the forum, Section 6 would apply, and give a renewed term; but, even admitting for a moment that Article 14 controls Section 6, and that the Convention applies to everything alive in the country of origin, the result would only be that an author so favoured would enjoy the *rights given to natives* (*i.e.*, of the country of the forum), and the right of a native of Great Britain to a copyright dating from say forty-two years back would be probably *nil*.

Lauri *versus* Renad was a case of the term given to authors as a limit of exclusive translating right. But let us take a case like Gounod's Opera of *Mireille*, which we will suppose to have been produced about 1860, in Paris at the Opera

Comique. The right would not be yet expired in the country of origin, where the protection lasts, roughly speaking, fifty years from the death of the author. The right of "*a native*" of Great Britain, however, would have expired by effluxion of time since 1860, and he could take nothing under Article 2 of the Convention, unless some ingenious mode can be suggested of inventing or conferring a period less in duration than the whole term of British Copyright repented over again (if the term granted by the country of origin lasted so long), for it is hardly conceivable that the author should be benefited to this extent without having done anything to deserve it.

In Lauri *versus* Renad no doubt, the period at issue was so much shorter than in the case last supposed, that the result of holding the retrospective view was less startling.

The view, however, of the eminent judges who decided that case was unequivocally "to negative the idea that the Berne Convention could revive a copy- or performing-right which had come to a termination *by any mode*." An ingenious distinction between effluxion of time and loss of right by omission to register, has been suggested by those who wish to escape from the decision, but no one who was engaged in the case (except perhaps a disappointed litigant) could blind themselves so completely as to suppose that the principle meant to be enunciated would not cover the case of a copyright allowed to expire for want of compliance with the formalities required by the early convention to be completed within a given time. The distinction sought to be established between the word "expired" used by their Lordships, and dead from neglect or "allowed to lapse" has no foundation, except in the wish which is father to the thought.

A question, which has never been noticed in any treatise, arises upon the construction of the convention with France, in 1852,* and of some others framed on the same model. That convention imposed as a condition to the attainment of copyright in the United Kingdom for a French work, that it should be registered at Stationers' Hall within three months of first publication abroad. The point that arises upon the language of the document is, whether this formality is, what is called in legal phraseology, a condition subsequent, or a condition precedent; in other words, does the copyright arise automatically on publication, subject to be destroyed if no registration occurs during the delay of three months, or is there no protection for the work until registration? This question is

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* It was found impossible to set out this document in a work of this size. It will be found set out *in extenso* in the second edition of Copinger, and in other works on copyright of a date previous to 1886.

only of importance now, because it has been suggested, in favour of the view that dead copyrights can be revived by the Act of 1886, that French works which have been omitted to be registered are not the subject of expired copyright, and that the condition is *precedent*, and no copyright ever arose. It is difficult to see, however, how, even should the convention receive this construction, the case would be rendered more favourable for the first view. The reasoning seems a two-edged one, which may tell for either side.

It will be seen that the principle involved in Hanfstongle *versus* Holloway, is identical with that in Lauri *versus* Renad; and this is admitted even by Mr. Scrutton, the most ardent champion of the ultra-retrospective theory.

Mr. Justice Charles, in his judgment, never sought to distinguish the two cases, on the ground of the subject-matter not being actually identical, or otherwise; but he, nevertheless, while professing to decide in accordance with Lauri *versus* Renad, used language the exact contradictory of that of the Court of Appeal. Lauri *versus* Renad raised neatly the point, "Can—yes or no—a copyright, defunct at the date of the Statute of 1886, come into renewed vigour by the effect of Section 6?" and the Court said unanimously that it could not, and that Section 6 only revived works produced since the date of the Statute, and which expire between that date and the date of any Order in Council under the Statutes of 1844 and 1886.

Mr. Justice Charles, on the contrary, said distinctly that he considered that "the Section 6 covered all works of whatever date, whether alive or dead at the date of the Statute commencing."

Again, the Court in Lauri *versus* Renad said that to hold Section 6 retrospective, so as to bring in copyrights dead at the statutory date, would be to violate the maxim that "*nova constitutio futuris formam debet imponere, non præteritis.*

Mr. Justice Charles said, to give the Section that effect violated no maxim of the sort.

If it could be suggested that the difference *between the subject-matters of the two cases* was one affecting the principle of law applying to them, that suggestion did not occur to Mr. Scrutton, who, in his able work, is forced to deny the validity of Lauri *versus* Renad in order to support his view that Section 6 is retrospective *as to everything*, and (the writer supposes) his opinion that the Latin rule relied on by the Court of Appeal as to retrospective effect of Statutes is obsolete and to be disregarded.

To recapitulate briefly, the fallacy lying at the root of all the arguments against Lauri *versus* Renad is the supposition that the International Copyright Act, 1886, is to be moulded,

and the legal construction varied, to bring it into harmony with one particular convention, *to the exclusion of all others*, which may be wholly different in their terms, because, forsooth, the Statute contains an allusion to the one favoured document, and that a document, which was then only in draft and not in operation for months afterwards.

But even if it be held that the Berne Convention ought to control the construction of the Statute of 1886, and impose upon that Statute a meaning which may be inconsistent with future conventions, it is by no means clear that Article 14 does necessitate the ultra-retrospective view, if *the protocol have its due weight*. The effect of the protocol, then, would be that interests acquired by the public through the lapse of copy- or performing-right by failure to observe the formalities required under the old conventions would not be allowed to be compromised, through the suggested retrospective effect given to Section 6 by Mr. Justice Charles, in opposition to the words of Lord Justice Lindley and Kay.

Mr. Justice Charles said that "the words did not oblige" him to hold that the Section was not retrospective.

That was not sufficient. Mr. Justice Lindley had laid down the converse in Lauri *versus* Renad, viz., that the Courts *cannot* hold a Section retrospective unless the *language plainly requires such a construction*.

It can hardly be said by the keenest retro-activist, that there is no doubt on Section 6, nor does even Mr. Justice Charles say so; he only says (in effect) that it was inconvenient not to take in prior works in date, and that the words *did not force him* to hold the contrary of what seemed convenient, and that is just what the Court of Appeal said was not a legitimate *ratio decidendi*.

It is to be hoped that the whole subject will be dealt with by the Court of Final Appeal.

The clause relating to scope, *qua* date, of the Austro-Hungarian Convention with Great Britain (which came into operation on May 11, 1894), is subject to the same question as to retrospective operation as the Berne Convention. The description of works "prior to the date of the convention coming into effect," occurring frequently, seems to contemplate the construction which would admit works produced between the date of the Statute of 1886 becoming law and that of the Order in Council. Article 8.

In the case of Moul *versus* Grönings, after the Berne Convention had been signed, the owner of a French work sued a Brighton *chef d'orchestre* for performing that work, although it had fallen into the public domain for want of registration under the convention of 1852. The writer, who was counsel for the defendant, argued that the Statute of 1886 did not bring Moul *versus* Grönings, 1891, 2, Queen's Bench Division, 443.

Section 6 of the Statute of 1882.

in and revive the expired work; but it became unnecessary to decide the point, as the Court held that, *the work having been produced*, the proviso in Section 6 indemnified the defendant and freed him from all liability to the plaintiff, whether the Statute was *retrospective or not. The short point that the* defendant had "an interest which was of value" was a tempting one to seize upon as a *ratio decidendi*, and their Lordships escaped embarking upon the wider question of the statutory scope, wisely, as the length of this essay upon it clearly shows.

The limits of this work preclude the possibility of setting out in extenso all the statutes affecting copyright; a selection has been made of those which are recent in date, or are difficult to obtain.

APPENDIX B.

[45 & 46 Vict.] *Copyright (Musical Compositions)* [Ch. 40.]
Act, 1882.

An Act to amend the law of Copyright relating to Musical Compositions. [August 10, 1882.]

A.D. 1882. WHEREAS it is expedient to amend the law relating to copyright in musical compositions, and to protect the public from vexatious proceedings for the recovery of penalties for the unauthorised performance of the same:—

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Printed notice restraining public performance.

(1) On and after the passing of this Act the proprietor of the copyright in any musical composition first published after the passing of this Act, or his assignee, who shall be entitled to and be desirous of retaining in his own hands exclusively the right of public representation or performance of the same, shall print or cause to be printed upon the title-page of every published copy of such musical composition a notice to the effect that the right of public representation or performance is reserved.

(2) In case, after the passing of this Act, the right of public representation or performance of, and the copyright in, any

musical composition shall be or become vested before publication of any copy thereof in different owners, then, if the owner of the right of public representation or performance shall desire to retain the same, he shall, before any such publication of any copy of such musical composition, give to the owner of the copyright therein notice in writing requiring him to print upon every copy of such musical composition a notice to the effect that the right of public representation or performance is reserved; but in case the right of public representation or performance of, and the copyright in, any musical composition shall, after publication of any copy thereof subsequently to the passing of this Act, first become vested in different owners, and such notice as aforesaid shall have been duly printed on all copies published after the passing of this Act previously to such vesting, then, if the owner of the right of performance and representation shall desire to retain the same, he shall, before the publication of any further copies of such musical composition, give notice in writing to the person in whom the copyright shall be then vested, requiring him to print such notice as aforesaid on every copy of such musical composition to be thereafter published.

Provision when right of performance and copyright are vested in different owners.

(3) If the owner for the time being of the copyright in any musical composition shall, after due notice being given to him or his predecessor in title at the time, and generally in accordance with the last preceding section, neglect or fail to print legibly and conspicuously upon every copy of such composition published by him or by his authority, or by any person lawfully entitled to publish the same, and claiming through or under him, a note or memorandum stating that the right of public representation or performance is reserved, then and in such case the owner of the copyright at the time of the happening of such neglect or default, shall forfeit and pay to the owner of the right of public representation or performance of such composition the sum of twenty pounds, to be recovered in any Court of competent jurisdiction.

Penalty on owner of copyright for non-compliance with notice from owner of right of performance.

(4) Notwithstanding the provisions of the Act passed in the third and fourth years of His Majesty King William the Fourth, to amend the laws relating to dramatic literary property, or any other Act in which those provisions are incorporated, the costs of any action or proceedings for penalties or damages in respect of the unauthorised representation or performance of any musical composition published before the passing of this Act shall, in cases in which the plaintiff shall not recover more than forty shillings as penalty or damages, be in the discretion of the Court or judge before whom such action or proceedings shall be tried.

Costs. 3 & 4 Will. IV., c. 15.

(5) This Act may be cited as the Copyright (Musical Compositions) Act, 1882.

Short title.

[51 & 52 Vict.] *Copyright (Musical Compositions) Act*, 1888. [Ch. 17.]

An Act to amend the Law relating to the Recovery of Penalties for the unauthorised Performance of Copyright Musical Compositions. [July 5, 1888.]

WHEREAS it is expedient to further amend the law relating to copyright in musical compositions, and to further protect the public from vexatious proceedings for the recovery of penalties for the unauthorised performance of the same:—

A.D. 1888.

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual, Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Provision as to damages.

(1) Notwithstanding the provisions of the Act of the Session held in the third and fourth years of His Majesty King William the Fourth, chapter fifteen, to amend the laws relating to dramatic literary property, or any other Act in which those provisions are incorporated, the penalty or damages to be awarded upon any action or proceedings in respect of each and every unauthorised representation or performance of any musical composition, whether published before or after the passing of this Act shall be such a sum or sums as shall, in the discretion of the Court or judge before whom such action or proceedings shall be tried, be reasonable, and the Court or judge before whom such action or proceedings shall be tried may award a less sum than forty shillings in respect of each and every such unauthorised representation or performance as aforesaid, or a nominal penalty or nominal damages as the justice of the case may require.

Costs to be in discretion of judge. 45 & 46 Vict., c. 40.

(2) The costs of all such actions or proceedings as aforesaid shall be in the absolute discretion of the judge before whom such actions and proceedings shall be tried, and Section 4 of the Copyright (Musical Compositions) Act, 1882, is hereby repealed.

Proprietor not wilfully permitting such performance to be exempt.

(3) The proprietor, tenant, or occupier of any place of dramatic entertainment, or other place at which any unauthorised representation or performance of any musical composition, whether published before or after the passing of this Act, shall take place, shall not by reason of such representation or performance be liable to any penalty or damages in respect thereof, unless he shall wilfully cause or permit such unauthorised representation or performance, knowing it to be unauthorised.

Saving for operas and plays.

(4) The provisions of this Act shall not apply to any action or proceedings in respect of a representation or performance

of any opera or stage play in any theatre or other place of public entertainment duly licensed in that respect.

Short title.

(5) This Act may be cited as the Copyright (Musical Compositions) Act, 1888.

[2 EDW. 7.] *Musical (Summary Proceedings) Copyright Act*, 1902. [CH. 15.]

An Act to amend the Law relating to Musical Copyright. A.D. 1902.

[July 22, 1902.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Seizure, &c., of pirated copies.

(1) A court of summary jurisdiction, upon the application of the owner of the copyright in any musical work, may act as follows: If satisfied by evidence that there is reasonable ground for believing that pirated copies of such musical work are being hawked, carried about, sold, or offered for sale, may, by order, authorise a constable to seize such copies without warrant and to bring them before the court, and the court, on proof that the copies are pirated, may order them to be destroyed or to be delivered up to the owner of the copyright if he makes application for that delivery.

Power to seize copies on hawkers.

(2) If any person shall hawk, carry about, sell, or offer for sale any pirated copy of any musical work, every such pirated copy may be seized by any constable without warrant, on the request in writing of the apparent owner of the copyright in such work, or of his agent thereto authorised in writing, and at the risk of such owner.

On seizure of any such copies, they shall be conveyed by such constable before a court of summary jurisdiction, and on proof that they are infringements of copyright, shall be forfeited or destroyed, or otherwise dealt with as the court may think fit.

Definitions.

(3) "Musical copyright" means the exclusive right of the owner of such copyright under the Copyright Acts in force for the time being to do or to authorise another person to do all or any of the following things in respect of a musical work:—

(1) To make copies by writing or otherwise of such musical work.

(2) To abridge such musical work.

(3) To make any new adaptation, arrangement, or setting of such musical work, or of the melody thereof, in any notation or system.

"Musical work" means any combination of melody and

harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced.

"*Pirated musical work*" means any musical work written, printed, or otherwise reproduced, without the consent lawfully given by the owner of the copyright in such musical work.

Short title and commencement

(4) This act may be cited as the Musical (Summary Proceedings) Copyright Act, 1902, and shall come into operation on the first day of October one thousand nine hundred and two, and shall apply only to the United Kingdom.

APPENDIX C.

THE BERNE CONVENTION.

Article 1.

The Contracting States are constituted into an Union for the protection of the rights of authors over their literary and artistic works.

Article 2.

Authors of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives.

The enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection granted in the said country of origin.

The country of origin of the work is that in which the work is first published, or if such publication takes place simultaneously in several countries of the Union, that one of them in which the shortest term of protection is granted by law.

For unpublished works the country to which the author belongs is considered the country of origin of the work.

Article 3.

The stipulations of the present Convention apply equally to the publishers of literary and artistic works published in one of the countries of the Union, but of which the authors belong to a country which is *not* a party to the Union.

ARTICLE 4.

The expression "literary and artistic works" comprehends books, pamphlets, and all other writings; dramatic or dramatico-musical works, musical compositions with or without words; works of design, painting, sculpture, and engraving; lithographs, illustrations, geographical charts; plans, sketches, and plastic works relative to geography, topography, architecture, or science in general; in fact, every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction.

ARTICLE 5.

Authors of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries the exclusive right of making or authorising the translation of their works until the expiration of ten years from the publication of the original work in one of the countries of the Union.

For works published in incomplete parts (*livraisons*) the period of ten years commences from the date of publication of the last part of the original work.

For works composed of several volumes published at intervals, as well as for bulletins or collections (*cahiers*) published by literary or scientific societies, or by private persons, each volume, bulletin, or collection is, with regard to the period of ten years, considered as a separate work.

In the cases provided for by the present Article, and for the calculation of the period of protection, December 31 of the year in which the work was published is admitted as the date of publication.

ARTICLE 6.

Authorised translations are protected as original works. They consequently enjoy the protection stipulated in Articles 2 and 3 as regards their unauthorised reproduction in the countries of the Union.

It is understood that, in the case of a work for which the translating right has fallen into the public domain, the translator cannot oppose the translation of the same work by other writers.

ARTICLE 7.

Articles from newspapers or periodicals published in any of the countries of the Union may be reproduced in original or in translation in the other countries of the Union, unless the authors or publishers have expressly forbidden it. For periodicals it is sufficient if the prohibition is made in a general manner at the beginning of each number of the periodical.

This prohibition cannot in any case apply to articles of

political discussion, or to the reproduction of news of the day or *current topics*.

ARTICLE 8.

As regards the liberty of extracting portions from literary or artistic works for use in publications destined for educational or scientific purposes, or for chrestomathies, the matter is to be decided by the legislation of the different countries of the Union, or by special arrangements existing or to be concluded between them.

ARTICLE 9.

The stipulations of Article 2 apply to the public representation of dramatic or dramatico-musical works, whether such works be published or not.

Authors of dramatic or dramatico-musical works, or their lawful representatives, are, during the existence of their exclusive right of translation, equally protected against the unauthorised public representation of translations of their works.

The stipulations of Article 2 apply equally to the public performance of unpublished musical works, or of published works in which the author has expressly declared on the title-page or commencement of the work that he forbids the public performance.

ARTICLE 10.

Unauthorised indirect appropriations of a literary or artistic work, of various kinds, such as *adaptations*, *arrangements of music*, &c., are specially included amongst the illicit reproductions to which the present Convention applies, when they are only the 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.

It is agreed that, in the application of the present Article, the Tribunals of the various countries of the Union will, if there is occasion, conform themselves to the provisions of their respective laws.

ARTICLE 11.

In order that the authors of works protected by the present Convention shall, in the absence of proof to the contrary, be considered as such, and be consequently admitted to institute proceedings against pirates before the Courts of the various countries of the Union, it will be sufficient that their name be indicated on the work in the accustomed manner.

For anonymous or pseudonymous works, the publisher whose name is indicated on the work is entitled to protect the rights belonging to the author. He is, without other

proof, reputed the lawful representative of the anonymous or pseudonymous author.

It is, nevertheless, agreed that the Tribunals may, if necessary, require the production of a certificate from the competent authority to the effect that the formalities prescribed by law in the country of origin have been accomplished, as contemplated in Article 2.

Article 12.

Pirated works may be seized on importation into those countries of the Union where the original work enjoys legal protection.

The seizure shall take place conformably to the domestic law of each State.

Article 13.

It is understood that the provisions of the present Convention cannot in any way derogate from the right belonging to the Government of each country of the Union to permit, to control, or to prohibit, by measures of domestic legislation or police, the circulation, representation, or exhibition of any works or productions in regard to which the competent authority may find it necessary to exercise that right.

Article 14.

Under the reserves and conditions to be determined by common agreement,* the present Convention applies to all works which at the moment of its coming into force have not yet fallen into the public domain in the country of origin.

Article 15.

It is understood that the governments of the countries of the Union reserve to themselves respectively the right to enter into separate and particular arrangements between each other, provided always that such arrangements confer upon authors or their lawful representatives more extended rights than those granted by the Union, or embody other stipulations not contrary to the present Convention.

Article 16.

An international office is established, under the name of "Office of the International Union for the Protection of Literary and Artistic Works."

This office, of which the expenses will be borne by the Administrations of all the countries of the Union, is placed

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* See paragraph 4 of Final Protocol, p. 15.

under the high authority of the Superior Administration of the Swiss Confederation, and works under its direction. The functions of this office are determined by common accord between the countries of the Union.

Article 17.

The present Convention may be submitted to revisions in order to introduce therein amendments calculated to perfect the system of the Union.

Questions of this kind, as well as those which are of interest to the Union in other respects, will be considered in Conferences to be held successively in the countries of the Union by delegates of the said countries.

It is understood that no alteration in the present Convention shall be binding on the Union except by the unanimous consent of the countries composing it.

Article 18.

Countries which have not become parties to the present Convention, and which grant by their domestic law the protection of rights secured by this Convention, shall be admitted to accede thereto on request to that effect.

Such accession shall be notified in writing to the Government of the Swiss Confederation, who will communicate it to all the other countries of the Union.

Such accession shall imply full adhesion to all the clauses and admission to all the advantages provided by the present Convention.

Article 19.

Countries acceding to the present Convention shall also have the right to accede thereto at any time for their Colonies or foreign possessions.

They may do this either by a general declaration comprehending all their Colonies or possessions within the accession, or by specially naming those comprised therein, or by simply indicating those which are excluded.

Article 20.

The present Convention shall be put in force three months after the exchange of the ratifications, and shall remain in effect for an indefinite period until the termination of a year from the day on which it may have been denounced.

Such denunciation shall be made to the Government authorised to receive accessions, and shall only be effective as regards the country making it, the Convention remaining in full force and effect for the other countries of the Union.

ARTICLE 21.

The present Convention shall be ratified, and the ratifications exchanged at Berne, within the space of one year at the latest.

In witness whereof, the respective Plenipotentiaries have signed the same, and have affixed thereto the seal of their arms.

Done at Berne, the 7th day of September, 1886.

ADDITIONAL ARTICLE.

The Plenipotentiaries assembled to sign the Convention concerning the creation of an International Union for the protection of literary and artistic works have agreed upon the following Additional Article, which shall be ratified together with the Convention to which it relates :—

The Convention concluded this day in no wise affects the maintenance of existing conventions between the Contracting States, provided always that such conventions confer on authors, or their lawful representatives, rights more extended than those secured by the Union, or contain other stipulations which are not contrary to the said Convention.

In witness whereof, the respective Plenipotentiaries have signed the present Additional Article.

Done at Berne, the 9th day of September, 1886.

FINAL PROTOCOL.

(2) As regards Article 9, it is agreed that those countries of the Union whose legislation implicitly includes choregraphic works amongst dramatico-musical works, expressly admit the former works to the benefits of the Convention concluded this day.

It is, however, understood that questions which may arise on the application of this clause shall rest within the competence of the respective tribunals to decide.

(3) It is understood that the manufacture and sale of instruments for the mechanical reproduction of musical airs which are copyright, shall not be considered as constituting an infringement of musical copyright.

(4) The common agreement alluded to in Article 14 of the Convention is established as follows :—

The application of the Convention to works which have not fallen into the public domain at the time when it comes into force, shall operate according to the stipulations on this head, which may be contained in special conventions, either existing or to be concluded.

In the absence of such stipulations, between any countries

of the Union, the respective countries shall regulate, each for itself, by its domestic legislation, the manner in which the principle contained in Article 14 is to be applied.

(1) With reference to the accession of the colonies or foreign possessions provided for by Article 19 of the Convention.

The Plenipotentiaries of His Catholic Majesty the King of Spain reserve to the Government the power of making known His Majesty's decision at the time of the exchange of ratifications.

The Plenipotentiary of the French Republic states that the accession of his country carries with it that of all the French Colonies.

The Plenipotentiaries of Her Britannic Majesty state that the accession of Great Britain to the Convention for the protection of literary and artistic works comprises the United Kingdom of Great Britain and Ireland, and all the colonies and foreign possessions of Her Britannic Majesty.

At the same time they reserve to the Government of Her Britannic Majesty the power of announcing at any time the separate denunciation of the Convention by one or several of the following Colonies or possessions, in the manner provided for by Article 20 of the Convention, namely :—

India, the Dominion of Canada, Newfoundland, the Cape, Natal, New South Wales, Victoria, Queensland, Tasmania, South Australia, Western Australia, and New Zealand.

ORDER IN COUNCIL GIVING VALIDITY TO THE BERNE CONVENTION.

AT THE COURT AT WINDSOR, NOVEMBER 28, 1887.

The Berne Convention itself is practically set out, so far as regards music, at p. 77 *et seq.*, Chap. VI., with comments on the main questions.

Whereas the Convention, of which an English translation is set out in the first schedule to this Order, has been concluded between Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the foreign countries named in this Order, with respect to the protection to be given by way of copyright to the authors of literary and artistic works.

And whereas the ratifications of the said Convention were exchanged on September 5, one thousand eight hundred and eighty-seven, between Her Majesty the Queen and the Governments of the foreign countries following, that is to say :—

Belgium, France, Germany, Haiti, Italy, Spain, Switzerland, Tunis.

And whereas Her Majesty in Council is satisfied that the foreign countries named in this Order have made such provisions as it appears to Her Majesty expedient to require for the protection of authors of works first produced in Her Majesty's dominions.

Now, therefore, Her Majesty, by and with the advice of her Privy Council, and by virtue of the authority committed to her by the International Copyright Acts, 1844 to 1886, doth order, and it is hereby ordered as follows:—

(1) The Convention, as set forth in the first schedule to this Order, shall as from the commencement of this Order, have full effect throughout Her Majesty's dominions, and all persons are enjoined to observe the same.

(2) This Order shall extend to the foreign countries following, that is to say:—

Belgium, France, Germany, Haiti, Italy, Spain, Switzerland, Tunis.

And the above countries are in this Order referred to as the foreign countries of the Copyright Union, and these foreign countries, together with Her Majesty's dominions, are in this Order referred to as "the countries of the Copyright Union."

(3) The author of a literary or artistic work, which on or after the commencement of this Order is first produced in one of the foreign countries of the Copyright Union shall, subject as in this Order, and in the International Copyright Acts, 1844 to 1886, mentioned, have as respects that work throughout Her Majesty's dominions the same right of copyright (*sic*), including any right capable of being conferred by an Order in Council under Section 2 or Section 5 of the International Copyright Act, 1844, or under any other enactment, as if the work had been first produced in the United Kingdom, and shall have such rights during the same period.

Provided that the author of a literary or artistic work shall not have any greater right or longer term of copyright therein than that which he enjoys in the country in which the work is first produced.

The author of any literary or artistic work first produced before the commencement of this Order shall have the rights and remedies to which he is entitled under Section 6 of the International Copyright Act, 1886.

(4) The rights conferred by the International Copyright Acts, 1844 to 1886, shall, in the case of a literary or artistic work first produced in one of the foreign countries of the Copyright Union by an author who is not a subject or citizen of any of the said foreign countries, be limited as follows: that is to say, the author shall not be entitled to take legal proceedings in Her Majesty's dominions for protecting any copyright in such work, but the publisher of such work shall, for the purpose of any legal proceedings in Her Majesty's dominions for protecting any copyright in such work, be deemed to be entitled to such copyright as if he were the author, but without prejudice to the rights of such author and publisher as between themselves.

(5) A literary or artistic work first produced simultaneously in two or more countries of the Copyright Union shall be deemed for the purpose of copyright to have been first produced in that one of those countries in which the term of copyright in the work is shortest.

(6) Section 6 of the International Copyright Act, 1852, shall not apply to any dramatic piece to which protection is extended by virtue of this Order.

(7) The orders mentioned in the second schedule to this Order are hereby revoked.

Provided that neither such revocation nor anything else in this Order shall prejudicially affect any right acquired or accrued before the commencement of this Order by virtue of any Order hereby revoked; and any person entitled to such right shall continue entitled thereto, and to the remedies for the same, in like manner as if the Order had not been made.

(8) This Order shall be construed as if it formed part of the International Copyright Act, 1886.

(9) This Order shall come into operation on December 6, one thousand eight hundred and eighty-seven, which day is in this Order referred to as the commencement of this Order.

And the Lords Commissioners of Her Majesty's Treasury are to give the necessary orders herein accordingly.

ORDER IN COUNCIL, MARCH 7, 1893.

(1) The additional Act to the Berne Convention set forth in the Schedule to this Order shall, as from the commencement of this Order have full effect throughout Her Majesty's dominions, and all persons are enjoined to observe the same:—

(2) This Order shall extend to the foreign countries following, that to say:—

Germany,	Luxembourg,
Belgium,	Monaco,
Spain,	Montenegro,
France,	Switzerland, and
Italy,	Tunis.

(3) The fourth Article of the hereinbefore recited Order in Council of the twenty-eighth day of November, one thousand eight hundred and eighty-seven, shall as from the commencement of this Order cease to apply to the foreign countries to which this Order extends:—

(4) The hereintofore recited Order in Council of the twenty-eighth day of November, one thousand eight hundred and eighty-seven, shall continue to be of full force and effect, save in so far as the same is varied by this Order:—

(5) Nothing contained in this Order shall prejudicially

affect any right acquired or accrued before the commencement of this Order by virtue of the said Order in Council of the twenty-eighth day of November, one thousand eight hundred and eighty-seven, or otherwise, and any person entitled to such right shall continue entitled thereto, and to the remedies for the same in like manner as if this Order had not been made.

(6) The author of any literary or artistic work first produced before the commencement of this Order shall have the rights and remedies to which he is entitled under Section 6 of "The International Copyright Act, 1886."

(7) This Order shall be construed as if it formed part of "The International Copyright Act, 1886."

(8) This Order shall come into operation on the date hereof which day is in this Order referred to as the commencement of this Order.

And the Lords Commissioners of Her Majesty's Treasury are to give the necessary order herein accordingly.

C. L. Peel.

SCHEDULE.

Additional Act.

The following is an English translation of the Additional Act with the omission of the formal beginning and end:—

Article I.

The International Convention of September 9, 1886, is modified as follows:—

(1) Article II.—The first paragraph of Article II. shall run as follows:—

> "Authors belonging to any one of the countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, whether unpublished, or published *for the first time* in one of these countries, the rights which the respective laws do now or shall hereafter grant to *nationals*."

A fifth paragraph is added in these terms:—

"*Posthumous works are included among those to be protected.*"

(2) Article III.—Article III. shall run as follows:—

> "Authors not belonging to one of the countries of the Union, who shall have published or caused to be published for the first time their literary or artistic works in a country which is a party to the Union, shall enjoy, in respect of such works, the protection accorded by the Berne Convention, *and by the present Additional Act*."

(3) ARTICLE V.—The first paragraph of Article V. shall run as follows:—

"Authors belonging to any one of the countries of the Union, or their lawful representatives, shall enjoy in the other countries the exclusive right of making or authorising the translation of their works *during the entire period of their right over the original work.* Nevertheless, the exclusive right of translation shall cease to exist if the author shall not have availed himself of it, during a period of ten years from the date of the first publication of the original work, by publishing or causing to be published in one of the countries of the Union, a translation in the language for which protection is to be claimed."

(5) ARTICLE XII.—Article XII. shall run as follows:—

"Pirated works may be seized by the competent authorities of the countries of the Union where the original work is entitled to legal protection.

"The seizure shall take place conformably to the domestic law of each State."

(6) ARTICLE XX.—The second paragraph of Article XX. shall run as follows:—

"Such denunciation shall be made to the Government of the Swiss Confederation. It shall only be effective as regards the country making it, the Convention remaining in full force and effect for the other countries of the Union."

ARTICLE II.

The Final Protocol annexed to the Convention of September 9, 1896, is modified as follows:—

(2) No. 4.—This clause shall run as follows:—

"The common agreement contemplated in Article XIV. of the Convention is established as follows:—

"The application of the Berne Convention and *of the present Additional Act* to works which have not fallen into the public domain within the country of origin at the time when these engagements come into force, shall operate according to such stipulations on this head as may be contained in special conventions, either actually existing or to be concluded hereafter.

"In the absence of such stipulations between any of the countries of the Union, the respective countries shall regulate, each for itself, by its domestic legislation, the manner in which the principle contained in Article XIV. is to be applied.

"The stipulations of Article XIV. of the Berne Conven-

tion and of the present clause of the Final Protocol shall apply equally to the exclusive right of translation, in so far as such right is established by the present Additional Act.

"The temporary stipulations noted above shall be applicable to countries which may hereafter accede to the Union."

ARTICLE III.

The countries of the Union which are not parties to the present Additional Act, shall at any time be allowed to accede thereto on their request to that effect. This stipulation shall apply equally to countries which may hereafter accede to the Convention of September 9, 1886. It will suffice for this purpose that such accession should be notified in writing to the Swiss Federal Council, who shall in turn communicate it to the other Governments.

ARTICLE IV.

The present Additional Act shall have the same force and duration as the Convention of September 9, 1886.

It shall be ratified, and the ratifications shall be exchanged at Paris, in the manner adopted in the case of that Convention, as soon as possible, and within the space of one year at the latest.

It shall come into force as regards those countries which shall have ratified it three months after such exchange of ratifications.

CONVENTION BETWEEN GREAT BRITAIN AND AUSTRIA-HUNGARY FOR THE ESTABLISHMENT OF INTERNATIONAL COPYRIGHT.

Signed at Vienna, April 24, 1893.

[*Ratifications exchanged at Vienna, April* 14, 1894.]

[A Hungarian version was also attached to the Convention as signed.]

ARTICLE I.

Authors of literary or artistic works and their legal representatives, including publishers, shall enjoy reciprocally, in the dominions of the High Contracting Parties, the advantages which are, or may be, granted by law there for the protection of works of literature or art.

Consequently, authors of literary or artistic works which have been first published in the dominions of one of the High Contracting Parties, as well as their legal representatives,

shall have in the dominions of the other High Contracting Party the same protection and the same legal remedy against all infringement of their rights as if the work had been first published in the country where the infringement may have taken place.

In the same manner, the authors of literary or artistic works, and their legal representatives, who are subjects of one of the High Contracting Parties, or who reside within its dominions, shall in the dominions of the other Contracting Party enjoy the same protection and the same legal remedies against all infringements of their rights as though they were subjects of or residents in the State in which the infringement may have taken place.

Those advantages shall only be reciprocally guaranteed to authors and their legal representatives when the work in question is also protected by the laws of the State where the work was first published, and the duration of protection in the other country shall not exceed that which is granted to authors and their legal representatives in the country where the work was first published.

Article II.

The right of translation forming part of the copyright, the protection of the right of translation is assured under the conditions laid down by this Convention. If ten years after the expiry of the year in which a work to be protected in Her Majesty's dominions on the basis of this Convention has appeared, no translation in English has been published the right of translating the work into English shall no longer within those dominions exclusively belong to the author.

Article III.

Authorised translations are protected as original works. They consequently enjoy the full protection granted by this Convention against the unauthorised reproduction of original works.

It is understood that in the case of a work for which the translating right has fallen into the public domain, the translator cannot oppose the translation of the same work by other writers.

Article IV.

The expression "literary or artistic works" comprehends books, pamphlets, and all other writings; dramatic or dramatico-musical works, musical compositions, with or without words; works of design, painting, sculpture, and engraving, lithographs, illustrations, geographical charts, plans, sketches, and plastic works relating to geography, topography,

architecture, or science in general; in fact, every production whatsoever in the literary, scientific, or artistic domain which can be published by any mode of impression or reproduction.

ARTICLE V.

In the British Empire, and in the Kingdoms and States represented in the Austrian Reichsrath, the enjoyment of the rights secured by the present Convention is subject only to the accomplishment of the conditions and formalities prescribed by the law of that State in which the work is first published; and no further formalities or conditions shall be required in the other country.

Consequently, it shall not be necessary that a work which has obtained legal protection in one country should be registered, or copies thereof deposited in the other country, in order that the remedies against infringement may be obtained which are granted in the other country to works first published there.

In the dominions of the Hungarian Crown the enjoyment of these rights is subject, however, to the accomplishment of the conditions and formalities prescribed by the Laws and Regulations both of Great Britain and of Hungary.

ARTICLE VI.

In order that the authors of works protected by the present Convention shall, in the absence of proof to the contrary, be considered as such, and be consequently, admitted to institute proceedings in respect of the infringement of copyright before the Courts of the other State, it will suffice that their name be indicated on the work in the accustomed manner.

The Tribunals may, however, in cases of doubt, require the production of such further evidence as may be required by the Laws of the respective countries.

For anonymous or pseudonymous works, the publisher whose name is indicated on the work is entitled to protect the rights belonging to the author. He is, without other proof, reputed the legal representative of the anonymous or pseudonymous author, until the latter or his legal representative has declared and proved his rights.

ARTICLE VII.

The provisions of the present Convention cannot in any way derogate from the right of each of the High Contracting Parties to control, or to prohibit by measures of domestic legislation or police, the circulation, representation, exhibition, or sale of any work or production.

Each of the High Contracting Parties reserves also its right

to prohibit the importation into its own territory of works which, according to its internal Laws, or to the stipulations of treaties with other States, are or may be declared to be illicit reproductions.

Article VIII.

The provisions of the present Convention shall be applied to literature or artistic works produced prior to the date of its coming into effect, subject, however, to the limitations prescribed by the following regulations :—

(*a*) In the Austro-Hungarian Monarchy—

Copies completed before the coming into force of the present Convention, the production of which has been hitherto allowed, can also be circulated in future.

In the same manner, appliances for the reproduction of works, such as stereotypes, woodblocks, and engraved plates of every description, such as lithographers' stones, if their production has not hitherto been prohibited may continue to be used during a period of four years from the coming into force of the present Convention.

The distribution of such copies, and the use of the said appliances, is, however, only permitted if an inventory of the said copies and appliances is taken by the Government in question, in consequence of an application of the interested party, within three months from the coming into force of the present Convention, and if these copies and appliances are marked with a special stamp.

Dramatic and dramatico-musical works, or musical compositions legally performed before the coming into force of the present Convention, can also be performed in the future.

(*b*) In the United Kingdom of Great Britain and Ireland—

The author and publisher of any literary or artistic work first produced before the date at which this Convention comes into effect shall be entitled to all legal remedies against infringement; provided that where any person has, before the date of the publication of the Order in Council putting this Convention into effect, lawfully produced any work in the United Kingdom, any rights or interests arising from or in connection with such production, which are subsisting and valuable at the said date, shall not be diminished or prejudiced.

Article IX.

The provisions of the present Convention shall apply to all the colonies and foreign possessions of Her Britannic Majesty, excepting to those hereinafter named, that is to say, except to—

India.
The Dominion of Canada.
Newfoundland.
The Cape.
Natal.
New South Wales.
Victoria.
Queensland.
Tasmania.
South Australia.
Western Australia.
New Zealand.

Provided always that the provisions of the present Conventions shall apply to any of the above-named colonies or foreign possessions on whose behalf notice to that effect shall have been given by Her Britannic Majesty's Representative at the Court of His Imperial and Royal Apostolic Majesty within two years from the date of the exchange of ratifications of the present Convention.

Article X.

The present Convention shall remain in force for ten years from the day on which the ratifications are exchanged; and in case neither of the two High Contracting Parties shall have given notice twelve months before the expiration of the said period of ten years of their intention of terminating the present Convention, it shall remain in force until the expiration of one year from the day on which either of the High Contracting Parties shall have given such notice.

Her Britannic Majesty's Government shall also have the right to denounce the Convention in the same manner, on behalf of any of the colonies or foreign possessions mentioned in Article IX., separately.

Article XI.

The present Convention shall be ratified, and the ratifications shall be exchanged at Vienna as soon as possible. It shall come into effect ten days after its publication in conformity with the forms prescribed by the Laws of the High Contracting Parties respectively.

In witness whereof, the respective Plenipotentiaries have signed this Convention, and have hereunto affixed their seals.

Done at Vienna, April 24, in the year of our Lord one thousand eight hundred and ninety-three.

APPENDIX D.

CANADA.

AN ACT RESPECTING COPYRIGHT.

Registers of Copyrights.

(1) The Minister of Agriculture shall cause to be kept in his office books to be called the "Registers of Copyrights," in which proprietors of literary, scientific, and artistic works or compositions may have the same registered in accordance with the provisions of this Act.

Penalty for printing MSS. without owner's consent.

(3) If any person prints or publishes, or causes to be printed or published, any manuscript whatever, the said manuscript having not yet been printed in Canada or elsewhere, without the consent of the author or legal proprietor first obtained, such person shall be liable to the author or proprietor for all damages occasioned by such publication, to be recovered in any court of competent jurisdiction.

Who may have copyright.

(4) Any person domiciled in Canada, or in any part of the British possessions, or being a citizen of any country having an international copyright treaty with the United Kingdom, who is the author of any book, map, chart, or *musical composition*, or of any original painting, drawing, statue, sculpture, or photograph, or who invents, designs, etches, engraves, or causes to be engraved, etched, or made from his own design, any print or engraving, and the legal representatives of such person, shall have the sole right and liberty of printing, reprinting, publishing, reproducing and vending such literary, scientific, or artistic works or compositions, in whole or in part, and of allowing translations to be printed or reprinted and sold, of such literary works from one language into other languages, for the term of twenty-eight years from the time of recording the copyright thereof in the manner hereinafter directed;

Condition of obtaining copyright.

(ii.) The condition for obtaining such copyright shall be that the said literary, scientific, or artistic works be printed and published, or reprinted or republished in Canada, or in the case of works of art that it (*sic*) be produced or reproduced in Canada, whether they be so published or produced for the first time or contemporaneously with or subsequently to publication or production elsewhere; provided that in no case the exclusive privilege in Canada shall continue to exist after it has expired anywhere else.

Exception.

(iii.) No immoral, or licentious, or irreligious, or treasonable, or seditious, literary, scientific, or artistic work shall be the legitimate subject of such registration or copyright.

Renewal of copyright.

(5) If at the expiration of the aforesaid term of twenty-eight years, such author, or any of the authors when the work has been originally composed and made by more than one person, be still living, or being dead has left a widow, or a child, or children living, the same exclusive right shall be continued to such author, or, if dead, then to such widow and child or children (as the case may be) for the further term of fourteen years; but in such case within one year after the expiration of the first term the title of the work secured shall be a second time recorded, and all other regulations herein required to be observed in regard to original copyrights shall be complied with in respect to such renewed copyright.

Record of renewal to be published.

(6) In all cases of renewal of copyright under this Act the author or proprietor shall, within two months from the date of such renewal, cause a copy of the record thereof to be published once in the *Canada Gazette*.

Deposit of copies, &c., in the Minister of Agriculture's office.

(7) No person shall be entitled to the benefit of this Act unless he has deposited in the office of the Minister of Agriculture two copies of such book, map, chart, *musical composition*, photograph, print, cut, or engraving, and in case of paintings, drawings, statuary, and sculpture, unless he has furnished a written description of such works of art, and the Minister of Agriculture shall cause the copyright of the same to be recorded forthwith in a book to be kept for that purpose, in the manner adopted by the Minister of Agriculture, or prescribed by the rules and forms which may be made from time to time as hereinbefore provided.

One to be sent to the Library of Parliament.

(8) The Minister of Agriculture shall cause one of the two copies of such book, map, chart, musical composition, photograph, print, cut, or engraving aforesaid, to be deposited in the Library of the Parliament of Canada.

Notice of copyright to appear in work.

(9) No person shall be entitled to the benefit of this Act, unless he gives information of the copyright being secured, by causing to be inserted in the several copies of every edition published during the term secured, on the title page, or the page immediately following, if it be a book, or if a map, chart, musical composition. print, cut, engraving, or photograph, by causing to be impressed on the face thereof, or if a volume of maps, charts, music, engravings, or photographs, upon the title page or frontispiece thereof, the following words, that is to say: "Entered according to Act of Parliament of Canada, in the year by A. B., in the office of the Minister of Agriculture." But as regards paintings, drawings, statuary, and sculptures, the signature of the artist shall be deemed a sufficient notice of such proprietorship.

Exception.

(10) Pending the publication or republication in Canada of a literary, scientific, or artistic work, the author, or his legal

Interim copyright for one month from date of original publication elsewhere, may be obtained by registering, &c.

representatives or assigns, may obtain an interim copyright by depositing in the office of the Minister of Agriculture a copy of the title, or a designation of such work intended for publication or republication in Canada, the said title or designation to be registered in an interim copyright register in the said office, to secure to the author aforesaid, or his legal representatives or assigns, the exclusive rights recognised by this Act, previous to publication or republication in Canada; the said interim registration, however, not to endure for more than one month from the date of the original publication elsewhere, within which period the work shall be printed or reprinted and published in Canada.

Notices of registration to be published.

(ii.) In all cases of interim registration under this Act, the author or proprietor shall cause notice of such registration to be inserted once in the *Canada Gazette*.

Penalty for infringement of copyright of a book.

(11) If any other person after the *interim* registration of the title of any book according to this Act within the term herein limited, or after the copyright is secured, and for the term or terms of its duration, prints, publishes, or reprints or republishes, or imports, or causes to be so printed, published, or imported, any copy or any translation of such book without the consent of the person legally entitled to the copyright thereof first had and obtained by assignment, or knowing the same to be so printed or imported publishes, sells, or exposes for sale, or causes to be published, sold, or exposed for sale, any copy of such book without such consent, such offender shall forfeit every copy of such book to the person then legally entitled to the copyright thereof; and shall forfeit and pay for every such copy which may be found in his possession, either printed or printing (*sic*), published, imported, or exposed for sale, contrary to the intent of this Act, such sum not being less than ten cents, nor more than one dollar as the court shall determine; of which penalty one moiety shall be to the use of Her Majesty, and the other to the legal owner of such copyright, and such penalty may be recovered in any court of competent jurisdiction.*

Or of a print, &c.

(13) If any person, after the recording of any print, cut, or engraving, map, chart, *musical composition*, or photograph, according to the provisions of this Act, within the term or terms limited by this Act, engraves, etches, or works, sells or copies, or causes to be engraved, etched, or copied, made or sold, either in the whole or by varying, adding to, or diminishing the main design with intent to evade the law, or prints, or reprints, or imports for sale, or causes to be so printed or imported for sale, any such map, chart, *musical composition*, print, cut, or engraving, or any part thereof, without the consent of the proprietor or proprietors of the copyright thereof,

* Section 12, 14 and 20 have no bearing on music.

first obtained as aforesaid, or knowing the same to be so printed or imported without such consent, publishes, sells, or exposes for sale, or in any manner disposes of any such map, chart, *musical composition*, engraving, cut, photograph, or print without such consent as aforesaid, such offender or offenders shall forfeit the plate or plates on which such map, chart, *musical composition*, engraving, cut, photograph, or print has been copied, and also every sheet thereof so copied or printed as aforesaid, to the proprietor or proprietors of the copyright thereof, and shall further forfeit for every sheet of such map, *musical composition*, print, cut, or engraving which may be found in his or their possession, printed or published or exposed for sale contrary to the true intent and meaning of this Act, such sum not being less than ten cents nor more than one dollar, as the Court shall determine; and one moiety of such forfeiture shall go to the proprietor or proprietors, and the other moiety to the use of Her Majesty, and such forfeiture may be recovered in any court of competent jurisdiction.

Conditions of obtaining Canadian copyright for reprints at any time.

(15) Works of which the copyright has been granted and is subsisting in the United Kingdom, and copyright of which is not secured or subsisting in Canada under any Canadian or Provincial Act, shall upon being printed and published or reprinted and republished in Canada, be entitled to copyright under this Act; but nothing in this Act shall be held to prohibit the importation from the United Kingdom of copies of such works legally printed there.

Disposal of foreign reprints imported before registration of copyright.

(ii.) In the case of the reprinting of any such copyright work subsequent to its publication in the United Kingdom, any person who may have, previous (*sic*) to the date of entry of such work upon the registers of copyright, imported any foreign reprints, shall have the privilege of disposing of such reprints by sale or otherwise, the burden of proof, however, in such a case will lie with such person to establish the extent and regularity of the transaction.

Copyright may be granted to assignee of original copyright.

(16) Whenever the author of a literary, scientific, or artistic work or composition which may be the subject of copyright has executed the same for another person, or has sold the same to another person for due consideration, such author shall not be entitled to obtain or retain the proprietorship of such copyright, which is by the said transaction virtually transferred to the purchaser, who may avail himself of such privilege, unless a reserve of the said privilege is specially made by the author or artist in a deed duly executed.

Penalty for fraudulent assumption of copyright.

(17) If any person, not having legally acquired the copyright of a literary, scientific, or artistic work, inserts in any copy thereof printed, produced, reproduced, or imported, or impresses on any such copy that the same hath been entered

according to this Act, or words purporting to assert the existence of a Canadian Copyright in relation thereto, every person so offending shall incur a penalty not exceeding three hundred dollars (one moiety thereof shall be paid to the person who sues for the same, and the other moiety to the use of Her Majesty), to be recovered in any court of competent jurisdiction.

Penalty for non-publication after interim registration.

(2) If any person causes any work to be inserted in the Register of Interim Copyright, and fails to print and publish or reprint and republish the same within the time prescribed, he shall incur a penalty not exceeding one hundred dollars (one moiety whereof shall be paid to the person who sueth (*sic*) for the same, and the other moiety to the use of Her Majesty), to be recovered in any court of competent jurisdiction.

Copyright assignable.

(18) The right of an author of a literary, scientific, or artistic work to obtain a copyright, and the copyright when obtained, shall be assignable in law, either as to the whole interest or any part thereof, by an instrument in writing made in duplicate, and to be recorded in the office of the Minister of Agriculture, on production of both duplicates and payment of the fee hereinafter provided. One of the duplicates shall be retained in the office of the Minister of Agriculture, and the other returned, with the certificate of registration, to the party depositing it.

Conflicting claims in respect of copyright to be settled before a Court.

(19) In case of any person making application to register as his own the copyright of a literary, scientific, or artistic work already registered in another person's name, or in case of simultaneous conflicting applications, or of an application made by any person other than the person entered as proprietor of a registered copyright, to cancel the said copyright, the party so applying shall be notified that the question is to be settled before a court of competent jurisdiction, and no further proceedings shall be had concerning the subject before a judgment is produced, maintaining, cancelling, or otherwise settling the matter; and this registration, or cancellation, or adjustment of the said right shall then be made by the Minister of Agriculture in accordance with such decision.

Copies or extracts to be evidence.

(21) All copies or extracts certified from the office of the Minister of Agriculture shall be received in evidence without further proof, and without production of the originals.

Provision for the case of a copyrighted work being out of print.

(22) Should a work copyrighted in Canada become out of print, a complaint may be lodged by any person with the Minister of Agriculture, who, on the fact being ascertained to his satisfaction, shall notify the copyright owner of the complaint and of the fact; and if, within a reasonable time, no remedy is applied (*sic*) by such owner, the Minister of Agriculture may grant a licence to any person to publish a new edition

or to import the work, specifying the number of copies, and the royalty to be paid on each to the copyright owner.

Registration may be through an agent. False assumption of agency punishable.

(23) The application for the registration of an interim copyright, of a temporary copyright, and of a copyright may be made in the name of the author or of his legal representative by any person purporting to be the agent of the said author, and any fraudulent assumption of such authority shall be a misdemeanour and shall be punished by fine and imprisonment accordingly; and any damage caused by a fraudulent or an erroneous assumption of such authority shall be recoverable before any court of competent jurisdiction.

Penalty for making false entries, &c.

(24) If any person shall wilfully make or cause to be made any false entry in the register books of the Minister of Agriculture, or shall wilfully produce or cause to be tendered in evidence any paper falsely purporting to be a copy of an entry in the said books, he shall be guilty of a misdemeanour, and shall be punished accordingly.

Anonymous books may be entered in name of first publisher.

(25) If a book be published anonymously it shall be sufficient to enter it in the name of the first publisher thereof, either on behalf of the unnamed author or on behalf of such first publisher, as the case may be.

Second and subsequent editions.

(26) It shall not be requisite to deliver any printed copy of the second or of any subsequent edition of any book or books unless the same shall contain very important alterations or additions.

Limitation of actions.

(27) No act or prosecution for the recovery of any penalty under this Act shall be commenced more than two years after the cause of action arose.

Fees payable under this Act.

The following fees shall be payable to the Minister of Agriculture before an application for any of the purposes hereinafter mentioned shall be entertained; that is to say,

	Dol.	c.
On registering a copyright	1	00
On registering an interim copyright	0	50
On registering a temporary copyright	0	50
On recording an assignment	1	00
On certified copy of registration	0	50
On registering any decision of a Court of Justice for every folio	0	50

On office copies of documents not above mentioned, the following charges shall be made:—

	Dol.	c.
For every single or first folio certified copy	0	50
For every subsequent 100 words (fractions from and under 50 being not counted, and over 50 being counted for 100)	0	25

(2) The said fees shall be full (*sic*) of all service performed under this Act by the Minister of Agriculture, or by any person employed by him in pursuance of this Act.

(3) All fees received under this Act shall be paid over to the Receiver-General and form part of the Consolidated Revenue Fund of Canada. No fees shall be made the subject of exemption in favour of any person, and no fee exacted by this Act, once paid, shall be returned to the person who paid it.

Repeal of inconsistent Acts.

(28) "The Copyright Act of 1868," being the Act thirty-first Victoria, chapter fifty-four, and all other Acts or parts of Acts inconsistent with the provisions of this Act, are hereby repealed, subject to the provisions of the next following section.

Unexpired copyrights to continue unimpaired.

(29) All copyrights heretofore acquired under the Acts or parts of Acts repealed shall, in respect of the unexpired terms thereof, continue unimpaired, and shall have the same force and effect as regards the province or provinces to which they now extend, and shall be assignable and renewable, and all penalties and forfeitures incurred and to be incurred under the same may be sued for and enforced, and all prosecutions commenced before the passing of this Act for any such penalties or forfeitures already incurred, may be continued and completed as if such Acts were not repealed.

Short title.

(30) In citing this Act it shall be sufficient to call it "The Copyright Act of 1875."

This Statute is copied from the collection of Colonial Statutes made by Mr. F. Daldy for the Copyright Association in 1889.

An Act to give effect to an Act of the Parliament of the Dominion of Canada respecting Copyright.

[August 2, 1875.]

WHEREAS by an Order of Her Majesty in Council, dated July 7, 1868, it was ordered that all prohibitions contained in Acts of the Imperial Parliament against the importing into the Province of Canada, or against the selling, letting out to hire, exposing for sale or hire, or possessing therein foreign reprints of books first composed, written, printed or published in the United Kingdom, and entitled to copyright therein, should be suspended so far as regarded Canada:

And whereas the Senate and House of Commons of Canada did, in the second session of the third Parliament of the Dominion of Canada, held in the thirty-eighth year of Her Majesty's reign, pass a Bill intitled "An Act respecting Copyrights," which Bill has been reserved by the Governor-General for the signification of Her Majesty's pleasure thereon:

This Bill passed into law in the words last hereinbefore stated.

And whereas by the said reserved Bill provision is made, subject to such conditions as in the said Bill are mentioned,

for securing in Canada the rights of authors in respect of matters of copyright, and for prohibiting the importation into Canada of any work for which copyright under the said reserved Bill has been secured; and whereas doubts have arisen whether the said reserved Bill may not be repugnant to the said Order in Council, and it is expedient to remove such doubts and to confirm the said Bill:

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same as follows:

Short title of Act.

"(1) This Act may be cited for all purposes as "The Canada Copyright Act, 1875."

Definition of terms.

(2) In the construction of this Act the word "book" and "copyright" shall have respectively the same meaning as in the Act of the fifth and sixth years of Her Majesty's reign, chapter forty-five, intituled "An Act to amend the Law of Copyright."

Her Majesty may assent to the Bill in schedule.

(3) It shall be lawful for Her Majesty in Council to assent to the said reserved Bill, as contained in the Schedule to this Act annexed, and if Her Majesty shall be pleased to signify Her assent thereto, the said Bill shall come into operation at such time and such manner as Her Majesty may by Order in Council direct; anything in the Act of the twenty-eighth and twenty-ninth years of the reign of Her Majesty, chapter ninety-three, or in any other Act to the contrary notwithstanding.

Colonial reprints not to be imported into United Kingdom.

(4) Where any book in which, at the time when the said reserved Bill comes into operation, there is copyright in the United Kingdom, or any book in which thereafter there shall be such copyright, becomes entitled to copyright in Canada in pursuance of the provisions of the said reserved Bill, it shall be unlawful for any person not being the owner, in the United Kingdom, of the copyright in such book, or some person authorised by him, to import into the United Kingdom any copies of such book reprinted and republished in Canada; and for the purpose of such importation the seventeenth section of the said Act of the fifth and sixth years of the reign of Her Majesty, chapter forty-five, shall apply to all such books in the same manner as if they had been reprinted out of the British Dominions.

Order in Council of July 7, 1868, to continue in force subject to this Act.

(5) The said Order in Council, dated the seventh day of July, one thousand eight hundred and sixty-eight, shall continue in force so far as relates to books which are not entitled to copyright for the time being in pursuance of the said reserved Bill.

Copied from the collection of Statutes published by the Copyright Association in 1889.

APPENDIX E.

INDIA.

Act No. 20 of 1847.

Passed by the Right Honourable the Governor-General of India, in Council, on December 18, 1847.

An Act for the Encouragement of Learning in the Territories subject to the Government of the East India Company, by defining and providing for the enforcement of the right called copyright therein.

WHEREAS doubts may exist whether the right called copyright can be enforced by the Common Law of England in those parts of the territories subject to the Government of the East India Company into which the Common Law of England has been introduced.

And whereas doubts may exist whether the said right can be enforced by virtue of the principles of equity and good conscience in the other parts of the territories subject to the Government of the East India Company.

And whereas, for the encouragement of learning, it is desirable that the existence of the said right should be placed beyond doubt, and that the said right should be made capable of easy enforcement in every part of the said territories.

And whereas it is doubtful whether the Act of Parliament 5 and 6 Vict., c. 45, entitled "An Act to Amend the Law of Copyright," although such Act extend to every part of the British dominions, has made appropriate and sufficient provision for the enforcement in every part of the said territories subject to the Government of the East India Company of the said right by proprietors thereof; and whether the said Act of Parliament has made provision for the enforcement of the said right by or against any persons not being subject to the jurisdiction of the Courts established by Her Majesty's Charter.

I. It is, therefore hereby enacted, that the copyright in every book published in the lifetime of its author within the said territories after the passing of the Act of Parliament 3 and 4 Wm. IV., c. 85, entitled, "An Act for Effecting an Arrangement with the East India Company, and for the better Government of His Majesty's Indian Territories till the 30th day of April, 1854," shall endure for the natural life of such author, and for the further term of seven years commencing at the time of his death, and shall be the property of such author and his assigns. Provided always, that if the said term of

seven years shall expire before the end of forty-two years from the publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book published after the death of its author and after the passing of the Act of Parliament last aforesaid shall endure for the term of forty-two years from the first publication thereof; and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns.

II. And whereas it is expedient to provide against the suppression of books of importance to the public. It is enacted, and it shall be lawful for the Governor-General in Council, on complaint made to them that the proprietor of the copyright in any book published after the passing of this Act within the said territories has, after the death of its author, refused to republish or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a licence to such complainant to publish such book, in such manner and subject to such conditions as they may think fit; and it shall be lawful for such complainant to publish such book according to such licence.

III.[1] And it is hereby enacted, that a Book of Registry wherein may be registered, as hereinafter enacted, the proprietorship in the copyright of books and assignments thereof, and licences affecting such copyright, shall be kept in the office of the Secretary to the Government of India for the Home Department, and shall at all convenient times be opened to the inspection of any person on the payment of eight annas for every entry which shall be searched for or inspected in the said book; and that such officer shall, whenever thereunto reasonably required, give a copy of any entry in such book, certified under his hand, to any person requiring the same, on payment to him of the sum of two rupees; and such copies so certified shall be received in evidence in all courts, and in all summary proceedings, and shall be *primâ facie* proof of the proprietorship or assignment of copyright or licence as therein expressed, but subject to be rebutted by other evidence.

IV. And it is enacted, that if any person shall wilfully make or cause to be made any false entry in the Registry Book aforesaid, or shall wilfully produce or cause to be tendered in evidence any paper falsely purporting to be a copy of any entry in the said book, he shall be guilty of a misdemeanour,

[1] All the emendations and alterations made since this Act became law have been printed in italics, as they are embodied in several subsequent Acts.

and shall be punished with imprisonment with or without hard labour for a term not exceeding three years.

V. And it is enacted that, after the passing of this Act, it shall be lawful for the proprietor of copyright in any book published after the passing of the said Act of Parliament 3 and 4 Wm. IV., c. 85, to make entry in the Registry Book of the title of such book, the time of the first publication, and the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright, in the form in that behalf given in the schedule to this Act annexed, upon payment of the sum of two rupees to the said secretary; and that it shall be lawful for every such registered proprietor to assign his interest or any portion of his interest therein by making entry in the said Book of Registry of such assignment, and of the name and place of abode of the assignee thereof, in the form given in that behalf in the said schedule, on payment of the like sum; and such assignment so entered shall be effectual in law to all intents and purposes whatsoever without being subject to any stamp or duty, and shall be of the same force and effect as if such assignment had been made by deed.

VI. And it is enacted, that if any person shall deem himself aggrieved by any entry made under colour of this Act in the said Book of Registry, it shall be lawful for such person to apply by motion to the Supreme Court of Calcutta, or if the Court shall not be then sitting to any judge of such Court sitting in chambers, for an order that such entry may be expunged or varied; and that upon any such application to the said Court, or to a judge as aforesaid, such Court or judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as to such Court or judge shall seem just; and the said secretary shall, on the production to him of any such order for expunging or varying any such entry, expunge or vary the same according to the requisitions of such order.

VII. And it is enacted, that if any person shall, after the passing of this Act, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright without the consent in writing of the proprietor thereof, or shall have in his possession for sale or hire any such book so unlawfully printed without such consent as aforesaid, such offender, if he shall have so offended within the local limits of the jurisdiction of any of the Courts of Judicature established by Her Majesty's Charter, shall be liable to a special action on the case in such Court, and if he shall have so offended in any other part of the Territories subject to the Government of the East India Company, to a

suit in the Zillah Court within the jurisdiction of which he shall have so offended, which shall and may be prosecuted in the same manner in which any other action of damages may be brought and prosecuted there; and if he shall have so offended in any such last-mentioned part of the Territories subject to the Government of the East India Company in which there is no Zillah Court, to a suit in the highest local Court exercising original civil jurisdiction in such part of the said Territories.

VIII. And it is hereby enacted, that after the passing of this Act, in any suit or action brought in any of the Courts of Judicature established by Her Majesty's Charter under the provisions of this Act against any person for printing any such book for sale, hire, or exportation, or for selling, publishing, or exposing to sale or hire, or causing to be sold, published, or exposed to sale or hire, or for having in his possession for sale or hire any such book so unlawfully printed, the defendant, on pleading thereto shall give to the plaintiff a notice in writing of any objections on which he means to rely on the trial of such action, and if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book in which he shall by such action claim copyright, or is not the proprietor of the copyright therein, or that some other person than the plaintiff was the author or first publisher of such book, or is the proprietor of the copyright therein, then the defendant shall specify in such notice the name of the person who he alleges to have been the author or first publisher of such book, or the proprietor of the copyright therein, together with the title of such book, and the time when, and the place where such book was first published, otherwise the defendant in such action shall not, at the trial or hearing of such action, be allowed to give any evidence that the plaintiff in such action was not the author or first publisher of the book in which he claims such copyright as aforesaid, or that he was not the proprietor of the copyright therein; and at such trial or hearing no other objection shall be allowed to be made on behalf of such defendant than the objections stated in such notice, or that any other person was the author or first publisher of such book, or the proprietor of the copyright therein than the person specified in such notice, or give (*sic*) in evidence in support of his defence any other book than one substantially corresponding in title, time, and place of publication with the title, time, and place specified in such notice.

IX. And it is hereby enacted, that after the passing of this Act, in any such suit or action as last aforesaid, brought in any Zillah Court or other local Court as aforesaid, the defendant shall state in his answer all such matters as he means

to rely on, and which by the last preceding Section the defendant in any suit or action brought in any of the Courts of Judicature established by Her Majesty's charter is required to give notice of in writing, otherwise such defendant shall be subject to the same consequences for any omission in his answer as a defendant is made subject to by the last preceding Section for any omission in his notice.

Sections X. and XI. have no bearing on the subject of music.

XII. And it is enacted, that all copies of any book wherein there shall be copyright, and of which entry shall have been made in the said Registry Book, and which shall have been unlawfully printed without the consent of the registered proprietor of such copyright in writing under his hand first obtained, shall be deemed to be the property of the proprietor of such copyright, and who shall be registered as such, and such registered proprietor shall, after demand thereof in writing, be entitled to sue for and recover the same, or damages for the retention thereof.

XIII. And it is enacted, that if the case be within the jurisdiction of any of the Courts of Judicature established by Her Majesty's Charter, such registered proprietor shall be entitled to sue for and recover such copies or damages for the detention thereof in an action of Detinue, from any party who shall detain the same, or to sue for and recover damages for the conversion thereof in an action of Trover, and that if the case be within the jurisdiction of any Zillah Court or other local Court as aforesaid, the registered proprietor shall be entitled to sue for and recover such copies or damages for the detention or conversion thereof, in such form as is in use in the said Zillah or other local Courts for the recovery of specific personal property or damages for the detention or conversion thereof.

XIV. And it is enacted, that no proprietor of copyright in any book first published after the passing of the said Act of Parliament, 3 and 4 Wm. IV., c. 85, shall maintain under the provisions of this Act any action or suit at law or in equity, or any summary proceeding in respect of any infringement of such copyright, unless he shall before commencing such action, suit, or proceeding, have caused an entry to be made in the Book of Registry at the office of the said Secretary, of such book pursuant to this Act. Provided always, that the omission to make such entry shall not affect the copyright in any book, nor the right to sue or proceed in respect of the infringement thereof, except the right to sue or proceed in respect of the infringement thereof under the provisions of this Act.

Section XV. is obsolete.

XVI. And it is enacted, that all actions, suits, bills, indictments, informations, and other criminal proceedings for any

offence which shall be committed against this Act shall be brought, sued, and commenced within twelve calendar months next after such offence committed, or else the same shall be void and of none effect.

XVII. Provided always and it is enacted, that nothing in this Act contained shall affect, alter, or vary any right subsisting at the time of passing this Act, except as herein expressly enacted; and all contracts, agreements, and obligations made and entered into before the passing of this Act, and all remedies relating thereto, shall remain in full force, anything herein contained to the contrary notwithstanding.

SCHEDULE.

No. 1.

Original Entry of Proprietorship of Copyright of a Book.

Time of making the Entry	Title of Book	Name of the Publisher and Place of Publication	Name and Place of Abode of the Proprietor of the Copyright	Date of First Publication

No. 2.

Form of Entry of Assignment of Copyright in any Book previously Registered.

Date of Entry	Title of Book	Assignor of the Copyright	Assignee of the 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)		

This Statute is copied from the collection of Statutes printed for the Copyright Association in 1889.

APPENDIX E.

THE COPYRIGHT LAW OF THE UNITED STATES IN FORCE ON JANUARY 1, 1904.

Section 4952. The author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, and of models or designs intended to be perfected as works of the fine arts, and the executors, administrators, or assigns of any such person shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others. And authors or their assigns shall have exclusive right to dramatise or translate any of their works, for which copyright shall have been obtained under the laws of the United States.

Section 4953. Copyrights shall be granted for the term of twenty-eight years from the time of recording the title thereof, in the manner hereinafter directed.

Section 4954. The author, inventor, or designer, if he be still living, or his widow or children, if he be dead, shall have the same exclusive right continued for the further term of fourteen years, upon recording the title of the work or description of the article so secured a second time, and complying with all other regulations in regard to original copyrights, within six months before the expiration of the first term. And such persons shall, within two months from the date of said renewal cause a copy of the record thereof to be published in one or more newspapers, printed in the United States, for the space of four weeks.

Section 4955. Copyrights shall be assignable in law by any instrument of writing, and such assignment shall be recorded in the office of the Librarian of Congress within sixty days after its execution; in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice.

Section 4956. No person shall be entitled to a copyright unless he shall, on or before the day of publication, in this 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, District of Columbia, a printed copy of the title of the book

map, chart, dramatic or musical composition, engraving, cut, print, photograph, or chromo, or a description of the painting, drawing, statue, statuary, or a model or design, for a work of the fine arts, for which he desires a copyright; nor unless he shall also, not later than the day of the publication thereof, in this or any foreign country, deliver at the office of the Librarian of Congress, at Washington, District of Columbia, or deposit in the mail, within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print, or photograph, or in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of the same.

Section 4957. The Librarian of Congress shall record the name of such copyright book, or other article, forthwith in a book to be kept for that purpose, in the words following: "Library of Congress, to wit: Be it remembered that on the day of A. B., of hath deposited in this office the title of a book (map, chart, or otherwise, as the case may be, or description of the article), the title or description of which is in the following words, to wit; (here insert the title or description), the right whereof he claims as author (originator, or proprietor, as the case may be), in conformity with the laws of the United States respecting copyrights. C.D., Librarian of Congress." And he shall give a copy of the title, or description, under the seal of the Librarian of Congress, to the proprietor, whenever he shall require it.

Section 4958. The Librarian of Congress shall receive from the persons to whom the services designated are rendered, the following fees: (1) For recording the title or description of any copyright book or other article, fifty cents. (2) For every copy under seal of such record actually given to the person claiming the copyright, or his assigns, fifty cents. (3) For recording and certifying any instrument of writing for the assignment of a copyright, one dollar. (4) For every copy of an assignment, one dollar. All fees so received shall be paid into the treasury of the United States: Provided that the charge for recording the title or description of any article entered for copyright, the production of a person not a citizen or a resident of the United States, shall be one dollar, to be paid as above into the treasury of the United States, to defray the expenses of lists of copyrighted articles as hereinafter provided for.

Section 4959. The proprietor of every copyright book or other article shall deliver at the office of the Librarian of Congress, or deposit in the mail, addressed to the Librarian of Congress, at Washington, District of Columbia, a copy of

every subsequent edition wherein any substantial changes shall be made. Provided, however, that the alterations, revisions, and additions made to books by foreign authors, heretofore published, of which new editions shall appear subsequently to the taking effect of this act, shall be held and deemed capable of being copyrighted as above provided for in this act, unless they form a part of the series in course of publication at the time this Act shall take effect.

Section 4960. For every failure on the part of the proprietor of any copyright to deliver, or deposit in the mail, either of the published copies, or description, or photograph, required by Sections 4956 and 4959, the proprietor of the copyright shall be liable to a penalty of twenty-five dollars, to be recovered by the Librarian of Congress, in the name of the United States, in an action in the nature of an action of debt, in any district court of the United States within the jurisdiction of which the delinquent may reside or be found.

The following Act in relation to the deposit of copies was approved March 3, 1893: "That any author, inventor, designer, or proprietor of any book, or other article entitled to copyright, who has heretofore failed to deliver in the office of the Librarian of Congress, or in the mail addressed to the Librarian of Congress, two complete copies of such book, or description, or photograph of such article, within the time limited by title sixty, chapter three, of the Revised Statutes relating to copyrights, and the Acts in amendment thereof, and has complied with all other provisions thereof, who has, before the first day of March, anno Domini eighteen hundred and ninety-three, delivered at the office of the Librarian of Congress, or deposited in the mail addressed to the Librarian of Congress, two complete printed copies of such book, or description, or photograph of such article, shall be entitled to all the rights and privileges of said title sixty, chapter three, of the Revised Statutes and the Acts in amendment thereof."

Section 4962. No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page, or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model, or design, intended to be perfected and completed as a work of the fine arts, by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz., "Entered according to act of Congress, in the year , by A.B., in the office of the Librarian of Congress, at Washington," or, at his option, the word "Copyright," together with the year

the copyright was entered, and the name of the party by whom it was taken out, thus: "Copyright, 18 , by A.B."

Section 4963. Every person who shall insert or impress such notice, or words of the same purport, in or upon any book, map, chart, dramatic or *musical composition*, print, cut, engraving or photograph, or other article, whether such article be subject to copyright or otherwise, for which he has not obtained a copyright, or shall knowingly issue or sell any article bearing a notice of a United States copyright which has not been copyrighted in this country; or shall import any book, photograph, chromo, or lithograph, or other article bearing such notice of copyright or words of the same purport, which is not copyrighted in this country, shall be liable to a penalty of one hundred dollars, recoverable one half for the person who shall sue for such penalty and one-half to the use of the United States; and the importation into the United States of any book, chromo, lithograph, or photograph, or other article bearing such notice of copyright, when there is no existing copyright thereon in the United States, is prohibited; and the circuit courts of the United States sitting in equity are hereby authorised to enjoin the issuing, publishing, or selling of any article marked or imported in viciation of the United States copyright laws, at the suit of any person complaining of violation: Provided, that this Act shall not apply to any importation of or sale of such goods or articles brought into the United States prior to the passage hereof.

Section 4964. Every person who, after the recording of the title of any book and the depositing of two copies of such book as provided by this Act, shall, contrary to the provisions of this Act, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, print, publish, dramatise, translate, or import, or, knowing the same to be so printed, published, dramatised, translated, or imported, shall sell or expose for sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction.

Section 4965. If any person, after the recording of the title of any map, chart, dramatic or *musical composition*, print, cut, engraving, or photograph or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this Act shall, within the term limited, contrary to the provisions of this Act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatise, translate, or import,

either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatised, translated, or imported, shall sell or expose for sale any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale.

Section 4966. Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the Court shall appear to be just. If the unlawful performance and representation be wilful and for profit, such person or persons shall be guilty of a misdemeanour and upon conviction be imprisoned for a period not exceeding one year. Any injunction that may be granted upon hearing after notice to the defendant by any Circuit Court in the United States, or by a judge thereof, restraining and enjoining the performance or representation of any such dramatic or musical composition, may be served on the parties against whom such injunction may be granted anywhere in the United States, and shall be operative and may be enforced by proceedings to punish for contempt or otherwise by any other circuit, court or judge in the United States; but the defendants in said action, or any or either of them, may make a motion, in any other circuit in which he or they may be engaged in performing or representing said dramatic or musical composition, to dissolve or set aside the said injunction upon such reasonable notice to the plaintiff as the Circuit Court or the judge before whom said motion shall be made shall deem proper; service of said motion to be made on the plaintiff in person or on his attorneys in the action. The Circuit Courts or judges thereof shall have jurisdiction to enforce said injunction and to hear and determine a motion to dissolve the same, as herein provided, as fully as if the action were pending or brought in the circuit in which said motion is made.

Section 4967. Every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained shall be liable to the author or proprietor for all damages occasioned by such injury.

Section 4968. No action shall be maintained in any case of forfeiture or penalty under the copyright laws, unless the

same is commenced within two years after the cause of action has arisen.

Section 4969. In all actions arising under the laws respecting copyrights the defendant may plead the general issue, and give the special matter in evidence.

Section 4970. The Circuit Courts, and District Courts having the jurisdiction of Circuit Courts, shall have power, upon bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of Courts of Equity, on such terms as the Court may deem reasonable.

"That this act shall go into effect on the first day of July, Anno Domini eighteen hundred and ninety-one" (Section 12).

"That this act shall only apply to a citizen or subject of a foreign State or nation when such foreign State or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own citizens; or when such foreign State or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may at its pleasure become a party to such agreement. The existence of either of the conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time as the purposes of this Act may require" (Section 13).

This *résumé* of the present copyright law is taken from "Copyright Cases]" compiled by Arthur S. Hamlin, New York.

APPENDIX F.

1905. The Senate.

Presented and read 1°, August 16; Senator Keating.

A BILL FOR AN ACT RELATING TO COPYRIGHT.

No. 9.

(Printed for the Commonwealth of Australia.)

At the last moment before publication, the present writer has received a copy of the above. He is only able to give the most cursory sketch of its tenour. The Bill is framed on British lines in point of form. The outline is due to the unrivalled skill in drafting of Lord Thring; no better model could have been adopted; but the merits have received some comment.

In Part III., Clause 13, placitum (2) it is enacted, in effect, that copyright shall subsist in every book, whether the author is a British subject or not, which has after the commencement of the Act been first published in Australia, before or simultaneously with its publication elsewhere.

A similar clause (14) relates to performing right. A doubt has been expressed by one or two of the leading London publishers whether these clauses contain an inference which would deprive works published in the United Kingdom of protection in Australia. There is no ground for this alarm. The constitutional rule extending the area of protection of such works to the whole British empire cannot be shaken. (Routledge *versus* Low, Law Reports, 3 House of Lords, 100.) This rule was extended by the International Copyright Act, 1886, Section VIII.; and see the concluding words of Section IX.; the Australian clause is clearly explained by clause 62 of the Bill and cannot give rise to any conflict of jurisdiction. Clause 16 is open to a similar observation.

The proposed term, for the author's life and thirty years after that in which he dies, is unobjectionable.

Copyright is wisely and with precision, kept distinct from performing right.

Importation of pirated works copyright in Australia "whether under this Act or otherwise," is prohibited.

Part VI., Clause 60, of the Bill provides that the owner of copy or performing right in any musical work entitled to protection in Australia under any Act of the Parliament of the United Kingdom [or entitled to protection in any State by virtue of any State Copyright Act] "shall have the same protection in the Commonwealth as 'an owner' under this Act." A certificate of registration is necessary.

Clause 62.—Nothing is to lessen the protection in Australia by virtue of any Act of Parliament of the United Kingdom in force at any time in the Commonwealth.

At the moment of going to press a charge at Bow Street is being heard, of conspiracy, against James Frederick Willets, William Tenant, and three others, who are accused of conspiring to print and sell copyright music. The accused were remanded on Thursday, November 9, 1905. Evidence was given that Willets, whose assumed names are hardly to be counted, after carrying on the fraudulent business in pirated music which has ruined so many worthy tradesmen, rich and poor, had been hunted by the copyright owners with some success, as he was at last trying to evade the law by launching a bogus limited company. Whether this device succeeds will depend upon the result of the present proceedings.

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Printed by John Bale, Sons and Danielsson, Ltd., 83-91, Great Titchfield Street, W.