A TREATISE

ON

THE LAW OF PROPERTY

IN

INTELLECTUAL PRODUCTIONS

IN GREAT BRITAIN AND THE UNITED STATES.

EMBRACING

COPYRIGHT IN WORKS OF LITERATURE AND ART, AND PLAYRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS.

BY

EATON S. DRONE.

BOSTON:

LITTLE, BROWN, AND COMPANY.

1879.

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Copyright, 1879,

by

Eaton S. Drone.

Rec. Jan. 22, 1879

Cambridge:
Press of John Wilson and Son.

THIS BOOK IS DEDICATED TO MY BROTHER,

JOHN DRONE,

WITHOUT WHOSE HELP I SHOULD HAVE BEEN WITHOUT THE EDUCATION NECESSARY TO WRITE IT.

PREFACE.

MEANINGLESS, inconsistent, and inadequate statutory provisions, ambiguous, erroneous, and conflicting decisions cover the law of copyright with doubt, difficulties, and confusion. Some of the evils which result from these causes are but seeming ones, which disappear when explained, or lose their force when exposed. Others are real, and of such a nature that they can be overcome only by the power of the legislature. This condition of the law is doubtless due in a measure to the facts that the nature of literary property is somewhat peculiar, that the law relating to it may be regarded as yet in its infancy, and that it is comparatively seldom that courts are called upon to determine its meaning. But much of the error and confusion which exist can be accounted for only on the theory that the statutes have been often drawn by incompetent persons, and often interpreted by those who, however learned in other branches, have had but a limited knowledge of the law of copyright.

The English statutes relating to this subject are but a piece of chaotic patchwork, extending over a century and a half. There are in force not fewer than fourteen acts passed at various times, from 1735 to 1875. Some of these have been drawn in such ignorance or disregard of others, important provisions have been enacted in such loose, ambiguous language, incongruous and meaningless clauses are so common,

so many questions have been carelessly left in doubt for judicial determination, that often the law can be determined only with the greatest difficulty, and sometimes its meaning baffles all recognized rules of interpretation. These statutes were rightly condemned by the Royal Commissioners on Copyright, when, in their recent report to Parliament, they said: "The law is wholly destitute of any sort of arrangement, incomplete, often obscure, and even when it is intelligible upon long study, it is in many parts so ill-expressed that no one who does not give such study to it can expect to understand it."

The statutes of the United States are free from some of the faults which exist in those of England. But as the former have in many parts been blindly copied from the latter, the same defects are often found in both.

That judges in the front rank of jurists should sometimes err and disagree in determining the meaning of the legislature, even when most clearly expressed, is but natural. In the judicial interpretation of such statutes as have been spoken of, much greater allowance is to be made for mistakes and conflicting opinions. But for much of the error found in this branch of the law the courts alone are responsible. Decisions have been made against fundamental principles which would not have been violated had their governing force been known, against well-grounded authorities which would have been followed had their application been seen, against statutory provisions which would not have been disregarded had they not been overlooked. One decision has been based on the authority of another when the controlling facts and principles were so different in the two cases that both judgments could not be alike without one being wrong. Opinions, not only wrong in principle but without binding force as authorities, have been blindly followed as supposed precedents. Judicial *dicta*, as uncalled for as erroneous, have been carelessly expressed in one case only to become in another the

corner-stone of a doctrine still more mischievous. It is hardly necessary to mention that what has been said applies to the smaller and not to the greater part of the decisions on this subject. But the former are so many, their influence so far-reaching, the groundless theories affirmed or recognized in some of them so plausible, that the whole body of the law of copyright is more or less affected by them.

If every decision, however clearly wrong it may be, is to be taken as representing the law until it shall be overruled, then must the rights of authors be in endless doubt and confusion. But if, error being eliminated wherever found, the law is to be determined alone by those authorities whose soundness will stand every test, and by those principles whose governing force is recognized, then, excepting some defects which can be reached only by legislation, will the law of copyright become reasonably clear, simple, and harmonious. Under the circumstances explained, to give the results of the decisions without testing their soundness or explaining their bearing, would be to put forth a digest, whose worth would be as little as the effort required to make it. The task of the juridical writer is to set forth the true principles which govern the law; to point out the proper meaning of the statutes; to show what decisions are right and what are wrong; to explain what is doubtful or obscure; and, generally, to give the law in a form as true, clear, systematic, and harmonious as it is in his power to do. He is without authority to say what construction shall be given to statutes, as he is without power to overrule erroneous decisions. But he may point out the true meaning of the law, and show wherein it has been wrongly interpreted. When this has been done, the judicial affirmance of what is right and the rejection of what is wrong will be in many cases but a question of time. In jurisprudence, as elsewhere, error once exposed must sooner or later be eradicated. The maker of a treatise should never lose sight of the fact that his duty is to give the law as it is. But this cannot always be done by sim-

ply recording what has been decided by the courts. Jurisprudence is a science based on principles rather than on single decisions. By the former rather than by the latter the law is to be determined. It is true that one as well as the other are made by judges, and that principles which are not judicially settled or recognized are without force. But principles are fundamental and general. On them decisions are grounded, by them governed, and with them must harmonize. When two authorities are in conflict, both cannot represent the law. One must be set aside. In this, as in other cases, whether one judgment is right and another wrong may sometimes be a matter of opinion. But often the question is capable of conclusive demonstration by the application of governing principles which are judicially settled. Dealing thus with principles, the writer of a treatise may determine with reasonable certainty what the law is where it has not been judicially interpreted. In the case of copyright, there are many important questions concerning which the statutes are silent or not clear, and which have not arisen in the courts, though they are likely to come up at any time. Not to consider these, simply because they are not discussed in the reports, is to leave a treatise on this subject lacking, without excuse, in thoroughness and usefulness.

Finding the law in the condition described, my aim has been to treat it on the principles which have been explained. I have given, in the first place, the law as it has been judicially interpreted, however erroneous in any case that interpretation may be. But I have let no important decision or doctrine go unquestioned, knowing or believing it to be wrong. In denying or questioning the soundness of any authority, I have tried to set forth all the facts, principles, and authorities which have any real bearing on the point in question, and to give fully the reasons for what is pointed out as the true meaning of the law. In this way, whatever is essential to a right understanding of the subject is brought together, so that,

if in any case the conclusion I have reached is wrong, the error becomes apparent, and the reader still has before him the law as it has been judicially construed. In treating many questions which have not been decided or discussed by the courts, I have given prominence to the fact that the law remains for judicial determination. Where I have not done what I aimed to do, the failure is due to lack of ability, not of effort.

E. S. DRONE.

NEW YORK, January, 1879.

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EXPLANATION OF ABBREVIATIONS USED IN THIS WORK.

Abb. Pr. N. S. (N. Y.)	Abbotts' Practice Reports, New York.
Abb. U. S.	Abbott's United States Reports, Circuit and District Courts.
Ad. & El.	Adolphus and Ellis's Reports, Queen's Bench.
Alb. Law Jour. . .	Albany Law Journal, Albany, N. Y.
Am.	American.
Am. Law Rec. . . .	American Law Record, Cincinnati, Ohio.
Am. Law Reg. . . .	American Law Register, Philadelphia, Pa.
Am. Law Reg. N. S. .	American Law Register, New Series, Philadelphia, Pa.
Am. Law Rev. . . .	American Law Review, Boston, Mass.
Am. L. T. N. S. . .	American Law Times, New Series, New York, N. Y.
Am. L. T. R. . . .	American Law Times Reports, Washington, D. C.
Am. L. T. R. N. S. .	American Law Times Reports, New Series, New York, N. Y.
Am. Rep.	American Reports.
Amb.	Ambler's Reports, Chancery, Br.
Anstr.	Anstruther's Reports, Exchequer, Br.
App. Cas.	Law Reports, Appeal Cases before House of Lords.
Art.	Article.
Atk.	Atkyns's Reports, Chancery, Br.
B.	Baron.
B. Mon. (Ky.) . . .	Ben. Monroe's Reports, Court of Appeals, Kentucky.
Bac. Abr. Prerog. . .	Bacon's Abridgment, title Prerogative.
Bac. Abr. Stat. . . .	Bacon's Abridgment, title Statute.
Ball & B.	Ball and Beatty's Reports, Chancery, Ireland.
Barb. Ch. (N. Y.) . .	Barbour's Chancery Reports, New York.
Barb. S. C. (N. Y.) .	Barbour's Supreme Court Reports, New York.
Barbeyr. Puf. . . .	Barbeyrac's Pufendorf de Jure Naturæ et Gentium.
Barn. & Ad.	Barnewall and Adolphus's Reports, King's Bench.
Barn. & Ald. . . .	Barnewall and Alderson's Reports, King's Bench.
Barn. & Cr.	Barnewall and Creswell's Reports, King's Bench.
Barnardiston, Ch. .	Barnardiston's Chancery Reports, Br.
Beav.	Beavan's Reports, Rolls Court, Br.
Best & S.	Best and Smith's Reports, Queen's Bench.
Bing.	Bingham's Reports, Common Pleas, Br.
Bing. N. C.	Bingham's New Cases, Common Pleas, Br.
Biss.	Bissell's Reports, U. S. Circuit and District Courts, 7th Circuit.
Bl. Com.	Blackstone's Commentaries.
Blatchf.	Blatchford's Reports, U. S. Circuit Court, 2d Circuit.
Bligh N. S.	Bligh's Reports, New Series, House of Lords.
Bond	Bond's Reports, U. S. Circuit and District Courts, Southern District of Ohio.
Br.	British.
Bro. C. C.	Brown's Chancery Cases, Br.
Bro. P. C.	Brown's Cases in Parliament.
Burr.	Burrow's Reports, King's Bench.
Bush (Ky.)	Bush's Reports, Court of Appeals, Kentucky.
C.	Chapter.
C. B.	Chief Baron.

C. B.	Common Bench Reports (Manning, Granger, and Scott), Br.
C. B. N. S.	Common Bench Reports, New Series, Br.
C. C.	Chancery Cases.
C. C.	Circuit Court of the United States.
C. J.	Chief Justice.
C. L.	Common Law.
C. P.	Common Pleas.
C. P. D.	Law Reports, Common Pleas Division of the High Court of Justice and the Court of Appeal, Br.
Camp.	Campbell's Reports, Nisi Prius, Br.
Car. II.	Charles the Second.
Car. & Kir.	Carrington and Kirwan's Reports, Nisi Prius, Br.
Car. & P.	Carrington and Payne's Reports, Nisi Prius, Br.
Carter	Carter's Reports, Common Pleas, Br.
Cent. Law Jour.	Central Law Journal, St. Louis, Mo.
Ch.	Chancery.
Ch. D.	Law Reports, Chancery Division of the High Court of Justice and the Court of Appeal, Br.
Chic. Leg. News	Chicago Legal News, Chicago, Ill.
Chit.	Chitty's Reports, King's Bench.
Civil Gov.	Locke's Civil Government.
Cl.	Clause.
Cliff.	Clifford's Reports, U. S. Circuit Court, 1st Circuit.
Cobb. Parl. Hist.	Cobbett's Parliamentary History.
Coke	Coke's Reports, Br.
Coll.	Collyer's Reports, Chancery, Br.
Com. (Bl.)	Blackstone's Commentaries.
Com. (Kent)	Kent's Commentaries.
Com. Dig.	Comyns's Digest.
Com. L. R.	Common Law Reports, Br.
Cong. Globe	Congressional Globe, Washington, D. C.
Const. Hist.	Hallam's Constitutional History.
Const. Lim.	Cooley's Constitutional Limitations.
Construction Stat. & Const. Law	Sedgwick's Construction of Statutory and Constitutional Law.
Coop. *temp.* Cottenham	Cooper's Chancery Reports, time of Lord Cottenham.
Coop. *temp.* Eldon	Cooper's Chancery Cases, time of Lord Eldon.
Cowp.	Cowper's Reports, King's Bench.
Cox	Cox's Cases in Equity, Br.
Cranch C. C.	Cranch's U. S. Circuit Court Reports, District of Columbia.
Curtis	Curtis's Reports, U. S. Circuit Court, 1st Circuit.
Daily Reg. (N. Y.)	Daily Register, New York. N. Y.
Day (Conn.)	Day's Reports, Supreme Court of Errors, Connecticut.
Deady	Deady's Reports, U. S. Circuit and District Courts, Oregon and California.
De G. & J.	De Gex and Jones's Reports, Chancery, Br.
De G. M. & G.	De Gex, Macnaghten, and Gordon's Reports, Chancery, Br.
De G. & Sm.	De Gex and Smale's Reports, Chancery, Br.
De Jure B. ac P.	Grotius de Jure Belli ac Pacis.
De Jure Nat. et Gent.	Pufendorf de Jure Naturæ et Gentium.
Dow. & L.	Dowling and Lowndes' Practice Reports, Br.
Dow. & Ry.	Dowling and Ryland's Reports, King's Bench.
Dow. Pr. Cas.	Dowling's Practice Cases, Br.
Drew.	Drewry's Reports, Chancery, Br.
Duer (N. Y.)	Duer's Reports, Superior Court of the City of New York.
East	East's Reports, King's Bench.
Eden	Eden's Reports, Chancery, Br.
Edw. Ch. (N. Y.)	Edwards's Chancery Reports, New York.
Eq.	Equity.
Eq. Jur.	Story's Equity Jurisprudence.
Eq. Rep.	Equity Reports, Br.

Esp.	Espinasse's Nisi Prius Reports, Br.
Exch.	Exchequer.
Exch. Eq.	Exchequer Equity.
Exch. Rep.	Exchequer Reports (Welsby, Hurlstone, and Gordon), Br.
Giff.	Giffard's Reports, Chancery, Br.
Gray (Mass.)	Gray's Reports, Supreme Court, Massachusetts.
Grotius de Jure B. ac P.	Grotius de Jure Belli ac Pacis.
H. L.	House of Lords.
H. L. C.	House of Lords Cases (Clark).
Hall & Tw.	Hall and Twells's Reports, Chancery, Br.
Hallam Const. Hist.	Hallam's Constitutional History.
Hans. Parl. Deb.	Hansard's Parliamentary Debates.
Har. & W.	Harrison and Wollaston's Reports, King's Bench.
Hare	Hare's Reports, Chancery, Br.
Harring. (Del.)	Harrington's Reports, Superior Court and Court of Errors and Appeals, Delaware.
Hem. & M.	Hemming and Miller's Reports, Chancery, Br.
Hodges	Hodges' Reports, Common Pleas, Br.
Holmes	Holmes's Reports, U. S. Circuit Court, 1st Circuit.
Hopk. Ch. (N. Y.)	Hopkins's Chancery Reports, New York.
How.	Howard's Reports, United States Supreme Court.
How. Pr. (N. Y.)	Howard's Practice Reports, New York.
Hurl. & C.	Hurlstone and Coltman's Reports, Exchequer, Br.
Hurl. & N.	Hurlstone and Norman's Reports, Exchequer, Br.
Ill.	Illinois Reports, Supreme Court.
Inst.	Coke's Institutes.
Inst. of Nat. Law	Rutherforth's Institutes of Natural Law.
Int. Rev. Rec.	Internal Revenue Record, New York, N. Y.
Ir. Ch.	Irish Chancery Reports.
Ir. Eq.	Irish Equity Reports.
Ir. Law Rep. n. s.	Irish Law Reports, New Series.
Jac.	Jacob's Reports, Chancery, Br.
Jac. II.	James the Second.
Jac. & W.	Jacob and Walker's Reports, Chancery, Br.
Johns. & H.	Johnson and Hemming's Reports, Chancery, Br.
Johns. Rep. (N. Y. 2d ed.)	Johnson's Reports, Supreme Court, New York, 2d edition.
Jones & Sp.	Jones and Spencer's Reports, Superior Court of the City of New York.
Jur.	Jurist, London.
Jur. n. s.	Jurist, New Series, London.
Kay	Kay's Reports, Chancery, Br
Kay & J.	Kay and Johnson's Reports, Chancery, Br.
K. B.	King's Bench.
Ken.	Kenyon's Reports, King's Bench.
Kent Com.	Kent's Commentaries.
L. J.	Lord Justice.
L. J. Ch.	Law Journal, Chancery, London.
C. P.	Common Pleas.
K. B.	King's Bench.
L. J. n. s. Ch.	Law Journal, New Series, Chancery, London.
C. L.	Common Law.
C. P.	Common Pleas.
Exch.	Exchequer.
Exch. Eq.	Exchequer Equity.
Q. B.	Queen's Bench.
L. T. n. s.	Law Times, New Series, or Law Times Reports, London.
L. T. R.	Law Times (Old Series), London.
L. & Eq. Reporter	Law and Equity Reporter, New York, N. Y.
Law Rep. Ch.	Law Reports, Chancery Appeal.
C. P.	Common Pleas.
Eq.	Equity.
Exch.	Exchequer.

Law Rep. H. L.	Law Reports, House of Lords.
Q. B.	Queen's Bench.
Stat.	Statutes.
Law Reporter	Law Reporter, Boston, Mass. (See Monthly Law Reporter.)
Leg. Gaz.	Legal Gazette, Philadelphia, Pa.
Leg. Int.	Legal Intelligencer, Philadelphia, Pa.
Lib.	Book.
Locke Civ. Gov.	Locke's Civil Government.
Lofft	Lofft's Reports, King's Bench.
McLean	McLean's Reports, U. S. Circuit Court, 7th Circuit.
Mac. & G.	Macnaghten and Gordon's Reports, Chancery, Br.
Macq.	Macqueen's Reports, House of Lords, Scotch Appeals.
Man. & Gr.	Manning and Granger's Reports, Common Pleas, Br.
Martin (Orleans T.)	Martin's Orleans Term Reports.
Mason	Mason's Reports, U. S. Circuit Court, 1st Circuit.
Mass.	Massachusetts Reports, Supreme Court.
Maugham Laws of Lit. Prop.	Maugham's Laws of Literary Property.
Maule & S.	Maule and Selwyn's Reports, King's Bench.
Me.	Maine Reports, Supreme Court.
Mees. & W.	Meeson and Welsby's Reports, Exchequer, Br.
Meriv.	Merivale's Reports, Chancery, Br.
Mich.	Michigan Reports, Supreme Court.
Minn.	Minnesota Reports, Supreme Court.
Mod.	Modern Reports, King's Bench.
Monthly Law Rep.	Monthly Law Reporter, Boston, Mass. (Continuation of the Law Reporter.)
Moody & R.	Moody and Robinson's Reports, Nisi Prius, Br.
Moore	Moore's Reports, Common Pleas, Br.
Moore & Sc.	Moore and Scott's Reports, Common Pleas, Br.
Mor. Dict. of Dec.	Morison's Dictionary of Decisions, Scotland.
Mor. Dict. of Dec. Lit. Prop. App.	Morison's Dictionary of Decisions, title Literary Property, Appendix.
M. R.	Master of the Rolls.
My. & Cr.	Mylne and Craig's Reports, Chancery, Br.
Nev. & M.	Nevile and Manning's Reports, King's Bench.
New Rep.	New Reports, Equity and Common Law, Br.
Niles Reg.	Niles's Register, Baltimore, Md.
N. S.	New Series.
N. Y.	New York Reports, Court of Appeals.
N. Y. Leg. Obs.	New York Legal Observer, New York, N. Y.
N. Y. Superior Ct.	New York City Superior Court Reports.
N. Y. Supreme Ct.	New York Supreme Court Reports.
N. Y. Weekly Dig.	New York Weekly Digest, New York, N. Y.
On ap.	On appeal.
Op. Atty-Gen.	Opinions of the Attorney-Generals of the United States.
Paige (N. Y.)	Paige's Chancery Reports, New York.
Paine	Paine's Reports, U. S. Circuit Court, 2d Circuit.
Pa. Law Jour. Rep.	Pennsylvania Law Journal Reports.
Pat. App. Cas.	Paton's Appeal Cases, House of Lords, Scotch Appeals.
Pet.	Peters's Reports, United States Supreme Court.
Petersd. Abr.	Petersdorff's Abridgment.
Phila. (Pa.)	Philadelphia Reports.
Phillips	Phillips's Reports, Chancery, Br.
Pick. (Mass.)	Pickering's Reports, Supreme Court, Massachusetts.
Pittsb. Leg. Jour. n. s.	Pittsburgh Legal Journal, New Series, Pittsburgh, Pa.
P. J.	Presiding Justice.
Plow. Com.	Plowden's Commentaries or Reports, King's Bench.
Pufendorf de Jure Nat. et Gent.	Pufendorf de Jure Naturæ et Gentium.
Q. B.	Queen's Bench.

Q. B.	Queen's Bench Reports.
Rev. Stat.	Revised Statutes of Great Britain.
Ridg. L. & S. . . .	Ridgeway, Lapp, and Schoales's Irish Term Reports.
Rob. (N. Y.) . . .	Robertson's Reports, Superior Court of the City of New York.
Russ.	Russell's Reports, Chancery, Br.
Russ. & My.	Russell and Mylne's Reports, Chancery, Br.
Ryan & M.	Ryan and Moody's Reports, Nisi Prius, Br.
S.	Section.
Sawyer	Sawyer's Reports, U. S. Circuit and District Courts, 9th Circuit.
Sc. Sess. Cas. . . .	Cases in the Court of Session, Scotland.
Scott	Scott's Reports, Common Pleas, Br.
Scott N. R.	Scott's New Reports, Common Pleas, Br.
Sedgwick Construction of Stat. & Const. Law . . .	Sedgwick's Construction of Statutory and Constitutional Law.
Ser.	Series.
Serg. & R. (Pa.) . .	Sergeant and Rawle's Reports, Supreme Court, Pennsylvania.
Show.	Shower's Reports, King's Bench.
Sim.	Simons's Reports, Chancery, Br.
Sim. n. s.	Simons's Reports, New Series, Chancery, Br.
Sim. & St.	Simons and Stuart's Reports, Chancery, Br.
Skin.	Skinner's Reports, King's Bench.
Stark.	Starkie's Reports, Nisi Prius, Br.
Story	Story's Reports, U. S. Circuit Court, 1st Circuit.
Story's Eq. Jur. . .	Story's Equity Jurisprudence.
Swans.	Swanston's Reports, Chancery, Br.
Sweeny (N. Y.) . .	Sweeny's Reports, Superior Court of the City of New York.
Taml.	Tamlyn's Reports, Rolls Court, Br.
Tan. Dec.	Taney's Decisions, U. S. Circuit Court, District of Maryland.
T. R.	Term Reports (Durnford and East), King's Bench.
U. S.	United States.
U. S. Pat. Off. Gaz. .	Official Gazette of the United States Patent Office, Washington, D. C.
U S. Rev. St. . . .	United States Revised Statutes.
U. S. St. at L. . . .	United States Statutes at Large.
V. C.	Vice-Chancellor.
Ves.	Vesey's (Junior) Reports, Chancery, Br.
Ves. & B.	Vesey and Beames's Reports, Chancery, Br.
Vict.	Victoria.
Victorian Law Rep. .	Victorian Law Reports, Australia.
Vin. Abr. Stat. . . .	Viner's Abridgment, title Statute.
Wall.	Wallace's Reports, United States Supreme Court.
Wall. Jr.	Wallace, Jr.'s Reports, U. S. Circuit Court, 3d Circuit.
Wash. C. C.	Washington's Circuit Court Reports, United States, 3d Circuit.
W. Bl.	Sir William Blackstone's Reports, King's Bench and Common Pleas.
W. & M.	William and Mary.
W. R.	Weekly Reporter, London.
Weekly Notes of Cases	Weekly Notes of Cases, Philadelphia, Pa.
Wend. (N. Y.) . . .	Wendell's Reports, Supreme Court, New York.
West. Law Jour. . .	Western Law Journal, Cincinnati, Ohio.
Wils. C. C.	Wilson's Chancery Cases, Br.
Woodb. & M. . . .	Woodbury and Minot's Reports, U. S. Circuit Court, 1st Circuit.
Y. & C. Exch. . . .	Younge and Collyer's Reports, Exchequer Equity, Br.

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THE

LAW OF COPYRIGHT AND PLAYRIGHT.

THE LAW

OF

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THE ORIGIN AND NATURE OF LITERARY PROPERTY.

When Anne was Queen of England, Parliament passed An Act for the Encouragement of Learning, which declared that an author should have the sole right of publishing his book for a named term of years, and prescribed penalties against piracy. Whether the origin of copyright is to be found in this legislation or in the common law; whether the common-law right, if it existed, was taken away or abridged by the statute; whether since 1710, when the 8 Anne, c. 19, became a law, copyright in a published work has existed only by statute, — are questions which have divided the opinions of jurists and statesmen for more than a century. For half a century after the act of Anne was passed, the chancery courts, in administering the law, did not doubt that, by the common law and independently of legislation, there was property of unlimited duration in printed books. In 1769, this principle was affirmed by the Court of King's Bench.[1] Five years later, the House of Lords, on an equal division of the judges, declared that the common-law right, after publication, had been taken away by the statute of Anne, and that authors had no rights in their published works except under that act.[2] This has since been the law of England. The English statute was copied by Congress in 1790, and the construction put upon it by the House of Lords was followed by the Supreme Court of the United States in 1834.[3] Some of the ablest jurists of England and America have con-

[1] Millar *v.* Taylor, 4 Burr. 2303.
[2] Donaldson *v.* Becket, 4 Burr. 2408.
[3] Wheaton *v.* Peters, 8 Pet. 591.

tended that this exposition of the law is wrong; others have maintained that it is right.

The discussion of the subject has given rise to four theories concerning the nature of copyright: —

First. That intellectual productions constitute a species of property founded in natural law, recognized by the common law, and neither lost by publication nor taken away by legislation.

Second. That an author has, by common law, the exclusive right to control his works before, but not after, publication.

Third. That this right is not lost by publication, but is destroyed by statute.

Fourth. That copyright is a monopoly of limited duration, created and wholly regulated by the legislature; and that an author has, therefore, no other title to his published works than that given by statute.

The chief question to be determined is, whether copyright is a natural right of property, based on and governed by the same general principles which underlie all property; or whether it is an artificial right, — a monopoly which has been created by the legislature, and may at any time be swept away by the same power. The true solution of this problem can be reached only by an examination of the fundamental principles on which the right of property rests. The questions to be considered are these: —

I. Has an author, by the common law, a property in his intellectual productions?

II. Is such property lost by publication?

III. May it rightfully be taken from the owner by the legislature?

IV. Has it been taken away or abridged by statute?

All the great writers on natural law agree in placing the origin of property in preoccupancy. They differ in the grounds and reasons advanced in support of this theory. Grotius and Pufendorf hold that this right is based on social compact; that there must have been a previous implied assent, or tacit agreement, that the first occupant should become the owner. Barbeyrac, Titius, Locke, Blackstone, and others maintain that such tacit agreement is not necessary, and that the right was

created by the act of occupancy alone. All, however, reach the same conclusion, that, in that early age, when all land was common, each person became entitled to hold to his own exclusive use that which he first occupied.[1] This act vested in one man a right which was respected by his fellows, and gave birth to ownership. And this was the theory of the Roman jurisconsults.[2]

Preoccupancy is first possession; and this is given by creation, by production. The creator is the first possessor of that which he creates. In labor, then, is found the origin of the right to property. Occupancy implies labor. It implied labor in the beginning; for to take and hold possession of a part of the unoccupied land were impossible without bodily exertion. Still more was physical effort required in later times, when occupancy represented distance overcome, toils endured, and dangers passed. Indeed, Locke, Barbeyrac, Titius, and others expressly hold that the principle of occupancy is based on labor.[3] In commenting on the statement of Paulus, the Ro-

[1] Grotius de Jure B. ac P. lib. ii. c. 2, 3; Pufendorf de Jure Nat. et Gent. lib. iv. c. 4, 6; Locke, Civil Gov. c. 5; 2 Bl. Com. c. 1.

[2] Maine Ancient Law, c. 8.

[3] Barbeyr. Puf. lib. iv. c. 4, § 4, n. 4; 2 Bl. Com. c. 1.

Locke's theory, that labor is the origin of the right of property, is thus explained in his own language: —

"Though the earth and all inferior creatures be common to all men, every man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that nature hath provided and left it in, he hath mixed his labor with and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature hath placed it in, it hath by this labor something annexed to it that excludes the common right of other men. For, this labor being the unquestionable property of the laborer, no man but he can have a right to what that is once joined to; at least where there is enough, and as good, left in common for others.

"Thus this law of reason makes the deer that Indian's who hath killed it; it is allowed to be his goods who hath bestowed his labor upon it; though, before, it was the common right of every one. And amongst those who are counted the civilized part of mankind, who have made and multiplied positive laws to determine property, this original law of nature, for the beginning of property, in what was before common, still takes place; and, by virtue thereof, what fish any one catches in the ocean, — that great and still remaining common of mankind, — or what ambergris any one takes up here, is, by the labor that removes it out of that common state nature left it in, made his property who takes that pains about it. And, even amongst us, the hare that any one is hunting is thought his who pursues her during the chase; for, being a beast that is still looked upon as common and no man's private possession, whoever has employed so much labor about any of

man lawyer, that creation — which implies labor — is an original mode of acquiring property, Grotius thought that this, instead of being classed as a distinct and peculiar mode of acquisition, should be referred to that of occupancy.[1]

We find, then, the principle of labor expressly advanced by some of the public jurists to explain the origin of property, not denied by others, and in harmony with the theories of all. And this has continued a fundamental principle, both in theory and practice, throughout the entire history of property. The principle is as old as property itself, that what a man creates by his own labor, out of his own materials, is his to enjoy to the exclusion of all others. It is based not only on natural right, but also on the necessities of society, being essential to the promotion of industry. Before the time of written law, Abraham maintained his right to a well because he had "digged this well;"[2] and, more than a century later, his son Isaac successfully claimed it as his father's property.[3] Even the savage claims for himself the game which he has secured by his own toil, — the fishes which he has caught, the trees which he has felled, and the acorns which he has picked up under the oak. As Locke says, "The grass my horse has bit, the turfs my servant has cut, and the ore I have digged, in any place where I have a right to them in common with others, become my property, without the assignation or consent of anybody. The labor that was mine removing them out of that common state they were in hath fixed my property in them."[4] And, where the science of law has attained its highest state, there is no purer, stronger, better title to property than that acquired by production. To him belongs the harvest whose toil has produced it; to him, the fruit who has planted the tree. This is the natural mode of acquiring property; while succession, purchase, gift, are derivative. It is not only the oldest, but the most meritorious; because what is held by this title must have been earned by the sweat of the brow, while acquisition by purchase, gift, or inheritance, is not inconsistent with

that kind as to find and pursue her, has thereby removed her from the state of nature wherein she was common, and hath begun a property." Civil Gov. c. 5.

[1] De Jure B. ac P. lib. ii. c. 3.
[2] Gen. xxi. 30.
[3] Gen. xxvi. 15, 18.
[4] Civil Gov. c. 5, § 28.

idleness. "The most natural claim to a thing," says Rutherforth, "seems to arise from our having made it; for no one appears to have so peculiar a right in it as he who has been the immediate cause of its existence."[1]

Ownership, then, is created by production, and the producer becomes the owner. This principle is general, and covers all productions, — the whole field of labor. It cannot be applied to the produce of one kind of labor, and withheld from that of another. It matters not whether the labor be of the body or of the mind. The yield of both comes under the same fundamental principle of property, which recognizes no distinction between the poet and the peasant in the ownership of their productions. No theory, no explanation, no consideration, has been advanced by the great writers to account for the inviolability of property in the produce of bodily labor, which does not apply with equal force and directness to property in the fruits of intellectual industry. No vital qualities have been assigned to one which are not equally inherent in the other. All the attributes and conditions marked out by Pufendorf as essential to the constitution of property are found in intellectual productions.[2] In other words, neither in its origin nor in its essential qualities is literary property *sui generis;* but it is simply a division, a species, of general property. It is subject to all the fundamental rules governing the acquisition, possession, and transmission of property. It is acquired by labor, succession, gift, purchase; transmitted by sale, donation, bequest; lost by abandonment. It may be injured, stolen, borrowed and lent, mortgaged and pawned. It may be the subject of contract, bargain, trade, fraud. Published, it may be seized by creditors. Disraeli says you may fill warehouses and freight ships with it.[3]

[1] Inst. of Nat. Law, b. i. c. 3, § 11.

[2] De Jure Nat. et Gent. lib. iv.

[3] "The origin of the property is in production. As to works of imagination and reasoning, if not of memory, the author may be said to create; and, in all departments of mind, new books are the product of the labor, skill, and capital of the author. The subject of property is the order of words in the author's composition: not the words themselves, they being analogous to the elements of matter, which are not appropriated unless combined; nor the ideas expressed by those words, they existing in the mind alone, which is not capable of appropriation. The nature of the right of an author in his works is analogous to the rights of ownership in other personal property." Erle, J., Jefferys *v.* Boosey, 4 H. L. C. 867. "A production of the mind

That there is an important dividing-line between property in the results of manual and in those of intellectual labor is clear. The former is corporeal; the latter, without material substance. Literary property is not in the material which preserves the author's production, and is the means of its communication to others, but in the intellectual creation, which is composed of ideas, conceptions, sentiments, thoughts. It is in what is conveyed by the words of the manuscript or the printed page, and not in the paper or parchment. It is in an invisible, intangible creation of the mind, fixed in form and communicated to others by language. Incorporeal itself, it is generally attached to the corporeal.

It has been maintained that material substance is an essential attribute of property, — that nothing can be the subject of ownership which is not corporeal. This is an error which has arisen from the assumption that materiality is essential to the determination of the identity of a thing. It is clear that a thing must be capable of identification, in order to be the subject of exclusive ownership. But when its identity can be determined so that individual ownership may be asserted, it matters not whether it be corporeal or incorporeal. The spirit both of natural and of artificial law is to assign an owner to every thing capable of ownership. The very meaning of the word "property" in its legal sense is "that which is peculiar or proper to any person; that which belongs exclusively to one." The first meaning of the word from which it is derived — *proprius* — is "one's own." Property in what is written on paper, as wholly distinct from that in the paper itself, is expressly conceded by Pufendorf; who denounces the doctrine of the Roman lawyers, that, when one man wrote any thing on the parchment of another, the writing belonged to the owner of the blank material, on the ground that "the writing is of more worth than the paper."[1]

Whatever, then, having the other requisites of property, can be identified, becomes a proper subject of ownership. This

is property in every essential sense in which a production of the hands is the producer's property." Robertson, J., Grigsby *v.* Breckinridge, 2 Bush (Ky.), 485.

[1] De Jure Nat. et Gent. lib. iv. c. 7, § 7.

attribute is found no less marked in intellectual than in manual productions. The identity and ownership of the former can be determined as easily and precisely as those of the latter. "I confess I do not know," said Mr. Justice Aston, "nor can I comprehend, any property more emphatically a man's own, nay, more incapable of being mistaken, than his literary works."[1] The absurdity of arguing that the poetry of Tennyson cannot be distinguished from that of Longfellow, or the prose of Carlyle from that of Emerson, would seem to be sufficiently apparent. And yet the corner-stone of the theory that there can be no property in intellectual productions was laid a century ago, by an English judge, on the error that such productions, being incorporeal, are "not capable of distinguishable proprietary marks;" and therefore cannot be the subject of property, since ownership cannot be determined.[2] Indeed, so complete may be the identity of an incorporeal literary composition, that, even when it has no existence in writing or print, it may be preserved in its entirety for ages in the memory; passing from generation to generation, from country to country. The composer will conceive and give expression to a musical composition without putting a note on paper. It is a creation, without material form, in the realm of the imagination; but so complete is its incorporeal, invisible form, so marked its individuality, so distinctly perceptible to the musical mind, that another will reproduce it "by ear," without the aid of written or printed notes.

Corporeal possessions perish; but time does not destroy or efface what is best in literature. The intellectual creations of the Romans have come to us, through twenty centuries, more completely preserved than their temples; and, while many of their monuments of stone and brass can no longer be distin-

[1] Millar *v.* Taylor, 4 Burr. 2345.

"The identity of a literary composition," says Sir William Blackstone, "consists entirely in the sentiment and the language: the same conceptions, clothed in the same words, must necessarily be the same composition; and whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no man (it hath been thought) can have a right to exhibit it, especially for profit, without the author's consent." 2 Com. 406.

[2] Yates, J., Millar *v.* Taylor, 4 Burr. 2365–2366.

guished, the identity of their intellectual monuments, small even as the gems of Horace, remains whole. That greatest creation of ancient genius, the Iliad, has not only preserved its identity through nearly thirty centuries, but, according to Jacobs and other Greek scholars, it was recited from memory at the Greek festivals for ages before it was "imprisoned in written characters." [1]

What Effect has Publication on the Author's Rights?

It may, then, be assumed that before publication an author has, in the fruits of his intellectual labor, a property as whole and as inviolable as that which exists in material possessions; that he has supreme control over such productions, may exclude others from their enjoyment, may dispose of them as he pleases. It is generally conceded that the author has this right while the work is in manuscript. But it has been argued that publication is an abandonment of the work to the public; that as soon as published it becomes *publici juris*, and the author's

[1] "With respect to the first of these grounds, that copyright cannot be the subject of property, inasmuch as it is a mental abstraction too evanescent and fleeting to be property, and as it is a claim to ideas that cannot be identified, nor be sued for in trover or trespass, the answer is, that the claim is not to ideas, but to the order of words; and that this order has a marked identity and a permanent endurance. Not only are the words chosen by a superior mind peculiar to itself, but in ordinary life no two descriptions of the same fact will be in the same words, and no two answers to your Lordships' questions will be the same. The order of each man's words is as singular as his countenance; and although, if two authors composed originally with the same order of words, each would have a property therein, still the probability of such an occurrence is less than that there should be two countenances that could not be discriminated. The permanent endurance of words is obvious, by comparing the words of ancient authors with other works of their day: the vigor of the words is unabated; the other works have mostly perished. It is true that property in the order of words is a mental abstraction: but so also are many other kinds of property; for instance, the property in a stream of water, which is not in any of the atoms of the water, but only in the flow of the stream. The right to the stream is not the less a right of property, either because it generally belongs to the riparian proprietor, or because the remedy for a violation of the right is by action on the case, instead of detinue or trover. The notion of Mr. Justice Yates, that nothing is property which cannot be ear-marked, and recovered in detinue or trover, may be true in an early stage of society, when property is in its simple form, and the remedies for violation of it also simple; but is not true in a more civilized state, when the relations of life and the interests arising therefrom are complicated." Erle, J., Jefferys *v.* Boosey, 4 H. L. C. 868.

property lost, except as far as it may be protected by statute. The effect of this theory is to deny to the author all property except that which he has in the paper on which his thoughts are written. While the manuscript is in his possession, it is his only by virtue of his property in the material; when he parts with his paper, he loses his entire property. Others admit the existence of a property other than that in the paper, but maintain that when published it is taken from the owner by force of the statute.

If by publication this species of property is lost to the owner, it must be on the principle of abandonment or of contract. No other theory has been, and no other can be, advanced. Let us, then, examine each.

No principle of law is more firmly established than that there can be no abandonment of property without the consent of the owner. This is conceded by all the writers on natural law, and denied by none. "A thing is understood to be abandoned," says Grotius, "when it is cast away; unless it appears that it was so cast away only for a time, and with intention to reclaim it."[1] Pufendorf says:—

"To make a thing completely abandoned or forsaken, two points are necessary: first, that the person refuse to own it for the future; and, secondly, that he divest himself of the possession by leaving the thing or casting it away. If either of these conditions be wanting, the property is not vacated. Thus, if I throw a thing by, yet without intention to quit my right in it, I do not prejudice myself by that action. And, on the other hand, though I am resolved utterly to quit my title to a thing, yet, unless I actually cast it off, I am still the proprietor."[2]

In his notes on the same jurist, Barbeyrac adds:—

"To authorize us, then, to look upon a thing as abandoned by him to whom it belonged, because he is not in possession, we ought to have some other reasons to believe that he has renounced his personal right to it. Now, as I have observed, we may presume this in respect to those things which remain such as nature has produced them, especially such as are very numerous or are of a vast extent; though Mr. Titius does not make that distinction, and maintains that one may be master of the sea, although he be not in possession. But as for other

[1] De Jure B. ac P. lib. ii. c. 4, § 4.
[2] De Jure Nat. et Gent. lib. iv. c. 6, § 12.

things, which are the fruits of human industry, and are either produced by nature, or are put into a new form, or are tamed, or are hunted out of their holes, — all this is done with great labor and contrivance, usually; and it can't be doubted but every one would preserve his right to them till he makes an open renunciation; and so they ought to be looked upon as his, though he does not keep them ever after, or he loses the possession by some accident, which may easily happen, and is almost unavoidable." [1]

Even when goods, supposed to be lost, were found, the law, both in ancient and modern times, has jealously guarded the rights of the owner. Pufendorf cites, after Ælian, a law of the Stagirites, which reads, *ἃ μὴ κατέθου μὴ λάμβανε*: "Take not up what you did not lay down." [2] According to Ulpian, it was theft for a person to convert to his own use, *animo lucrandi*, property found, when there was no reason to believe it had been abandoned. Even title by prescription or usucaption, which grows out of long undisturbed possession, is based on the same principle; for the consent of the owner is implied from long neglect to claim his property.

To constitute abandonment, then, there must be intention; without it, there can be no abandonment. Literary and material property are equally governed by this principle. But such intention is expressly denied by the author, who never ceases to claim his rights of ownership. In publishing his book, he maintains a vigilant watch over his property, and loudly protests against its spoliation. The theory of abandonment, therefore, must be rejected.

If, then, the ownership is transferred by publication from the author to the public, it must be by agreement, express or implied. In the language of Pufendorf, "The concurrence of two wills is required, — the giver's and the receiver's." [3] What, then, is the compact between the author and the public? In consideration of a sum of money, the author gives to the reader the means of intellectual improvement or enjoyment contained in a book. Now, a book consists of two elements, — the corporeal and the incorporeal; the material, — paper, printing, binding, — and the thoughts, ideas, sentiments, conceptions,

[1] De Jure Nat. et Gent. lib. iv. c. 6, § 1, n. 1.
[2] Ibid. lib. iv. c. 6, § 12. [3] Ibid. lib. iv. c. 9, § 2.

which constitute the invisible creation of the mind. The former is simply a channel of communication, a vehicle of conveyance, for the latter. The author impliedly says to the reader: "I will grant you the perpetual privilege of using my literary production in return for a small sum of money, but on condition that you do not injure it and render it worthless, as a source of profit to me, by multiplying and circulating copies. I will provide you with a manuscript or printed copy to enable you to read and enjoy the work. That copy shall be yours to keep for ever, or to dispose of as you please; but in the intellectual contents of the book you have simply a right of use in common with thousands of others. This property and the right of multiplying it I reserve to myself. It is worth twenty thousand dollars; but I will admit you to a common use of it for one dollar."

These terms are accepted by the buyer, who is willing to pay the named price for the enjoyment, instruction, or information to be derived from reading the book. He thus becomes the owner of the entire property in the material substance of the book; and with the book, as such material substance, he may do as he pleases. But in the intellectual contents of the book, — the literary creation, — he acquires a right not of property, but of use. He is simply privileged to make of it certain uses which are implied in the contract. He is entitled to all the enjoyment, improvement, instruction, and information to be derived from reading the book. He may lend the book to be read by another; may sell it, or give it away, or destroy it. That particular copy is his to keep for ever. All these uses are within the terms of purchase, — are covered by the consideration passed. They do not injure the author's property, or depreciate its value. But as the author grants simply the use of his literary production, reserving to himself the exclusive ownership, the buyer may not exercise any proprietary rights, or in any way interfere with the author's property. To multiply copies of the work is a violation of the contract, — a direct invasion of the author's rights, an appropriation of his property, which has no warrant in law, no justification in equity. There is no contract, express or implied, no understanding that the buyer of a copy of the book is a purchaser of the right to multiply

copies. This right may be worth twenty thousand dollars, while the amount given for the book is but one dollar. No consideration is paid for the copyright; and there is a principle of justice older than written law, that property can be acquired only by a valid consideration, or with the owner's consent. To say that property worth twenty thousand dollars may be acquired for one dollar, against the will of the owner, is a violation of the first principle of construing contracts.

The rights which vest in the purchaser of a book have been aptly compared with those acquired by the buyer of a ticket to a place of public amusement. The latter is entitled to all the enjoyment, instruction, and information to be derived from witnessing the performance. He may, perhaps, give or sell his ticket to another, who may enjoy the same advantages in his stead. He has paid for one seat in the theatre, and he may claim the right to use it. But no one will argue that the privilege of using one ticket carries the right to multiply it a thousand-fold; that the holder may print other tickets, and sell them for his own profit; that the right of admission vests any right of property in the theatre or the play. In this case, the ticket-holder is entitled to just what he pays for. So the buyer of a book is entitled to just what he pays for, and no more; and nothing can be clearer than that, in paying for a copy of the book, he does not pay for the copyright.

"All the knowledge which can be acquired from the contents of a book," said Mr. Justice Willes, "is free for every man's use: if it teaches mathematics, physic, husbandry; if it teaches to write in verse or prose; if, by reading an epic poem, a man learns to make an epic poem of his own, — he is at liberty. . . . The book conveys knowledge, instruction, or entertainment; but multiplying copies in print is a quite distinct thing from all the book communicates. . . . And there is no incongruity to reserve that right, and yet convey the free use of all the book teaches." [1]

If the author should furnish the reader with a manuscript copy with the same understanding that is created by the delivery of a printed one, no one would claim that the manuscript might be lawfully published without the consent of the author;

[1] Millar *v.* Taylor, 4 Burr. 2331.

yet the contract is the same in both cases. How, then, can the rights of the parties be changed? As early as 1758, it was held in England that permission given to take a copy of Clarendon's manuscript history did not carry the right to print such copy, even a century after the author's death. The court said that any use might be made of the copy except publication.[1]

According to Grotius, the exclusive right of using and transferring property is a necessary consequence of the recognition of the right of property itself.[2] It is the peculiarity of literary property that only by the multiplication of copies can it have any value to its owner; by publication alone can the author secure the reward of his labor. Without this, his toil is without fruit, his property without value. Can it, then, be a sound principle of law, of ethics, of reason, that property is lost by the very act which alone gives it value? Those who concede to intellectual productions all the essential attributes of property before publication, but insist that such property is destroyed by publication, say in effect to men of letters: "Every man is entitled to the fruits of his labor. You are sole owners of your productions. Your literary property is sacred, and shall continue inviolable *as long as you do not use it;* but beware of publication, which, though the only road to reward, is a certain one to ruin. Your manuscript is yours for all purposes except publication. You may read it, lend it to your neighbor, lock it up in your safe, burn it; but you must keep it from the printer."

Such reasoning is a burlesque, which might be entertaining if it were confined to theory; but reduced to practice, as it has been, it becomes grievously serious.

It is a ridiculous doctrine which recognizes the existence of a species of property, and yet pronounces its only use unlawful and self-destructive. If the property is recognized, a mode of use must be conceded. To say that authors have rights of property in their literary productions, and that they are lost by publication, which is their only source of value, is absurd. It is destructive of the first principles, the essence, the very notion, of the right of property. "Property," says Pufendorf,

[1] Duke of Queensbury *v.* Shebbeare, 2 Eden, 329.

[2] De Jure B. ac P. lib. ii. c. 6, § 1.

"implies a right of excluding others from your possession, which right would be altogether insignificant, if it could not be effectually exercised; 'twould be in vain for you to claim that as your own which you can by no means hinder others from sharing with you." [1]

This view of the law was well expressed a century ago, by a learned English judge, when the Court of King's Bench affirmed the perpetuity of literary property. Mr. Justice Aston said: —

"It is settled and admitted, and is not now controverted, that literary compositions, in their original state, and the incorporeal right of the publication of them, are the private and exclusive property of the author; and that they may ever be retained so; and that, if they are ravished from him before publication, trover or trespass lies. I should be glad to know, then, in such a case, where the property is admitted, how the damages ought to be estimated by a jury. Should they confine their consideration to the value of the ink and paper? Certainly not. It would be most reasonable to consider the known character and ability of the author, and the value which his work, so taken from him, would produce by the publication and sale. And yet, what could that value be, if it was true that the instant an author published his works they were to be considered by the law as given to the public, and that his private property in them no longer existed? The present claim is founded upon the original right to this work, as being the mental labor of the author, and that the effect and produce of the labor is his. It is a personal, incorporeal property, salable and profitable. It has *indicia certa;* for, though the sentiments and doctrine may be called ideal, yet, when the same are communicated to the sight and understanding of every man, by the medium of printing, the work becomes a distinguishable subject of property, and not totally destitute of corporeal qualities.

"Now, without publication, 'tis useless to the owner, because without profit; and property without the power of use and disposal is an empty sound. In that state, 'tis lost to the society in point of improvement, as well as to the author in point of interest. Publication, therefore, is the necessary act and only means to render this confessed property useful to mankind and profitable to the owner. In this they are jointly concerned. Now, to construe this only and necessary act to make the work useful and profitable, to be destructive at once of

[1] De Jure Nat. et Gent. lib. iv. c. 5, § 1.

the author's confessed original property, against his expressed will, seems to be quite harsh and unreasonable. . . .

"But it was said at the bar, 'If a man buys a book, it is his own.' What! is there no difference betwixt selling the property in the work and only one of the copies? To say, 'Selling the book conveys all the right' begs the question. For, if the law protect the book, the sale does not convey away the right, from the nature of the thing, any more than the sale conveys it where the statute protects the book. The proprietor's consent is not to be carried beyond his manifest intent. Would not such a construction extend the partial disposition of the true owner beyond his plain intent and meaning? which, from the principles I have before laid down, is no more to be done in this compact than in the case of borrowing or hiring. Can it be conceived that, in purchasing a literary composition at a shop, the purchaser ever thought he bought the right to be the printer and seller of that specific work? The improvement, knowledge, or amusement which he can derive from the perusal is all his own; but the right to the work, the copyright, remains in him whose industry composed it. The buyer might as truly claim the merit of the composition, by his purchase, in my opinion, as the right of multiplying the copies and reaping the profits.

"The invasion of this sort of property is as much against every man's sense of it as it is against natural reason and moral rectitude. It is against the conviction of every man's own breast who attempts it. He knows it not to be his own; he knows he injures another; and he does not do it for the sake of the public, but *mala fide et animo lucrandi*."[1]

Those who contend that authors can have no property in their published works, except under the statute, lay great stress on the assumed analogy between literary productions and inventions. It is argued that the latter are clearly a monopoly, and therefore the former must be; that inventors are entitled to no rights in the productions of their genius, except those conferred by the patent-laws; and therefore authors have no property in their books other than that secured by the copyright statutes. In considering the nature of literary property, it is not material to determine whether inventions may or may not be the subject of property, or whether they do or do not constitute a monopoly. If they are not

[1] Millar *v.* Taylor, 4 Burr. 2340–2342.

analogous to literary productions, the argument from one to the other does not hold. If there be an analogy, it does not follow that, because property has not been recognized in one, it does not exist in the other. It is a question whether inventions are a proper subject of property. To assume that they are not, and on that assumption argue that the same is true of intellectual productions, is a shallow *petitio principii*. This fallacy has been well exposed by one of the soundest of English lawyers. After maintaining that there is a distinction between literary productions and inventions, Sir William Blackstone says: "But supposing, after all, that there was no real distinction between literary and mechanical compositions, yet the conclusion drawn from this argument is very illogical and unjust. If it be reasonable to allow a property in a literary production (and I submit it is highly so), can we argue thus? Books and machines are of the same nature; no property is allowed in a machine; therefore, none should be allowed in a book. The argument would rather stand thus: Books and machines are of the same nature; property should be allowed in books; and, therefore, it should also be allowed in machines. But, since they are of natures very different, both arguments will fall to the ground." [1]

The principles above set forth are equally applicable to works of the drama, music, sculpture, and painting. Here also the laborer is entitled to the full fruits of his labor. As reward in these cases often comes not from publication in print, but from representation or performance on the stage, or public exhibition, it is also contrary to the first principles of property that ownership should be lost by such public representation, performance, or exhibition. The producer of a drama or a musical composition, a painting or a statue, is entitled to its exclusive public use, whether by circulating copies or by performing or exhibiting the original.

How far Government may Interfere with Literary Property.

Assuming it to be the true doctrine, that literary property, both before and after publication, is founded on the same prin-

[1] Tonson *v.* Collins, 1 W. Bl. 344.

ciples, has the same essential attributes, is the same in every respect, as ordinary property, it necessarily follows that it must be governed by the same fundamental rules, and protected by the same great safeguards that are thrown around all property. Whatever violates the sanctity of one violates the sanctity of the other. How far, then, may the legislature interfere with those material possessions which constitute private property?

To preserve the sanctity of property has ever been a chief function of government. Next to protecting the lives and liberties of the people, it is the highest. Centuries ago, it was foreseen that sovereignty itself was to be feared as the most dangerous enemy of this right. As a bulwark against invasion from this source, the Magna Charta was made to declare that property should not be taken from the owner, except by the "law of the land." The same great guaranty has been sacredly treasured through more than six centuries of English history. It has been firmly implanted in the Constitution of the United States, which declares that private property shall not be taken for public use without just compensation, and in the constitution of every State. There are, however, cases in which the government may rightly interfere with private property against the will of the owner. On the universal principle of eminent domain, recognized by all writers on jurisprudence, and grafted in the constitutional law of America, the property of the individual is subordinate to the general welfare, and may, without his consent, be taken for public uses. But even here the powers of the State are sharply defined and strictly limited; since no property can be taken except for public uses, and none without just compensation.[1] These two conditions — public use and compensation — must always exist. Without either, the taking is unlawful. It is true that the line between what is and what is not a public use has not been clearly drawn. But the use must be open to all persons, — not one, or a few, — and it must be demanded by public necessity, convenience, or welfare. There must exist "the necessity of accomplishing some public good, which is otherwise impracti-

[1] Grotius de Jure B. ac P. lib. iii. c. 19, § 7; c. 20, § 7; Pufendorf de Jure Nat. et Gent. lib. viii. c. 5, §§ 3, 7; 2 Kent, Com. 339, and the authorities there cited; Cooley, Const. Lim. 530, 559.

cable."[1] "That only can be considered" a public use, says a high authority, "where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty (perhaps impossibility) of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide."[2] On this principle, railroads, canals, and highways may be run through rich farms without the owner's consent; capitols, custom-houses, and court-houses built on valuable private lots; levees thrown up; marshes drained; cities supplied with pure water; and other measures of general utility effected.

The legislature may also interfere with private property to abate a nuisance, or to protect persons or property from danger or injury. Again, in the interests of society, certain restrictions as to the succession of the ownership of property, as to the power of the owner to control it by will, may be imposed by positive law.

To these principles literary property is no exception. If a nuisance, it may be abated. If harmful to society, as obscene literature is, it may be seized. If damaging to the property of others, as libellous publications may be, it may be suppressed. If needed for necessary public uses, it may be taken against the will of the owner, who must, however, be compensated. In these respects, it is subject to the same rules and conditions which govern other species of property.

But the legislation which reduces the ownership of literary property from perpetuity to a term of years does not proceed on any of these principles. Such property is not claimed to be a nuisance, or detrimental to the proprietary rights of others. The doctrine of eminent domain has never been pleaded in justification of such legislation. Nor can it be; for the two vital principles of that doctrine — public use and compensation — are wanting. It is true that literature is for the general good of society. In a certain sense, it is for public use; but only in the sense in which all kinds of merchandise and wares may be said to be *pro bono publico*. The use made of

[1] Cooley, J., People *v.* Salem, 20 Mich. 481.
[2] Cooley, Const. Lim. 533.

books is of the same public nature as that made of grain, fuel, textile fabrics, &c. But this is wholly different from that public use which is contemplated by the doctrine of eminent domain. The owners of these commodities cannot rightfully be made to contribute them to the public demand, either with or without compensation, except perhaps in an extreme case not likely to arise. The case of literature is precisely analogous. There is no difference in principle between a statute which requires an author to surrender his works to the public at a prescribed time, and one which would compel the owner of the Mammoth Cave, after a term of years, to admit visitors without charge to view its subterranean wonders; or one which would limit the ownership of mines or fields to a term of years.

Again, no compensation is made for literary property appropriated by statute. Sophistry may assert that statutory protection produces an enhanced value during the term prescribed, and that this is an equivalent for the final loss of the copyright. Conceding, for the sake of the argument, what is not conceded in fact, that there is an increase in value wholly due to the statutes, this cannot be regarded, on any principle of natural or constitutional law, as taking the place of that indemnity which is a vital constituent of the doctrine of eminent domain. This *must be not conditional, but absolute; not doubtful, but* certain; not left to the future, but determined when the property is taken.[1] It is an established principle of the doctrine of eminent domain, that, when a part of private property is taken for public purposes, the enhanced value thus given to the remainder may be considered in determining the remuneration due the owner; but this affords no analogy to justify the taking of the whole on an undetermined, doubtful, supposititious, or, perhaps, no compensation, as in the case of literary property.

The conclusion, then, is inevitable, that the copyright statute which deprives authors of property in their intellectual productions after a term of years, cannot be defended on any principle which sanctions the taking of private property for public uses, or which justifies the regulation of private property for the common welfare. No one will contend that the State has

[1] 2 Kent, Com. 339; Cooley, Const. Lim. 559 *et seq.*

any right to control proprietary rights in an unpublished work, that it may compel the author to publish his production for the benefit of society. And, yet, to interfere with the author's rights in a manuscript is the same in principle as to regulate his rights in a printed composition. The right of property is the same after as before publication. It is as inviolable in one case as in the other.

Has the Common-law Property in Published Works been Taken Away by the Legislature?

I have endeavored to show that the ownership of literary property is perpetual by the common law, and that it cannot rightly be taken away or abridged by the legislature. It remains to be considered whether it has been so taken away or abridged. That the acts of Parliament and of Congress have been judicially construed to have this effect, and that this construction is the settled law of England and of the United States, is well known. The examination of the subject, then, involves the inquiry, whether the law has been rightly expounded by the courts. It will be necessary to consider the statute of Anne alone.[1] No English or American statute since passed has by express words taken away the common-law copyright in a book; and, in interpreting the meaning of the several acts, the courts have simply adopted the judicial construction given to the statute of Anne by the House of Lords in 1774.

It is a fact which may be regarded as judicially conceded, that copyright in printed books was not created by legislation, but that it existed by the common law long before, and when the statute of Anne was passed.[2] This doctrine was declared by the King's Bench in Millar *v.* Taylor;[3] and it has never been judicially overruled. It was expressly approved by a majority of the judges in Donaldson *v.* Becket;[4] and was in effect affirmed in that case by the House of Lords, whose judgment was not, that copyright had been created by the statute of Anne, but that the common-law right had been superseded by the statutory. The Parliament of Anne, therefore, in passing a law for the protection of literary property, was dealing with

[1] 8 Anne, c. 19.
[2] See History of Literary Property, *post*, pp. 58–68.
[3] 4 Burr. 2303.
[4] Ibid. 2408.

an existing, recognized right; and the statute affords ample internal evidence that this fact was clearly known and acted on by the members.[1] It is a settled principle of construction, that a statute cannot rightly be interpreted as taking away a common-law right, unless express words are used for that purpose, or a clear intention to that effect is apparent.[2] It cannot be successfully claimed that the statute of Anne by express language destroyed the common-law right. Had this been so, the contrary construction could not have been given to the act by the courts during more than half a century after its passage, and its meaning could not have been the subject of so much doubt and learned discussion. The sole ground, then, on which the statute could be construed as taking away or abridging the common-law right was a clearly implied intention of Parliament to that effect. That such intention was not clearly implied is shown by the following facts: —

1. For half a century after the statute became a law, it was the uniform practice of the chancery courts to grant injunctions protecting the common-law property in printed books in which the statutory copyright had expired.[3] Had there been any ground for the belief that Parliament had intended to destroy the common-law right, or any reasonable doubt as to the meaning of the statute, no injunction of this kind would have been granted.[4] "Every adjudication upon the act since it was passed," said Mr. Justice Willes in 1769, "is an authority that there never was an idea that this act had decided against the property of authors at common law."[5]

[1] "The particular wording of the enacting clause is very material, as it precisely adopts the identical expressions used in the decrees, ordinances, and statutes referred to; alike speaking of the right of authors as a known, subsisting, transferable property. I am not satisfied with saying that such right may be implied from the words: they are so express that the legislature cannot be otherwise understood than as speaking of a known property. 'The copy of the book,' 'the title to the copy,' is a technical recognition of the right, in the words of the act." Aston, J., Millar *v.* Taylor, 4 Burr. 2350.

[2] Sedgwick, Construction of Stat. & Const. Law, 75, 342; Potter's Dwarris on Statutes, 185, 219.

[3] See *post*, pp. 70, 71.

[4] "There never was a doubt in the Court of Chancery, till a doubt was raised there from decency upon a supposed doubt in this court in the case of Tonson and Collins [brought in 1760]. There is not an instance of an injunction refused, till it was refused upon the grounds of that doubt. The Court of Chancery never grants injunctions, in cases of this kind, where there is any doubt." Lord Mansfield, Millar *v.* Taylor, 4 Burr. 2400.

[5] Ibid. 2384.

2. In the three law cases, Tonson *v.* Collins,[1] Millar *v.* Taylor,[2] and Donaldson *v.* Becket,[3] in which the defendants sought to show that there was no copyright in printed books except under the statute, the chief ground on which this theory was based was, not that the common-law right had been taken away or abridged by the statute, but that copyright was created by the statute, and hence did not exist by the common law. This reasoning would not have been advanced, if the intention of Parliament to abridge an existing right had been clear.

3. In Millar *v.* Taylor, the King's Bench, on the opinion of three of its four judges, decided that the statute of Anne did not take away the common-law right.

4. Six of the twelve judges, including Lord Mansfield, in Donaldson *v.* Becket were of the same opinion.

This evidence is conclusive that there was neither an expressed nor a clearly implied intention to interfere with the common-law right.

The effect which Parliament intended that the statute should have, can be satisfactorily determined by considering the purpose for which the act was needed, and for which it was passed. The most direct and valuable evidence on this point is afforded by the petitions which were made by booksellers to Parliament, and in answer to which the law was enacted. That of 1709, which immediately preceded the introduction of the bill, expressly set forth the fact that copyright was recognized by the common law, and that a remedy was afforded by the common law for its protection. But this remedy was inadequate. What was wanted, and what was asked for, was a more effective remedy, — a speedier and more direct means of protecting literary property and punishing pirates than that afforded by the uncertain, cumbersome machinery of the common law.[4]

[1] 1 W. Bl. 301, 321.
[2] 4 Burr. 2303.
[3] Ibid. 2408.

[4] "This act was brought in at the solicitation of authors, booksellers, and printers, but principally of the two latter; not from any doubt or distrust of a just and legal property in the works or copyright (as appears by the petition itself, p. 240, vol. xvi., of the Journal of the House of Commons), but upon the common-law remedy being inadequate, and the proofs difficult to ascertain the damage really suffered by the injurious multiplication of the copies of those books which they had bought and published. And this appears from the case they presented to the members at the time. All the sanction they could obtain was a protection

To these appeals for additional protection for property, whose ownership was of unlimited duration, it is not likely that Parliament would respond by reducing that ownership to a short term of years, and by imposing upon authors the oppressive tax from which they were free under the common law, of giving to public libraries nine copies of every book published. It is hardly conceivable that, under these circumstances, they would pass a measure so important as one sweeping away a long-existing right of property, without expressing such intention in the most unmistakable language. Parliament avowedly legislated in the interests of literature, and for the better protection of literary property. If it had been intended to destroy or abridge the existing rights of authors, it would have been mockery to entitle the statute An Act for the Encouragement of Learning, and to declare that it was designed "for the encouragement of learned men to compose and write useful books." The prayer of the petitioners was that "confiscation of counterfeit copies be one of the penalties to be inflicted on offenders."[1] Parliament was thus plainly asked to provide penalties against piracy, in addition to the remedies afforded by

of their right, by inflicting penalties on the wrong-doer." Aston, J., Millar *v.* Taylor, 4 Burr. 2350.

The petition presented Dec. 12, 1709, set forth, "That it has been the constant usage for the writers of books to sell their copies to booksellers or printers, to the end they might hold those copies as their property, and enjoy the profit of making and vending impressions of them; yet, divers persons have of late invaded the properties of others, by reprinting several books, without the consent, and to the great injury, of the proprietors, even to their utter ruin, and to the discouragement of all writers in any useful department of learning." 16 Commons' Journal, 240.

Among the reasons given in support of the application for a bill was the following: "The liberty now set on foot of breaking through this ancient and reasonable usage is no way to be effectually restrained but by an act of Parliament. For by common law a bookseller can recover no more costs than he can prove damage; but it is impossible for him to prove the tenth, nay, perhaps the hundredth, part of the damage he suffers; because a thousand counterfeit copies may be dispersed into as many different hands all over the kingdom, and he not able to prove the sale of ten. Besides, the defendant is always a pauper; and so the plaintiff must lose his costs of suit. No man of substance has been known to offend in this particular; nor will any ever appear in it. Therefore the only remedy by the common law is to confine a beggar to the rules of the King's Bench or Fleet; and there he will continue the evil practice with impunity. We therefore pray that confiscation of counterfeit copies be one of the penalties to be inflicted on offenders." 4 Burr. 2318.

[1] Ibid.

the common law. They passed a law for that purpose. There is nothing in the statute, nothing in any contemporaneous record, showing that the legislature had any other purpose in view.

The declaration in the statute that the author of a book, or his assign, shall have the sole right of printing it for a specified period, "and no longer," has been cited to show that Parliament intended to restrict the ownership of literary property to a term of years. But the words, "and no longer," apply only to the penalties prescribed by the statute, and cannot rightly be construed as affecting the common-law right or remedies. The right to sue for the statutory penalties was given for a term of years, "and no longer;" but, both during this term and after its expiration, the common-law remedies remained unimpaired. "The words, 'no longer,'" said Lord Mansfield, "add nothing to the sense, which is exactly the same whether these words are added or not." [1]

If it had been intended to destroy the common-law right, and to make the statutory the only protection for literary property, not only would this purpose have been made clear beyond doubt and dispute, but the provisions of the statute would have been very different. The statutory means for protection would have been at least as complete as those afforded by the common law. The ordinary remedies by injunction and by action for damages would have been expressly provided. The facts that the only remedies given were penalties, that the forfeited copies were not to be given to the injured owner, but were to be destroyed, and that the money penalty might be recovered, not exclusively by the person aggrieved, but by a common informer, are in harmony with the construction that the statute was not designed to disturb the common-law rights and remedies. They are not reasonably consistent with the view that Parliament, in passing the statute, intended to take away the common-law right.

So far was it from the intention of Parliament to interfere with the existing rights and remedies of authors, that a declaration was put into the statute, which, in the opinion of three

[1] 4 Burr. 2406. "What the act gives with a sanction of penalties is for a term; and the words, 'and no longer,' add nothing to the sense, any more than they would in a will, if a testator gave for years." Willes, J., Ibid. 2333.

of the four judges in Millar *v.* Taylor, was intended expressly to save the common-law right, and to guard against the possibility of the statute being construed to take away that right. Section 9 declared "that nothing in this act contained shall extend, or be construed to extend, to prejudice or confirm any right that the said universities, or any of them, or any person or persons, have, or claim to have, to the printing or reprinting any book or copy already printed or hereafter to be printed." "It has been said," remarked Mr. Justice Aston, "that this was inserted that the rights which the universities or others had under *letters-patent* might not be affected. There can be no ground for this; for the act does not at all meddle with letters-patent, or enact a title that could either prejudice or confirm them. This proviso seems to be the effect of extraordinary caution that the rights of authors at common law might not be affected; for, if it had not been inserted, I apprehend clearly, they could not have been taken away by construction, but the right and the remedy would still remain unaffected by the statute." [1]

If the reasoning which has here been followed be correct, the only sound conclusions are these: —

[1] 4 Burr. 2352. "Had there been the least intention," said Lord Mansfield, "to take or declare away every pretence of right at the common law, it would have been expressly enacted, and there must have been a new preamble, totally different from that which now stands. But the legislature has not left their meaning to be found out by loose conjectures. The preamble certainly proceeds upon the ground of a right of property having been violated, and might be argued from as an allowance or confirmation of such right at the common law. The remedy enacted against the violation of it, being only temporary, might be argued from as implying there existed no right but what was secured by the act. Therefore, an express saving is added, 'that nothing in this act shall extend or be construed to extend to prejudice or confirm any right,' &c.; 'any right' is manifestly any other right than the term secured by the act. The act speaks of no right whatsoever but that of authors, or derived from them: no other right could possibly be prejudiced or confirmed by any expression in the act. The words of the saving are adapted to this right: 'Book or copy already printed, or hereafter to be printed.' They are not applicable to prerogative copies. If letters-patent to an author or his assigns could give any right, they might come under the generalty of the saving. But so little was such a right in the contemplation of the legislature, that there is not a word about patents in the whole act. Could they have given any right, it was not worth saving; because it never exceeded fourteen years." Ibid. 2406.

"What," asked Mr. Justice Willes, "was the right to be saved, either as to books already printed, or much more as to books hereafter to be printed, but the common-law right? Without this proviso it might fairly have been argued, that there is nothing in this act which can prejudice the property of authors in the copy." Ibid. 2334.

Literary property, like all property, has its origin in natural law, and not in legislation; it is, therefore, a natural and not an artificial right.

It has the same general attributes, is governed by the same general principles, and is subject to the same general conditions, that obtain in the case of all property.

Its ownership, like that of all property, is transferred only with the consent of the owner. It is no more lost by publication than the ownership of land is lost by a grant of the privilege of hunting, felling timber, or digging minerals, within its borders.

The legislature may rightfully interfere with it, only as it may interfere with other property.

In passing the statute of Anne, Parliament did not intend to destroy or prejudice the common-law rights and remedies of authors. The judicial interpretation given to that act by the House of Lords, in 1774, is contrary not only to right and justice, but to the true purpose and meaning of the statute as determined by settled rules of construction.

Judicial History relating to the Origin and Nature of Literary Property.

A review of the judicial history of this subject will show that common-law copyright in published works was recognized by the English courts until 1774; that this principle has been maintained by many of the most learned British jurists; and that the decisions which support the prevailing doctrine rest on one disputed precedent, like a pyramid on its apex.

Prior to the statute of Anne, authors had a perpetual property in their works, by the common law.[1] During half a century after this statute was passed, its meaning was not disputed; it being generally understood that the only purpose and effect of the act was to provide a cumulative remedy against piracy. The Court of Chancery proceeded uniformly on this assumption, and granted, between 1735 and 1752, not fewer than five injunctions restraining piracy of printed books not protected by the statute.[2] The injunctions were granted and

[1] See History of Literary Property, *post*, pp. 58–68.

[2] Eyre *v.* Walker, Motte *v.* Falkner, Walthoe *v.* Walker, Tonson *v.* Walker, cited 4 Burr. 2325; Tonson *v.* Walker, 3 Swans. 672.

acquiesced in on the ground that the ownership of literary property was perpetual by the common law, and had not been taken away or abridged by the statute. These were equity decisions; but, in speaking of their weight, Lord Mansfield said that "the judicial opinions of those eminent lawyers and great men who granted or continued injunctions, in cases after publication, not within 8 Queen Anne, uncontradicted by any book, judgment, or saying, must weigh in any question of law; much more in a question of mere theory and speculation as to what is agreeable or repugnant to natural principles. I look upon these injunctions as equal to any final decree."[1] "The whole jurisdiction exercised by the Court of Chancery since 1710," said Mr. Justice Willes in 1769, "against pirates of copies, is an authority that authors had a property antecedent to which the act gives a temporary additional security."[2]

In 1760, the plea was first raised in an English court of law, that the purpose and effect of the statute of Anne were to give to authors a limited monopoly in their productions; that copyright had been created by the statute, and existed only by virtue of it; and that no author had an exclusive right to his book after publication, and consequently no remedy against piracy, except under the statute. This theory found no favor with the judges, who had not, however, the opportunity to expose its unsoundness; for the case was discovered to be one of collusion, and was therefore thrown out of court. But all of the judges are known to have favored the plaintiff.[3]

[1] Millar *v.* Taylor, 4 Burr. 2399. "They considered the act," said Lord Mansfield, "not as creating a new offence, but as giving an additional security to a proprietor grieved; and gave relief without regard to any of the provisions in the act, or whether the term was or was not expired. No injunction can be obtained till the court is satisfied that the plaintiff has a clear legal right. And where, for the sake of the relief, the Court of Chancery proceeds upon a ground of common or statute law, their judgments are precedents of high authority in all the courts of Westminster Hall." Ibid. 2407.

[2] Ibid. 2323.

[3] Tonson *v.* Collins, 1 W. Bl. 301, 321. "I have been informed, from the best authority, that, so far as the court had formed an opinion, they all inclined to the plaintiff." Willes, J., Millar *v.* Taylor, 4 Burr. 2327. In 1765, doubtless in consequence of the legal questions raised but not decided in Tonson *v.* Collins, the Lord Chancellor dissolved the injunction which had been granted against the publication of a book in which the copyright had expired. Osborne *v.* Donaldson, and Millar *v.* Donaldson, 2 Eden, 328. As early as 1748, it was held in Scotland that copyright in a published book

Soon after, the same plea was again offered in defence of piracy. The fact that this was a bold attack upon the citadel of literary property; that the work in controversy was Thomson's Seasons; that in the contest were the first lawyers of the English bar; that Lord Mansfield, then in the noon of his fame, as Chief Justice of the King's Bench, presided over the trial,—make the case of Millar *v.* Taylor one of the most important, as it is one of the most famous, in the English reports. The action was brought in 1766, and was decided by the Court of King's Bench in 1769.[1] The copyright secured by the statute of Anne had expired. The direct issue was raised, whether a right of property in a published work was given by the common law.

The origin and nature of literary property were discussed by the judges in the most elaborate opinions that have ever been pronounced on the subject. The questions considered were: 1. Whether intellectual productions have the attributes of property; 2, whether the exclusive right of an author to multiply copies of his book existed by the common law, and had been recognized prior to the statute of Anne; 3, whether this right is lost by publication; 4, whether it had been taken away or abridged by the statute of Anne.

Three of the four judges — Lord Mansfield, and Justices Aston and Willes — maintained, with a degree of learning and thoroughness that has not since been equalled in the examination of this question, that literary property did exist by the common law, and that its ownership was neither lost by publication nor abridged by the statute of Anne. Their opinions were founded on the general principle underlying all property, that the laborer is entitled to enjoy the fruits of his labor, whether manual or mental, that the common-law existence of literary property was attested by the history of two centuries; that the author's rights could not be prejudiced by publication, which was the only means of rendering his property useful or

did not exist by the common law independently of the statute of Anne. Midwinter *v.* Hamilton, 10 Mor. Dict. of Dec. 8295; on ap. (Midwinter *v.* Kincaid) 1 Pat. App. Cas. 488. To the same effect are Hinton *v.* Donaldson, decided in 1773, 10 Mor. Dict. of Dec. 8307; Cadell *v.* Robertson (1804), Ibid. Lit. Prop. App. 5; on ap. (1811) 5 Pat. App. Cas. 493.

[1] 4 Burr. 2303.

valuable; that the obvious intent of the legislature in framing the act of Anne was to provide a cumulative remedy against piracy, without disturbing the existing right of literary property; and that there was nothing in the act to indicate that such was not its sole object and effect. The sound and enlightened views expressed by Lord Mansfield may well be quoted here:—

"From premises either expressly admitted, or which cannot and therefore never have been denied, conclusions follow, in my apprehension, decisive upon all the objections raised to the property of an author in the copy of his own work, by the common law. I use the word 'copy' in the technical sense in which that name or term has been used for ages, to signify an incorporeal right to the sole printing and publishing of somewhat intellectual communicated by letters. It has all along been expressly admitted that by the common law an author is entitled to the copy of his own work until it has been once printed and published by his authority; and that the four cases in chancery cited for that purpose are agreeable to the common law; and the relief was properly given in consequence of the legal right. The property in the copy thus abridged is equally an incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever. . . .

"No disposition, no transfer, of paper upon which the composition is written, marked, or impressed, though it gives the power to print and publish, can be construed a conveyance of the copy, without the author's express consent to print and publish, much less against his will. The property of the copy thus narrowed may equally go down from generation to generation, and possibly continue for ever, though neither the author nor his representatives should have any manuscript whatsoever of the work,—original, duplicate, or transcript. . . .

"If the copy belongs to an author after publication, it certainly belonged to him before. But, if it does not belong to him after, where is the common law to be found which says there is such a property before? All the metaphysical subtleties from the nature of the thing may be equally objected to the property before. It is incorporeal; it relates to ideas detached from any physical existence. There are no *indicia*; another may have had the same thoughts upon the same subject, and expressed them in the same language, *verbatim*. At what time and by what act does the property commence? The same string

of questions may be asked upon the copy before publication. Is it real or personal? Does it go to the heir or to the executor? Being a right which can only be defended by action, is it, as a *chose in action*, assignable or not? Can it be forfeited? Can it be taken in execution? Can it be vested in the assignees, under a commission of bankruptcy?

"The common law as to the copy before publication cannot be found in custom. Before 1732, the case of a piracy before publication never existed; it never was put or supposed. There is not a syllable about it to be met with anywhere. The regulations, the ordinances, the acts of Parliament, the cases in Westminster Hall, all relate to the copy of books after publication by the authors. Since 1732, there is not a word to be traced about it, except from the four cases in chancery. . . .

"From what source, then, is the common law drawn, which is admitted to be so clear in respect of the copy before publication? From this argument: Because it is just that an author should reap the pecuniary profits of his own ingenuity and labor. It is just that another should not use his name without his consent. It is fit that he should judge when to publish. It is fit he should not only choose the time, but the manner, of publication, — how many, what volume, what print. It is fit he should choose to whose care he will trust the accuracy and correctness of the impression, to whose honesty he will confide, not to foist in additions; with other reasonings of the same effect.

"I allow them sufficient to show it is agreeable to the principles of right and wrong, the fitness of things, convenience, and policy, and therefore to the common law, to protect the copy before publication. But the same reasons hold after the author has published. He can reap no pecuniary profit, if, the next moment after his work comes out, it may be pirated upon worse paper, and in worse print, and in a cheaper volume. The 8th of Queen Anne is no answer. We are considering the common law upon principles before and independent of that act. The author may not only be deprived of any profit, but lose the expense he has been at. He is no more master of the use of his own name. He has no control over the correctness of his own work. He cannot prevent additions. He cannot retract errors. He cannot amend or cancel a faulty edition. Any one may print, pirate, and perpetuate the imperfections, to the disgrace and against the will of the author; may propagate sentiments under his name which he disapproves, repents, and is ashamed of. He can exercise no discretion as to the manner in which, or the persons by whom, his work shall be published. For these and many more reasons, it seems to me just and fit to protect the copy after publication.

"All objections which hold as much to the kind of property before as to the kind of property after publication, go for nothing; they prove too much. There is no peculiar objection to the property after, except that the copy is necessarily made common after the book is once published. Does a transfer of paper upon which it is printed necessarily transfer the copy, more than the transfer of paper upon which the book is written? The argument turns in a circle: 'The copy is made common, because the law does not protect it; and the law cannot protect it, because it is made common.' The author does not mean to make it common; and, if the law says he ought to have the copy after publication, it is a several property, easily protected, ascertained, and secured. The whole, then, must finally resolve in this question, whether it is agreeable to natural principles, moral justice and fitness, to allow him the copy after publication as well as before. The general consent of this kingdom for ages is on the affirmative side. The legislative authority has taken it for granted, and interposed penalties to protect it for a time."[1]

After the most thorough examination of the general scope and purpose of the statute of Anne, the circumstances under which it was passed, and especially the language employed to express its meaning, the three judges in the majority agreed that to interpret the statute as creating a right for a term of years, or as destroying an existing right, was contrary to the obvious intent of the legislature, the plain meaning of the act, and the most natural and established rules of construing statutes. Lord Mansfield thought that it was "impossible to imply this act into an abolition of the common-law right, if it did exist; or into a declaration that no such right ever existed. . . . Had there been the least intention to take or declare away every pretence of right at the common law, it would have been expressly enacted; and there must have been a new preamble, totally different from that which now stands."[2]

Mr. Justice Yates, dissenting from the conclusions reached by his associates, argued that there could be no property in intellectual productions; that the sole right of an author to the copy of his published works was unknown in England before the statute of Anne; and that copyright was a limited monopoly created, and wholly regulated, by that act.

[1] 4 Burr. 2396–99.

[2] Ibid. 2405, 2406.

The thoughtful student will seek in vain in the reported opinion of this judge for good reasons to support his remarkable theory. Those who are convinced by the sound reasoning of the court, and are led to the conclusions reached by it, will look upon his exposition of legal principles as wholly unsound, his reasoning as sophistry, and his statement of facts as contrary to plain history. This bad law, sophistry, and perversion of facts, were woven into a solemn judicial opinion, which is plausible enough to have misled many intelligent men, but which was doubtless heard with surprise by the other judges of the court.

Mr. Justice Yates asserted that "nothing can be the object of property which has not a corporeal substance."[1] And yet materiality is no more essential to the right of property than is color or shape. A subject of property must be capable of identification, in order that ownership may be asserted. This is a necessary attribute of property; and, where it exists with the other essential qualities, it matters not whether the thing be corporeal or incorporeal.

He denied that intellectual productions could be the subject of property, because they could not be identified.[2] And yet he admitted the king's property in prerogative copies; that members of the stationers' company had exercised the exclusive right of printing books; that injunctions had been granted protecting authors from piracy; and that the statute of Anne

[1] 4 Burr. 2361. "But the property here claimed," he continued, "is all ideal: a set of ideas which have no bounds or marks whatever, nothing that is capable of a visible possession, nothing that can sustain any one of the qualities or incidents of property. Their whole existence is in the mind alone; incapable of any other modes of acquisition or enjoyment than by mental possession or apprehension; safe and invulnerable from their own immateriality; no trespass can reach them; no tort, affect them; no fraud or violence, diminish or damage them. Yet these are the phantoms which the author would grasp and confine to himself; and these are what the defendant is charged with having robbed the plaintiff of." Mr. Justice Thompson said, that this view of the nature of copyright "would hardly deserve a serious notice, had it not been taken by a distinguished judge." Wheaton *v.* Peters, 8 Pet. 678.

[2] "There is another maxim, too," he said, "concerning property, 'that nothing can be an object of property that is not capable of distinguishable proprietary marks.' . . . Now, where are the *indicia* or distinguishing marks of ideas! What distinguishing marks can a man fix upon a set of intellectual ideas, so as to call himself the proprietor of them? They have no ear-marks upon them; no tokens of a particular proprietor." 4 Burr. 2365–66.

gave a monopoly in books for a limited term. Every one of these conceded facts shows the falsity of the assertion that intellectual productions are incapable of identification. Worse than useless would have been the statute securing the exclusive right of printing a literary composition, if the ownership of such production were beyond the possibility of determination. The very admissions of Mr. Justice Yates show that the *meum* and *tuum* line can be drawn and preserved with the same ease and precision in the case of literary productions as in that of lands or bonds.

Equally fallacious is his argument, that there can be no property in intellectual productions because they are not capable of separate possession.[1] The possession of any kind of property is often, and may always be, theoretical. It is only by a fiction of the law that the owner is said in many cases to be in possession of real property. He cannot actually and personally possess extensive lands. He may be the owner of estates in opposite parts of the world, — of fields which he never sees. The legal possession is in him; the actual possession, with the right of use, may be in another. So personal property is transferred, with the right of use, to the actual possession of any person, without prejudice to the owner's title. It is the right of ownership which gives the title to legal possession. Where this right exists, it matters not whether or not the property is in the actual possession of the owner. When the property is identified and the legal title established, the law protects the rightful owner. The same is true of literary property. This principle was conceded by Mr. Justice Yates, in the case of material possessions. "But how can an author," he asked, "after publishing a work, confine it to himself?"[2] This is

[1] 4 Burr. 2357, 2363, 2384, 2385.

[2] "It is not necessary, I own, that the proprietor should always have the total actual possession in himself. A potential possession, a power of confining it to his own enjoyment, and excluding all others from partaking with him, is an object or accident of property. But how can an author, after publishing a work, confine it to himself? If he had kept the manuscript from publication, he might have excluded all the world from participating with him, or knowing the sentiments it contained. But by publishing the work the whole was laid open; every sentiment in it made public for ever; and the author can never recall them to himself, never more confine them to himself and keep them subject to his own dominion." 4 Burr. 2363.

equivalent to asking how the owner who has vested the use of his lands in another, or has sent his vessels and cargoes in charge of another to distant seas, can confine his property to himself.

He admitted that property is acquired by labor; but argued that the property created by mental labor is in the material manuscript, which merely preserves the results of the author's industry, and not in the intellectual production, which alone is the fruit of that industry.[1]

He conceded that an author has an exclusive right to his production while it is in manuscript, and that it may pass from his possession into that of others; but that no one is entitled to publish it without authority.[2] The unlicensed publication of a composition cannot be any violation of property in the material manuscript, since that may be returned without injury to the author after publication; or publication may be from a copy, leaving the original undisturbed in the author's possession. The only ground on which the author may prevent the publication of his manuscript is that of property in the incorporeal, literary composition. But Mr. Justice Yates denied the existence of this ground, in holding that an intellectual production could not be the subject of property. He conceded that the owner might lend his manuscript to another person with the stipulation that it should not be published; but he denied, what is the same in principle, that the owner might publish his manuscript with the stipulation or contract that no person, without authority, should republish it.[3] He defended the right of the author before publication, on the ground that the manuscript is then in "his dominion." But, when the author has intrusted his manuscript to another, it is in his dominion only by a fiction of law. On the same principle, the literary property in the work, after publication, continues in the dominion of the author until his title in the property ceases. If Mr. Justice Yates intended to maintain, that manuscript, but not published, productions may be the subject of property, the fallacy was well exposed by Lord Mansfield, who forcibly pointed out that every argument against the existence of liter-

[1] 4 Burr. 2357. [2] Ibid. 2360, 2364, 2378. [3] Ibid. 2364.

ary property after publication applies with equal force to the existence of such property before publication.[1]

Mr. Justice Yates asserted that the act of publication is "a gift to the public," and that the "author must be deemed to intend it" as such.[2] And yet the author loudly protests against the unlicensed appropriation of his work, and never ceases to assert his ownership.[3]

He declared that property in copies was unknown before the statute of Anne was passed. And yet the twelve sworn jurymen sitting before him had found, after careful investigation, "that before the reign of her late Majesty, Queen Anne, it was usual to purchase from authors the perpetual copyright of their books, and to assign the same from hand to hand for valuable considerations, and to make the same the subject of family settlements for the provision of wives and children."[4]

He said that in framing the statute of Anne "the legislature had no notion of any such things as copyrights as existing for ever at common law; but that, on the contrary, they understood that authors could have no right in their copies after they had made their works public, and meant to give them a security which they supposed them not to have had before."[5] And yet, as has been shown, the very persons who petitioned for that act, and who were instrumental in securing its passage, expressly informed Parliament, in written language whose meaning could not be mistaken, that authors then had and previously had had in their published works exclusive rights, which were perpetual by the common law.

Because the word "vesting" was used by Parliament, he urged that there could have been no property in books before

[1] 4 Burr. 2397.

[2] Ibid. 2363.

[3] "With respect to the third objection, that by publication the property is given to the public: if it is meant as a fact that the author intends to give it, it is contrary to the truth; for the proprietors of copyright have continuously claimed to keep it. If it is meant that the publication operates in law as a gift to the public, the question is begged, and the reasoning is in a circle. For the question being, whether the law protects copyright after publication, the reasoning in law is, that the law does not so protect it, because publication operates as a gift to the public; and the reasoning in fact is, that the publication must be taken to operate as a gift to the public, because after publication the law does not protect copyright." Erle, J., Jefferys *v.* Boosey, 4 H. L. C. 872.

[4] 4 Burr. 2306.

[5] Ibid. 2390.

the act of Anne.[1] And yet this word is found only in the title, which is not an essential part of the act; while the word "secured" is employed in the body of the statute.[2]

He believed that "the property of authors must be subject to the same rule of law as the property of other men is governed by."[3] And yet he offered three hours of special pleading to show that this "same rule" was not applicable to literary property.

"The labors of an author," he said, "have certainly a right to a reward."[4] And yet he alone, of the four judges whose duty it was to see that that right was protected, declared the only means by which such reward is possible to be a bar to its realization.

Having thus argued that the industry of authors was entitled to no protection from English law other than what the legislature might choose to give, and having sought to support this position by extra-judicial objections to the just rights claimed for men of letters,[5] he did not hesitate to declare: "I wish as sincerely as any man that learned men may have all the encouragements and all the advantages that are consistent with the general right and good of mankind."[6]

[1] 4 Burr. 2389.

[2] "The word 'vesting' in the title cannot be argued from as declaratory that there was no property before. The title is but once read; and is no part of the act. In the body, the word 'secured' is made use of." Lord Mansfield, ibid. 2406.

[3] Ibid. 2359.

[4] Ibid. 2360.

[5] "I have before observed the dangerous snares which this ideal property will lay, as it carries no proprietary marks in itself, and is not bound down to any formal stipulations. So obscure a property, especially after the work has been a long while published, might lead many booksellers into many litigations. And, in such litigations, many doubtful questions might arise: such as, whether the author of the work did not intend it as a gift to the public; whether, since that, he has not abandoned it to the public, and at what time; disputes also might arise among authors themselves, whether the works of one author were or were not the same with those of another author; or whether there were only colorable differences, — a question that would be liable to great uncertainties and doubts. So, whether those who should compile notes on a publication, and should insert the text, should be liable to an action for it; or, if the notes were good, the author might refuse the publication of them." Ibid. 2394.

[6] Ibid. 2394. "But if the monopoly," he continued, "now claimed be contrary to the great laws of property, and totally unknown to the ancient and common law of England; if the establishing of this claim will directly contradict the legislative authority, and introduce a species of property contrary to the end for which the whole system of property was established; if it will tend to embroil the peace of

As Chief Justice of the Court of King's Bench, Lord Mansfield now pronounced one of the grandest judgments in English judicial literature. It may well be given in the language of Mr. Justice Aston: "Upon the whole, I conclude, that upon every principle of reason, natural justice, morality, and common law; upon the evidence of the long-received opinion of this property appearing in ancient proceedings and in law cases; upon the clear sense of the legislature, and the opinions of the greatest lawyers of their time in the Court of Chancery since that statute, — the right of an author to the copy of his work appears to be well founded; and that the plaintiff is therefore, upon this special verdict, entitled to his judgment. And I hope the learned and industrious will be permitted from henceforth not only to reap the same, but the profits of their ingenious labors, without interruptions, to the honor and advantage of themselves and their families."[1]

Thus, in the tribunal over which Lord Mansfield presided, the cause of piracy suffered a signal and deserved defeat. But in 1774 the attack on literary property was renewed, in the House of Lords, in the case of Donaldson *v.* Becket,[2] which had been brought on appeal from the Court of Chancery, where an injunction had been granted in conformity with the law as declared in Millar *v.* Taylor.

Eleven judges were ordered to give their opinions on the same vital questions that had been exhaustively reviewed and settled, five years before, by the King's Bench. Ten were of opinion that at common law the author of an unpublished literary composition had the sole right of publishing it for sale, and might bring an action against any person who published the manuscript without his consent. One dissented from this view.

Eight maintained that by the common law the author's exclusive rights were not lost or prejudiced by publication; in other words, that copyright in a published work existed by the common law.

society with frequent contentions, — contentions most highly disfiguring the face of literature, and highly disgusting to a liberal mind; if it will hinder or suppress the advancement of learning and knowledge; and, lastly, if it should strip the subject of his natural right — if these or any of these mischiefs would follow, I can never concur in establishing such a claim."

[1] 4 Burr. 2354.

[2] Ibid. 2408.

Three believed that publication was an abandonment of the common-law property. Seven of the eleven judges expressed the opinion, that the ownership of literary property was perpetual by the common law.

Five maintained that the statute of Anne did not destroy, abridge, or in any way prejudice the common-law property in a published work, and did not deprive the author of his common-law remedies. Six contended that the common-law right, after publication, was taken away by the statute, to which alone the author must look for protection.[1]

Lord Mansfield, being a peer, did not deliver an opinion; but it was well known that he firmly adhered to the enlightened doctrines which he had before advocated.[2] Including him, the twelve judges were evenly divided in opinion as to whether the statute of Anne had abridged the author's common-law property, or left it perpetual: while nine to three believed that, under the common law, publication was not an abandonment of the author's rights; or, in other words, that his property was the same after as before publication.

Chief among those who advised the Lords that literary property was not less inviolable than any species of property known to the law of England, was Sir William Blackstone, whose teachings will ever be a pure fountain source of knowledge for all students of English jurisprudence.

[1] The questions submitted to the judges were as follows:—

1. "Whether at common law an author of any book or literary composition had the sole right of first printing and publishing the same for sale; and might bring an action against any person who printed, published, and sold the same, without his consent." Ten judges, or eleven including Lord Mansfield, answered yes; and one, no.

2. "If the author had such right originally, did the law take it away, upon his printing and publishing such book or literary composition? and might any person afterward reprint, and sell for his own benefit, such book or literary composition, against the will of the author?" No, eight; including Lord Mansfield, nine. Yes, three.

3. "If such action would have lain at common law, is it taken away by the statute of 8th Anne? And is an author by the said statute precluded from every remedy, except on the foundation of the said statute, and on the terms and conditions prescribed thereby?" No, five; including Lord Mansfield, six. Yes, six.

4. "Whether the author of any literary composition, and his assigns, had the sole right of printing and publishing the same in perpetuity by the common law?" Yes, seven; with Lord Mansfield, eight. No, four.

5. "Whether this right is in any way impeached, restrained, or taken away by the statute 8th Anne?" No, five; with Lord Mansfield, six. Yes, six. 4 Burr. 2408.

[2] See ibid. 2417.

Lord Camden now moved the judgment of the House, and exerted his influence on the wrong side. He declared that there was no foundation for the perpetual ownership of literary property, either in the common law or in the principles of sound policy or good sense. That his specious harangue should have turned the scale, as it is said to have done, is certainly not to the credit of the House of Lords. The absurd character of the speech is well shown by the following specimen: —

"If there be any thing in the world common to all mankind, science and learning are in their nature *publici juris*, and they ought to be as free and general as air or water. They forget their Creator, as well as their fellow-creatures, who wish to monopolize his noblest gifts and greatest benefits. Why did we enter into society at all, but to enlighten one another's mind, for the common welfare of the species? Those great men, those favored mortals, those sublime spirits, who share that ray of divinity which we call genius, are intrusted by Providence with the delegated power of imparting to their fellow creatures that instruction which heaven meant for universal benefit. They must not be niggards to the world, or hoard up for themselves the common stock. We know what was the punishment of him who hid his talent; and Providence has taken care that there shall not be wanting the noblest motives and incentives for men of genius to communicate to the world those truths and discoveries which are nothing if uncommunicated. Knowledge has no value or use for the solitary owner: to be enjoyed, it must be communicated. *Scire tuum nihil est, nisi te scire hoc sciat alter.* Glory is the reward of science, and those who deserve it scorn all meaner views. I speak not of the scribblers for bread, who tease the press with their wretched productions: fourteen years is too long a privilege for their perishable trash. It was not for gain that Bacon, Newton, Milton, Locke, instructed and delighted the world; it would be unworthy such men to traffic with a dirty bookseller for so much a sheet of letter-press. When the bookseller offered Milton five pounds for his Paradise Lost, he did not reject it, and commit his poem to the flames; nor did he accept the miserable pittance as the reward of his labor. He knew that the real price of his work was immortality, and that posterity would pay it. Some authors are as careless about profit as others are rapacious of it; and what a situation would the public be in, with regard to literature, if there were no means of compelling a second impression of a useful work to be put forth, or wait till a wife and children are to be provided for by the

sale of an edition! All our learning will be locked up in the hands of the Tonsons and the Lintons of the age, who will set what price upon it their avarice chooses to demand, till the public become as much their slaves as their own hackney compilers are."[1]

It would seem that this extravagant speech would have moved the peers only to disgust; that the highest judicial tribunal of England, deliberating on one of the greatest questions ever brought before it, would have been guided by the pure principles which had been so forcibly expounded by the Chief Justice and the profoundest jurists of England, rather than by the fallacious theories of Judge Yates and the Sophomoric rhetoric of Lord Camden. But it was not so. Contrary to right and reason, it declared that literary property may be lost by the only act — publication — which renders it useful; contrary to the intention of that body, as it had been judicially interpreted for half a century, it decided that Parliament, in legislating "for the encouragement of learned men to compose and write useful books," meant to afford such encouragement by taking from authors far more than it gave to them; contrary to these and other considerations, it fixed in English jurisprudence an unjust law, which has ruled the legislatures and courts of England and America for a century.

It would be natural to suppose that if the House of Lords had been moved by a sincere desire to reach the truth, to ascertain what the law really was, to rest their judgment on a foundation of rock, they would have sought the opinion of that chief justice sitting in their presence whose profound knowledge of the law had given honor to English jurisprudence in every country of Europe; whom Lord Campbell pronounced "the brightest ornament to the profession of the law that appeared in England during the last century;"[2] who, in the language of Lord Thurlow, himself a great jurist, was "a surprising man; ninety-nine times out of a hundred, he was right in his decisions and opinions; and, when once in a hundred times he was wrong, ninety-nine men out of a hundred would not discover it."[3]

[1] 17 Cobb. Parl. Hist. 999.

[2] 4 Lives of the Chief Justices, 13.

[3] See Foss's Judges of England, 471. Lord Chatham, long the political opponent of Lord Mansfield, comparing him with those great jurists,

Nor was this mere rhetoric. For it is a matter of history that, of the many thousand judgments pronounced by him during the third of a century that he was chief justice of the Court of King's Bench, all but two received the unanimous approval of his associate judges; and, what is still more remarkable, only two were reversed on appeal to a higher tribunal; and, what is more extraordinary still, in all this time, when among the political opponents who argued causes before him were such lawyers as Dunning and Erskine, there never was a bill of exceptions tendered to his direction.[1] And yet among his judgments were many that have become historic. When the law was yet unsettled, he proclaimed from the English bench that the owner's title to a wreck, when no living thing had come to the shore, was superior to that claimed by the king; that governors of English provinces must answer in English courts for wrongful acts against individuals; that Turks, Hindoos, men of every creed, might be sworn as witnesses in English courts, according to the forms of their own religion; that

> "Slaves cannot breathe in England: if their lungs
> Receive our air, that moment they are free;
> They touch our country and their shackles fall."

Errare, mehercule, malo cum Platone quam cum istis vera sentire. Rightly, then, did the continental lawyers place the bust of Lord Mansfield beside those of Grotius and D'Aguesseau.[2]

Somers and Holt, said: "I vow to God, I think the noble lord excels them both in abilities."

[1] 3 Campbell's Lives of the Chief Justices (4 vols., London), 265, 266.

[2] Probably no English judge of the last century studied the subject of literary property so thoroughly as did Lord Mansfield. In concluding his opinion in Millar *v.* Taylor, 4 Burr. 2407, he said: "The subject at large is exhausted, and therefore I have not gone into it. I have had frequent opportunities to consider of it. I have travelled in it for many years. I was counsel in most of the cases which had been cited from Chancery; I have copies of all from the Register Book. The first case of Milton's Paradise Lost was upon my motion. I argued the second, which was solemnly argued by one on each side. I argued the case of Millar against Kincaid, in the House of Lords. Many of the precedents were tried by my advice. The accurate and elaborate investigation of the matter in this cause, and in the former case of Tonson and Collins, has confirmed me in what I always inclined to think, — that the Court of Chancery did right in giving relief upon the foundation of a legal property in authors, independent of the entry, the term for years, and all the other provisions annexed to the security given by the act."

That the peers did not seek light from this pure source, that they did not follow the safe counsel of that great teacher of law, Sir William Blackstone, is as little to their credit as the unsound and unjust law they proclaimed. And Lord Mansfield himself has been justly censured, that at this, the greatest crisis in the history of literary property, he allowed a trivial matter of etiquette to prevent him from repeating and emphasizing those unanswerable arguments on which his great judgment of five years before rested. Perhaps he did not realize that the grand structure of literary property was in danger of falling, — that his peers could be moved by the empty declamation of Lord Camden to set aside the authority of two centuries, and proclaim a doctrine condemned by the best lawyers of England.

The only question decided in Donaldson *v.* Becket, in conformity with the expressed opinions of a majority of the judges, was that the common-law copyright in a book after publication in print was taken away by the statute of Anne. On this point alone the House of Lords can be rightly said to have overruled the judgment in Millar *v.* Taylor. Two-thirds of the judges who advised the Lords, or three-fourths including Lord Mansfield, held to the doctrine that, in the absence of any statute, literary property exists by the common law, and is not lost or prejudiced by publication. There is nothing in the judgment of the House of Lords to unsettle this doctrine, or to overrule the authority of Millar *v.* Taylor as far as it affirmed it. On the other hand, the decision in Donaldson *v.* Becket, that common-law copyright in published works was taken away by the statute of Anne, necessarily implied the existence of that right.[1]

The judgment rendered by the House of Lords in 1774 has continued to represent the law; but its soundness has been questioned by very high authorities. In delivering the opinion of the full bench of the Court of Exchequer in 1851, in Boosey

[1] Referring, in the House of Lords, to the judgment in Donaldson *v.* Becket, and the different opinions expressed by the judges on the questions, whether there was copyright at common law, and whether it had been taken away by the statute, Lord Brougham said: "This House, however, reversed the decree under appeal, in accordance with the opinion given on the main point by the majority of the judges; and, upon the general question of literary property at common law, no judgment whatever was pronounced." Jefferys *v.* Boosey, 4 H. L. C. 961.

v. Jefferys, Lord Campbell said: "The first question discussed before us was whether authors have a copyright in their works at common law. This is not essential for our determination of the present case. If it were, we are strongly inclined to agree with Lord Mansfield and the great majority of the judges, who, in Millar *v.* Taylor and Donaldson *v.* Becket, declared themselves to be in favor of the common-law right of authors."[1] And when the same case came before the House of Lords, in 1854, although the consideration of this subject was not essential to the determination of the issue before the house, Mr. Justice Erle delivered an elaborate argument in support of the doctrine maintained by Lord Mansfield.[2] Mr. Justice Coleridge gave expression to similar views, and added: "If there was one subject more than another upon which the great and varied learning of Lord Mansfield, his special familiarity with it, and the philosophical turn of his intellect, could give his judgment peculiar weight, it was this. I require no higher authority for a position which seems to me in itself reasonable and just."[3] In the Scotch case of Cadell *v.* Robertson, decided by the Court of Session in 1804, Lord Monboddo, dissenting from the opinions of his colleagues, maintained that copyright existed in a published work by the common law, and was not taken away by the statute of Anne.[4]

In the United States, the authorities have been divided not less than in England, regarding the origin and nature of literary property. Indeed, the doctrines there prevalent have ruled our courts. In 1834, it became the duty of the Supreme Court of the United States, in the case of Wheaton *v.* Peters, to declare the meaning of the law of 1790, and to determine the same question that had been decided by the Court of King's Bench in 1769, and by the House of Lords in 1774; viz., whether copyright in a published work existed by the common law, and, if so, whether it had been taken away by statute. The court held that the law had been settled in England to the effect that, since the passing of the 8 Anne, c. 19, an author had no right in a published work excepting that secured by statute; that there

[1] 6 Exch. Rep. 592.
[2] Jefferys *v.* Boosey, 4 H. L. C. 866–877.
[3] Ibid. 903.
[4] 5 Pat. App. Cas. 518.

was no common law of the United States, and that the common law as to copyright had not been adopted in Pennsylvania, in which State the cause of action before the court arose; that, by the copyright statute of 1790, Congress did not affirm an existing right, but created one.[1]

This judgment, like that of the House of Lords in Donaldson *v.* Becket, which was followed, rests on a divided opinion of the judges. Three agreed with Mr. Justice McLean, who delivered the opinion of the court, two dissented, and one was absent.

In opposing the opinion of the majority, Justices Thompson and Baldwin expounded the true principles governing literary property, with a clearness and force, a comprehensive grasp, that recall the great arguments on this question by Sir William Blackstone, Lord Mansfield, and Justices Aston and Willes. Their opinions are among the most masterly to be found on the subject of copyright. Mr. Justice Thompson based his argument on the firm ground, that "the great principle on which the author's right rests is, that it is the fruit or production of his own labor, and that labor by the faculties of the mind may establish a right of property as well as by the faculties of the body." "Whether literary property," he added, "is *sui generis*, or under whatever denomination of rights it may be classed, it seems founded upon the same principle of general utility to society which is the basis of all other moral rights and obligations. Thus considered, an author's copyright ought to be esteemed an inviolable right established in sound reason and abstract morality."[2] He then maintained that the right of an author in his published works was recognized and protected as property by the common law in this country; that it was farthest from the intention of Congress, in legislating for the "encouragement of learning," to take away or abridge that right; and that the statute could not be properly construed to have that effect. "Congress having before them," he said, "the statute of Anne, and apprised of the doubt entertained in England as to its effect upon the

[1] 8 Pet. 591, 654.

[2] Ibid. 670, 672. The language quoted is taken from the separately published report of Wheaton *v.* Peters, 110, 112.

common-law right, if it had been intended to limit or abridge that right, some plain and explicit provision to that effect would doubtless have been made; and not having been made, is, to my mind, satisfactory evidence that no such effect was intended." [1] Speaking of the first copyright law passed in 1790, he said: "Protection is the avowed and real purpose for which it is passed. There is nothing here admitting the construction that a new right is created. The provision in no way or manner deals with it as such. It in no manner limits or withdraws from the right any protection it before had. It is a forced and unreasonable interpretation, and in violation of all the well-settled rules of construction, to consider it as restricting, limiting, or abolishing any pre-existing right." [2]

[1] 8 Pet. 696.

[2] Ibid. 692. "In construing statutes," said Mr. Justice Thompson, "three points are to be regarded: the old law, the mischief, and the remedy; and the construction should be such, if possible, to suppress the mischief and advance the remedy. 1 Bl. Com. 87; Bac. Abr. Stat. I. pl. 31, 32. An affirmative statute does not abrogate the common law. If a thing is at common law, a statute cannot restrain it, unless it be in negative words. Plow. Com. 113; 2 Kent, Com. 462; 2 Mason, 451; 1 Inst. 111, 115; 10 Mod. 118; Bac. Abr. Stat. 9. Where a statute gives a remedy where there was one by the common law, and does not imply a negative of the common-law remedy, there will be two concurrent remedies. In such case, the statute remedy is accumulative. 2 Burr. 803-5; 2 Inst. 200; Com. Dig., Action upon Statute, C.

"Considering the common-law right of the author established, and with these rules of construing statutes kept in view, I proceed to the consideration of the acts of Congress.

"The first law was passed in the year 1790 (Story's ed. of Laws of United States, vol. i. p. 94), and is entitled 'An Act for the encouragement of learning, by *securing* the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned.'

"The first section declares, that 'the author of any book or books already printed, being a citizen of the United States, &c., and who hath not transferred the copyright to any other person, and any other person, being a citizen of the United States, &c., who hath purchased or legally acquired the copyright of such book, in order to print, reprint, publish, or vend the same, shall have the *sole right* and liberty of printing, reprinting, publishing, and vending the same, for fourteen years *from the recording the title thereof* in the clerk's office, as hereinafter directed.' The like provision is made with respect to books or manuscripts not printed, or thereafter composed. The title and this section of the act obviously consider and treat this copyright as property, — something that is capable of being transferred; and the right of the assignee is protected equally with that of the author; and the object of the act, and all its provisions, purport to be for *securing* the right. Protection is the avowed and real purpose for which it is passed. There is nothing here admitting the construction that a new right is created. The provision in no way or manner deals with it as such. It in no manner limits or withdraws from

These doctrines were also maintained with clearness and force by Mr. Justice Baldwin.

"If authors had not a right of property by the common law," he said, "or if that part of the common law has not been adopted here, it becomes a matter of serious inquiry what the public and the profession are to consider as evidence of the law, and the rules as to right and remedy by which other property is to be governed. If the judicial history of the law of copyright does not establish its existence independent of statutes in England, and if the acts of Congress passed professedly for the *encouragement* of *learning*, *by securing* the copyright of authors, is, by fair construction, an abrogation of the common-law right, I am much mistaken if the opinion of the majority of the court in this case does not, in its consequences, open a new epoch in the history of our jurisprudence. I, for one, must look to other than the accustomed sources of information to find the common law, to new tests of its adoption here, and new rules of construing statutes, as well in their effect on the pre-existing law of property as the settled principles by which their provisions are interpreted. There are none more ancient or sacred than that the common law can be altered only by act of Parliament; that statutes and usages which derogate from its rules shall be construed strictly, and not be extended by equity beyond their words or necessary implication; and that a statute which gives an additional remedy, or inflicts new penalties and forfeitures for the violation of a right, leaves the injured party the option of appealing to the statute or common law for redress. In the application of these principles to the acts of Congress on copyright, there can be found no one provision which either professes, or

the right any protection it before had. It is a forced and unreasonable interpretation, and in violation of all the well-settled rules of construction, to consider it as restricting, limiting, or abolishing any pre-existing right. Statutes are not presumed to make any alteration in the common law further or otherwise than the act expressly declares. And, therefore, where the act is general, the law presumes it did not intend to make any alteration; for, if such was the intention, the legislature would have so expressed it. 11 Mod. 148; 19 Vin. Abr. 512, Stat. E. 6, pl. 12; and hence the rule as laid down in Plowden. If a thing is at common law, a statute cannot restrain it, unless it be in negative words. It is in every sense an affirmative statute, and does not abrogate the common law." 8 Pet. 691.

by implication can be construed, to alter the common law. Their titles and enactments are affirmative and remedial for the security of the right of property in authors." [1]

The meaning of the first American copyright law, therefore, as construed by these jurists, was the same as that of the first English copyright law as interpreted by the Court of King's Bench in 1769; viz., that it did not create a right, but gave a cumulative security or protection to one already existing. It did not, therefore, abridge the ownership of literary property, perpetual under the common law.

The judgment of the court, as has been seen, was based on two grounds: 1. That the common law of England did not prevail in the United States. 2. That in England it had been decided that the common-law property in published works had been taken away by statute. The first position rested on a foundation of sand, which has since been swept away. "The whole structure of our present jurisdiction," said Mr. Justice Thompson in his dissenting opinion, "stands upon the original foundation of the common law." The doctrine is now well settled in this country, that a complete property in unpublished works is secured by the common law. This was admitted by the Supreme Court in Wheaton *v.* Peters. It has since been repeatedly affirmed by the same tribunal, by the Circuit Court of the United States, and by every State court in which the question has been raised.[2] If the common law thus prevails in the United States with reference to unpublished productions, there is no principle, independently of the statute, by which it can be held not to prevail in the case of published works.

The controlling question in Wheaton *v.* Peters was whether this common-law right, after publication, had been taken away by the statute of 1790. The doctrine had been settled in England, that copyright in a published work existed by the

[1] See Mr. Justice Baldwin's opinion in the separately published report of Wheaton *v.* Peters, 134, 152.

[2] See *post*, p. 101. The statute "to promote literature" passed by the State of New York in 1786 expressly recognized the common-law rights of authors Section 4 provided "that nothing in this act shall extend to affect, prejudice, or confirm the rights which any person may have to the printing or publishing of any book or pamphlet at common law, in cases not mentioned in this act." 2 Laws of New York (Jones & Varick's ed., 1789), 320.

common law. Donaldson *v.* Becket decided simply that this right had been taken away or superseded in England by the act of Anne. But this statute did not change or affect the common law in the United States, for the obvious reason that the statute had no operation here. Whether Congress intended to take away this right, whether the statute of 1790 could rightly be construed to take it away, was an open question in this country. Had the court recognized this as the pivotal point in the case, and, after an examination of the fundamental principles of literary property and the rules of statutory construction, not less thorough than that found in the opinions of the dissenting judges, had reached the conclusion, that there was no right in a published work except that secured by the statute, the judgment would still be open to criticism. But in holding that the common-law right, if it existed in this country, had been taken away by statute, the court simply followed the doubtful and disputed precedent of the House of Lords, without testing its soundness. The judges in the minority grounded their opinions on fundamental principles, which are not shaken by any reasoning to be found in the opinion of the court. These considerations deprive Wheaton *v.* Peters of much of its weight as an authority.

The main question decided by the Supreme Court in 1834 has not since been brought before that tribunal; consequently, the judgment of that year has continued to represent the law in this country.

The law which for a century has denied to men of letters in England and America the full fruits of their labor has grown out of the groundless theories of one man; and these originated not with the judge, but with the advocate. As a lawyer, Joseph Yates had been retained in the first controversy that arose in an English court of law under the statute of Anne, and argued in vain to establish the theory that copyright was a monopoly.[1] If a decision had been reached, this plea would doubtless have received from the court a condemnation so unanimous and decided as to have destroyed all hope of its success thereafter. Unfortunately, however, this opportunity

[1] Tonson *v.* Collins, 1 W. Bl. 321.

was not given to the court, and when the question was next brought before the King's Bench, Joseph Yates was one of the judges, and reiterated the same arguments on the bench that he had offered at the bar.

Courts are too often the slaves of precedent. Too often do they use a foundation already prepared, without examining its strength, rather than build a new one; too often do they follow a decision without questioning its validity. Thus, an unsound law rooted in our jurisprudence may prevail for generations. A more marked illustration of this evil can nowhere be found than in the judicial history of copyright in England and America during the past century. The fundamental principles governing literary property were never more thoroughly examined than by the judges of the King's Bench in 1769. They based their judgment on a foundation of rock. That foundation was afterward rejected by the House of Lords, who selected one of sand. The wisdom of this change has since been assumed by the majority, not proved. No court has since gone back of that decision, or tested its soundness. It has ruled the courts of two nations for a century. The rock foundation of 1769 is hidden with sand and drift; its strength, known only to those who dig below the surface. When the British Parliament was asked (1837–42) to throw around literary property the same protection given to every other species, the reply was: "The House of Lords has declared that in published books there are no rights except what the legislature may choose to give." When the House of Lords, in 1854, sitting as the highest court known to English law, was advised to recognize the full rights of the author to the fruits of his labor, it followed the precedent of 1774.[1] When the Supreme Court of the United States was urged, in 1834, to rise above precedent, and to found its judgment on the universal principles of property, the majority declared that the law of literary property had been settled since 1774.[2]

The anomaly of the present law of copyright is apparent to many thoughtful persons.[3] Literary productions are the one

[1] Jefferys *v.* Boosey, 4 H. L. C. 815.

[2] Wheaton *v.* Peters, 8 Pet. 591.

[3] This has been pointed out by Hood with no less truth than wit. "Literary property is the lowest in the market. It is declared by the law only so many years' purchase, after which the private right becomes common;

great species of property which the law has left without that protection to which it is entitled. Even to inventions a protection is guaranteed by the United States which is denied to literature; for our laws make no distinction between a native and a foreign applicant for a patent, while the works of a foreign author are laid open to piracy. The manufacturers, farmers, and manual laborers of England and the United States toil in the confidence that the fruits of their industry will be protected and shielded for their children by the same law that defends their lives and liberties. The maker of a piece of cloth, a box, a wagon, or a house, has therein a title whose duration is not limited. His property is protected because it is the product of his labor. But time and money spent in producing a work of

and, in the mean time, the estate being notoriously infested with poachers, is as remarkably unprotected by game-laws. An author's winged thoughts, though laid, hatched, bred, and fed within his own domain, are less his property than is the bird of passage that of the lord of the manor on whose soil it may happen to alight. An author cannot employ an armed keeper to protect his preserves; he cannot apply to a pinder to arrest the animals that trespass on his grounds; nay, he cannot even call in a common constable to protect his purse on the king's highway! I have had thoughts myself of seeking the aid of a policeman, but counsel learned in the law have dissuaded me from such a course: there was no way of defending myself from the petty thief but by picking my own pocket! Thus I have been compelled to see my own name attached to catchpenny works, none of mine, hawked about by placard-men in the street; I, who detest the puffing system, have apparently been guilty of the gross forwardness of walking the pavement by proxy for admirers, like the dog Bashaw! I have been made, nominally, to ply at stage-coach windows with my wares, like Isaac Jacobs with his cheap pencils, and Jacob Isaacs with his cheap penknives to cut them with; and without redress. For whether I had placed myself in the hands of the law, or taken the law in my own hands, as any bumpkin in a barn knows, there is nothing to be thrashed out of a man of straw. Now, with all humility, if my poor name be any recommendation of a book, I conceive I am entitled to reserve it for my own benefit. What says the proverb? 'When your name is up, you may lie abed.' But what says the law;—at least, if the owner of the name be an author? Why, that any one may steal his bed from under him, and sell it; that is to say, his reputation, and the revenue which it may bring.

"In the mean time, for other street frauds there is a summary process. The vender of a flash watch, or a razor 'made to sell,' though he appropriates no maker's name, is seized without ceremony by A 1, carried before B 2, and committed to C 3, as regularly as a child goes through its alphabet and numeration. They have defrauded the public, forsooth, and the public has its prompt remedy; but for the literary man, thus doubly robbed of his money and his reputation, what is his redress but by injunction, or action, against walking shadows?—a truly homœopathic remedy, which pretends to cure by aggravating the disease." 6 Hood's Works (10 vols. London), 381.

literature capable of doing good to men through all coming time, give to the producer no title beyond a brief term of years. If Tennyson or Darwin, Emerson or Worcester, had spent their lives in making bricks, digging for gold, or hunting for diamonds, no English law would deny them everlasting title to the products of their industry.

The law which puts an arbitrary terminus on the ownership of literary property is the same in principle with one that would abridge the farmer's right to his orchards and grainfields. If there were the remotest danger that this principle would ever be applied to material possessions, every English tongue would clamor for a new Magna Charta. Its actual application would raise every Saxon hand in rebellion. And yet, for a century, the same principle has been applied with impunity to a species of property no less valuable, no less inviolable.[1] To-day the English nation says to its greatest poet: "Queen Mary shall be yours for forty-two years, and no longer." If the same genius had made a beer-barrel, his title to it would run against all future time. To take from one and give to all is not less communism in the case of literary property than it is in that of any other kind of property. There is still too much truth in Thomson's words: —

> "Is there no patron to protect the Muse,
> And fence for her Parnassus' barren soil?
> To every labor its reward accrues,
> And they are sure of bread who swink and moil:
> But a fell tribe the Aonian hive despoil,
> As ruthless wasps oft rob the painful bee;
> Thus while the laws not guard that noblest toil,
> Ne for the Muses other meed decree,
> They praised are alone, and starve right merrily."

During this century, the progress in legislation has been steady toward a juster recognition of the rights of authors. In England, the absolute duration of copyright has, by two exten-

[1] "We should be all shocked if the law tolerated the least invasion of the rights of property in the case of merchandise; whilst those which justly belong to the works of authors are exposed to daily violation, without the possibility of their invoking the aid of the laws." Report in favor of international copyright, submitted to the United States Senate by Henry Clay, in 1837. 2 Senate Documents, 24th Cong. 2d Sess. (1836–37), Rep. No. 179.

sions, been made three times greater than it was before 1814. The exclusive right of dramatists and composers to represent their productions on the stage has been recognized and protected by statute. Statutory protection has been provided for works of art. Foreign authors and dramatists have been admitted to the privileges of the English laws. The nation is now, doubtless, on the eve of another important advance toward a higher recognition and better protection of property in intellectual productions. The Royal copyright commissioners, whose report was submitted to Parliament in June, 1878, recommend that the duration of copyright be enlarged; that all works be effectively protected against piratical translation, abridgment, and dramatization; and that the same privileges provided for Englishmen be given to foreign authors. The International Literary Congress, which was called together by the *Société des Gens de Lettres de France*, and met in Paris in June, 1878, under the presidency of Victor Hugo, affirmed the principle that the right of an author to his intellectual productions is a species of property whose ownership is unlimited in duration, and declared that in all countries better protection should be provided for the fruits of literary labor. Similar good signs are to be found in the judicial treatment of questions relating to copyright. While authors have suffered much from narrow and unsound decisions, there are many recent cases in which the courts have risen to a high level in determining rights of literary property, and there are indications that such rights will be better understood and recognized in the future than they have been in many instances in the past.

The progress of legislation and jurisprudence is constantly uprooting bad laws. The light of to-day shows the mistakes of yesterday. The errors of to-day will be exposed by the enlightenment of to-morrow. Progress is fatal to wrong. Time alone will show whether the grand principles governing literary property so well expounded by Lord Mansfield and other great jurists will again prevail; whether the judgment proclaimed by the Court of King's Bench in 1769 will again be recognized as the true law; whether the truth will again become clear to all, as it was to Mr. Justice Thompson when he said, "Every principle of justice, equity, morality, fitness, and sound policy, con-

curs in protecting the literary labors of men to the same extent that property acquired by manual labor is protected;"[1] and as it was to Mr. Justice Baldwin when he maintained, that "to place the proprietors of literary property on a worse footing in courts of equity than the owners of other property would not only be subversive of all principles of justice, but in direct repugnance to the spirit of the Constitution and laws."[2] But, until these things shall come to pass, an inviolable right will be denied to men of letters.[3]

[1] Wheaton *v.* Peters, 8 Pet. 672.

[2] See opinion of Mr. Justice Baldwin, in the separately published report of Wheaton *v.* Peters, 134, 139.

[3] "We are surprised at the undefined state of property, in those early stages of society, when piracy is considered a noble employment, fit to be extolled by bards; but we must not forget that there are rights of property to this day unacknowledged, which future generations will consider as sacred as we do those acknowledged centuries ago. Because there was no copyright in early times, — because there were no books, or books did not yield any profit to make copyright worth any thing, — it is believed by many, to this day, that copyright is an invented thing, and held as a grant bestowed by the mere grace and pleasure of society; while, on the contrary, the right of property in a book seems to be clearer and more easily to be deduced from absolute principle than any other. It is the title of actual production and of preoccupancy. If a canoe is mine because I made it, shall not that be mine which I actually created, — a composition? It has been asserted that the author owes his ideas to society: therefore, he has no particular right in them. Does the agriculturist not owe his ideas to society, present and past? Could he get a price for his produce except by society? But a work of compilation, it is objected, is not creation or invention. In the form in which it is presented, it is invention. The ideas thus connected, though they are, separately, common stock, like the wild pigeons flying over my farm, are the compiler's, are preoccupied by him, and belong to him in their present order and arrangement. The chief difficulty has arisen from the fact that ideas thus treated, thrown into a book, had for a long time no moneyed value to be expressed numerically, and that copyright has therefore not the strength of antiquity on its side. . . . It strikes every one nowadays as very barbarous, that in former times commodities belonging to any foreign nation were considered as good prize; yet we allow robbing in the shape of reprint, to the manifest injury of the author. The flour raised in Pennsylvania has full value in Europe, and is acknowledged as private property; but the composition of a book, the production of which has cost far more pains, is not considered as private property." Lieber, 2 Political Ethics (Woolsey's ed. Phila. 1875), 121.

HISTORY OF LITERARY PROPERTY.

THE history of literary property in England may be traced with satisfactory precision through this and the preceding century; but beyond that the recorded facts are of doubtful import, and their interpretation has given rise to conflicting opinions. It has been claimed, that since the introduction of printing into England, in the latter half of the fifteenth century, the right of publishing and selling a literary production has existed as a species of property.[1] There is, however, no direct evidence that copyright was recognized by the law as a species of private property before 1558. In 1534, Henry VIII. granted to the University of Cambridge the right of printing certain books, in which the crown claimed a prerogative right.[2] Afterward, patents *cum privilegio* were granted to individuals. From the middle of the sixteenth to the close of the seventeenth century, numerous decrees, ordinances, and acts, relating to the publication of books, were passed; but what was their relation to literary property, or their effect upon the rights of authors, cannot be determined with precision.

Decrees were promulgated by the Star Chamber in 1556, 1585, 1623, and 1637, regulating the number of presses and the manner of printing throughout the kingdom, providing for the licensing of printing, and prohibiting the publication and importation of unlicensed books.[3] Ordinances and acts for

[1] The date of the introduction of printing into England has been a subject of dispute. According to the generally received account, the art was brought from Holland by John Caxton, about 1471; but it has also been claimed to have been first practised at Oxford, in 1468.

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

[3] In 1556, by a decree of the Star Chamber, it was forbidden, among other things, to print contrary to any ordinance, prohibition, or commandment in any of the statutes or laws of the realm; or in any injunction, letters-

like purposes were passed by Parliament at various times from 1643 to 1692.

These decrees and ordinances have occupied a prominent place in the controversy concerning literary property, and have been cited by high authorities as showing that the property of an author in his book was recognized and protected during this period as a common-law right. But whatever benefit they may have been to authors, by affording additional protection to their productions, either fully or in part, their primary and chief object was the regulation of the press for political and ecclesiastical purposes. Every reader of English history knows to what unwarrantable extremes the crown went during this period in preventing the liberty of the press, and to what a despotic censorship all publications, and especially those relating to politics and religion, were subjected.[1] The declared

patent, or ordinances set forth or to be set forth by the queen's grant, commission, or authority. By another decree, dated June 23, 1585, every book was required to be licensed, and all persons were prohibited from printing "any book, work, or copy against the form or meaning of any restraint contained in any statute or laws of this realm, or in any injunction made by her Majesty or her Privy Council; or against the true intent and meaning of any letters-patent, commissions, or prohibitions under the great seal; or contrary to any allowed ordinance set down for the good government of the Stationers' Company." In 1623, a proclamation was issued to enforce this decree; reciting that it had been evaded, among other ways, "by printing beyond sea such allowed books, works, or writings as have been imprinted within the realm by such to whom the sole printing thereof, by letters-patent or lawful ordinance or authority, doth appertain." In 1637, the Star Chamber again decreed that "no person is to print or import (printed abroad) any book or copy which the Company of Stationers, or any other person, hath or shall, by any letters-patent, order or entrance in their register book, or otherwise, have the right, privilege, authority or allowance, solely to print." 4 Burr. 2312. For the "rules and ordinances made and set forth by the Archbishop of Canterbury and Lords of the Privy Council in the Star Chamber, for redressing abuses in printing," see Strype's Life of Archbishop Whitgift, Appendix No. xxiv.

[1] "It is natural to suppose that a government thus arbitrary and vigilant must have looked with extreme jealousy on the diffusion of free inquiry through the press. The trades of printing and bookselling, in fact, though not absolutely licensed, were always subject to a sort of peculiar superintendence. Besides protecting the copyright of authors, the council frequently issued proclamations to restrain the importation of books, or to regulate their sale. It was penal to utter, or so much as to possess, even the most learned works on the Catholic side; or, if some connivance was usual in favor of educated men, the utmost strictness was used in suppressing that light infantry of literature, — the smart and vigorous pamphlets with which the two parties arrayed against the church assaulted her opposite flanks. Stow, the well-known chronicler of England, who lay under a suspicion of an attachment to popery, had his library

purpose of the Stationers' Company, chartered by Philip and Mary in 1556, was to prevent the propagation of the Protestant Reformation. After reciting that several seditious and heretical books, both in rhymes and tracts, were daily printed, renewing and spreading great and detestable heresies against the Catholic doctrine of the Holy Mother Church, the charter provided for the suppression of this evil by constituting ninety-seven named persons an incorporated society of the art of a stationer, and ordered that no person not a member of this society should practise the art of printing. The master and wardens of the society were empowered to search, seize, and burn all prohibited books, and to imprison any person found exercising the art of printing without authority.[1] From 1556 to 1641, the crown exercised over the press an unlimited authority, which was enforced by the summary powers of search, confiscation, and imprisonment given to the Stationers' Company, and by the Star Chamber, whose jurisdiction was then supreme.

searched by warrant, and his unlawful books taken away; several of which were but materials for his history. Whitgift, in this as in every other respect, aggravated the rigor of preceding times. At his instigation, the Star Chamber, 1585, published ordinances for the regulation of the press. The preface to these recites 'enormities and abuses of disorderly persons professing the art of printing and selling books' to have more and more increased, in spite of the ordinances made against them, which it attributes to the inadequacy of the penalties hitherto inflicted. Every printer, therefore, is enjoined to certify his presses to the Stationers' Company, on pain of having them defaced, and suffering a year's imprisonment. None to print at all, under similar penalties, except in London, and one in each of the two universities. No printer who has only set up his trade within six months to exercise it any longer, nor any to begin it in future until the excessive multitudes of printers be diminished and brought to such a number as the Archbishop of Canterbury and Bishop of London for the time being shall think convenient; but, whenever any addition to the number of master printers shall be required, the Stationers' Company shall select proper persons to use that calling, with the approbation of the ecclesiastical commissioners. None to print any book, matter, or thing whatsoever, until it shall have been first seen, perused, and allowed by the Archbishop of Canterbury or Bishop of London, except the queen's printers, who shall require the license only of the chief justices. Every one selling books printed contrary to the intent of this ordinance to suffer three months' imprisonment. The Stationers' Company empowered to search houses and shops of printers and booksellers, and to seize all books printed in contravention of this ordinance, to destroy and deface the presses, and to arrest and bring before the council those who shall have offended therein." Hallam, 1 Const. Hist. (3 vols., London), 238. See also vol. iii. p. 2.

[1] Maugham, Laws of Lit. Prop. (London, 1829) 12.

The despotic decrees, which, for more than three-quarters of a century, had served to control the press, expired with the abolition of the Star Chamber in 1641. But their spirit and worst features were revived by various ordinances passed by Parliament during the next half century, which likewise had for their main object the censorship of the press. Such were the ordinances of 1643, 1647, 1649, and 1652.[1]

The Licensing Act of Charles II.,[2] passed in 1662, is often cited as a marked recognition of the rights of authors in their literary property. But, like all the preceding enactments, it was aimed directly and chiefly at the press.[3] Its preamble and provisions disclose the same tyrannical purposes that are so prominently indicated in the earlier ordinances.[4] In the spirit of the Star Chamber decrees, it ordered that no person should

[1] The ordinance of 1643, c. 12, recited in its preamble that "divers good orders have been lately made by both Houses of Parliament for suppressing the great late abuses and frequent disorders in printing many false, forged, scandalous, seditious, libellous, and unlicensed papers, pamphlets, and books, to the great defamation of religion and government." It then ordered that no book, pamphlet, or paper be printed or sold, unless first approved and licensed by persons appointed for this purpose by Parliament. To enforce this provision, the master and wardens of the Stationers' Company, and other designated persons, were authorized and required to search for and seize unlicensed printing-presses and scandalous or unlicensed papers, pamphlets, or books; to arrest the authors and printers; and, "in case of opposition, to break open doors and locks."

Of similar import, and for the same primary purpose of controlling the press, were the ordinances of 1647, c. 95, 1649, c. 60, and 1652, c. 34. Scobell's Acts.

[2] 13 & 14 Car. II. c. 33. Keble's Statutes at Large, 1250.

[3] Indeed, while the bill was pending, the king sent a special message to the House of Commons, saying that the passing of the act was necessary to the peace of the kingdom, as the exorbitant liberty of the press had been a great occasion of the late Rebellion, and the schisms in the church; and urging the House "to give a speedy dispatch to that bill." 8 Commons' Journal, 425.

[4] What could be more in harmony with the spirit of the Star Chamber proceedings than its preamble!

"Whereas the well government and regulating of printers and printing-presses is matter of public care and of great concernment, especially considering, that, by the general licentiousness of the late times, many evil-disposed persons have been encouraged to print and sell heretical, schismatical, blasphemous, seditious, and treasonable books, pamphlets, and papers, and still do continue such their unlawful and exorbitant practice, to the high dishonor of Almighty God, the endangering the peace of these kingdoms, and raising a disaffection to his most excellent Majesty and his government; for prevention whereof, no surer means can be advised than by reducing and limiting the number of printing-presses, and by ordering and settling the said art or mystery of printing by act of Parliament, in manner as hereinafter is expressed."

presume to print "any heretical, seditious, schismatical, or offensive books or pamphlets, wherein any doctrine or opinion shall be asserted or maintained which is contrary to the Christian faith, or the doctrine or discipline of the Church of England, or which shall or may tend or be to the scandal of religion or the church, or the government or governors of the church, state, or commonwealth, or of any corporation or particular person or persons whatever." It then prohibited the publication of unlicensed books, prescribed regulations as to printing, and empowered the king's messengers, and the master and wardens of the Stationers' Company, to seize books suspected of containing matters hostile to the church or government. It was necessary to print, in the beginning of every licensed book, the certificate of the licenser, to the effect that the book contained nothing "contrary to the Christian faith or the doctrine or discipline of the Church of England, or against the state and government of this realm, or contrary to good life or good manners, or otherwise, as the nature and subject of the work shall require." To prevent fraudulent changes in a book after it had been licensed, a copy was required to be deposited with the licenser when application was made for a license.

The Licensing Act was continued by several acts of Parliament till 1679. It was re-enacted in 1685,[1] and again in 1692,[2] and finally expired in 1694.

It is plain, then, that the primary and chief object of all the decrees, ordinances, and acts promulgated, either by the Star Chamber or by Parliament, prior to the act of Anne, in 1710, was the regulation of the press, and the suppression of all writings obnoxious to the government or the church. But most, if not all, of them contained clauses recognizing property in books, and providing for its protection. What the extent of this protection was, or what was the exact *status* of literary property, cannot be precisely determined.

The Star Chamber decree of 1623, promulgated to secure the enforcement of that of 1585, contained a clause referring to persons in whom the sole right of printing a book was vested "by letters-patent or lawful ordinance or authority."

[1] 1 Jac. II. c. 17, s. 15. [2] 4 W. & M. c. 24, s. 14.

The later decrees and ordinances contained express clauses recognizing and providing for the protection of private property in books. The Star Chamber decree of 1637 ordered that no person should "print or import (printed abroad) any book or copy which the Company of Stationers, or any other person, hath or shall, by any letters-patent, order, or entrance in their register book, or otherwise, have the right, privilege, authority or allowance, solely to print."[1] The ordinance of 1643 prohibited the printing or importing of any book that had been lawfully licensed and entered in the register of the Stationers' Company, "for any particular member thereof, without the license and consent of the owner." The penalty prescribed was forfeiture of the book to the owner, "and such further punishment as shall be thought fit." This clause was repeated in the ordinances of 1647, 1649, and 1652.[2]

The clause in the Licensing Act of Charles II., intended for the protection of literary property, prohibited any person from printing or importing, without the consent of the owner, any book which any person had the sole right to print, by virtue of letters-patent, or "by force or virtue of any entry or entries thereof duly made, or to be made, in the register book of the said Company of Stationers, or in the register book of either of the universities." The penalty of piracy was forfeiture of the book, and six shillings and eight pence for each copy; half to go to the king, and half to the owner.[3]

Here we find express statutory provision for the protection of literary property. But it is contended by some that these clauses were applicable only to members of the Stationers' Company; and were, therefore, no benefit to authors outside of that organization. On the other hand, it is maintained that the protection was intended for all books and all authors, whether within or without the Company of Stationers. This question cannot be determined satisfactorily from the language of the acts, and little light is thrown upon it by contemporary records. Carte, the historian, writing in 1735, after a careful examination of the records of the Stationers' Company and other documents, had no doubt that the property clauses

[1] 4 Burr. 2312.
[2] Scobell's Acts.
[3] 13 & 14 Car. II. c. 33, s. 6; Keble's Statutes at Large, 1250.

in the ordinances under consideration were intended for the benefit of all authors.[1] Most of the judicial proceedings of the Star Chamber are missing; and no record of any prosecution for printing without license, or against letters-patent, or pirating another's copy, or "any other disorderly printing," has been found. Mr. Justice Willes said that "it is certain that down to the year 1640, copies were protected and secured from piracy by a much speedier and more effectual remedy than actions at law or bills in equity. No license could be obtained to print another man's copy; not from any prohibition, but because the thing was immoral, dishonest, and unjust. And he who printed without a license was liable to great penalties."[2]

That the sole right of publishing a book existed as a species of property during this early period of English history is established by ample evidence, aside from that afforded by the decrees and ordinances which have been cited. Indeed, in his famous speech for the liberty of unlicensed printing, published in 1644, against the ordinance of 1643, Milton shows how fully the right of an author to his productions was then recognized, in theory at least, when he says, that "one of the glosses used to color that ordinance, and make it pass, was the just

[1] "'Tis certain," says Carte, "that no printer, since the invention of the art of printing, ever had in England a right to print the works of another man without his consent. There ever was a property in all books here printed; and for the making of it known, the better to prevent all invasion thereof, when the Stationers' Company were incorporated, all authors, and the proprietors to whom they sold their copies, constantly entered them in the register of that company as their property. The like method was taken with regard to foreign books, to which no subject of England could pretend an original right. To prevent the inconveniences of different persons engaging (perhaps unknown to one another) in printing of the same work (which might prove the ruin of both), the person who first resolved on it, and entered his design in that register, became thereby the legal proprietor of such work, and had the sole right of printing it; so that there has scarce ever been a book published in England but it belonged to some author or proprietor, exclusive of all other persons. This is evident to every one who hath ever viewed the stationers' register, from the erection of that company down to the year 1710, when the act 8 Anne was passed, which refers to this as an unusual practice. It was indeed so customary that I hardly think there ever was a book (unless of a seditious nature) printed till within forty years last past, but, however inconsiderable it was for size or value, the property thereof was ascertained, and the sole right of printing it secured to the proprietor, by such entry." Published in Reasons for a Farther Amendment of the Act 54 Geo. III. c. 156, by Sir Egerton Brydges (London, 1817).

[2] 4 Burr. 2313.

retaining of each man his several copy; which God forbid should be gainsaid."[1] In Millar *v.* Taylor, the jury found, "that, before the reign of her late Majesty, Queen Anne, it was usual to purchase from authors the perpetual copyright of their books, and to assign the same from hand to hand for valuable considerations, and to make the same the subject of family settlements for the provisions of wives and children."[2] In the same case, Lord Mansfield said, "I use the word 'copy,' in the technical sense in which that name or term has been used for ages, to signify an incorporeal right to the sole printing and publishing of somewhat intellectual communicated by letters."[3]

For a century and a half before the reign of Anne, an extensive traffic was carried on in copyrights by members of the Stationers' Company, who invested much capital in buying from authors the right to publish their books. Carte "was surprised, on carefully examining one of the registers in Queen Elizabeth's time, from 1576 to 1595, to find, even in the infancy of English printing, above two thousand copies of books entered as the property of particular persons, either in whole or in shares, and mentioned from time to time to descend, be sold, and be conveyed to others."[4] These entries, showing that copies were entered as property, appear as early as 1558.[5]

[1] Carte says that in 1641, "when do so enjoy a property, all scholars will be utterly deprived of any recompense from the stationers or printers for their studies or labor in writing or preparing books for the press.'" Printed by Brydges, see *ante*, p. 60, note 1.

[2] 4 Burr. 2306. The same fact had before been found by the jury in Tonson *v.* Collins, 1 W. Bl. 326.

[3] 4 Burr. 2306. Mr. Justice Willes said: "'The name 'copy of a book,' which has been used for ages as a term to signify the sole right of printing, publishing, and selling, shows this species of property to have been long known, and to have existed in fact and usage as long as the name." Ibid. 2311.

[4] Printed by Brydges. See *ante*, p. 60, note 1.

[5] "In 1558, and down from that time, there are entries of copies for the licentiousness of the press was carried to the greatest height, and there wanted not persons to insinuate to the members of the then House of Commons that it would be convenient to lay all copies open for every printer that pleased to publish them, Featley, Burges, Gouge, Byfield, Calamy, Seaman, and several other divines, favorites of the prevailing party in that House, thought it proper to sign a paper declaring, 'that to their knowledge very considerable sums of money had been paid by stationers and printers to many authors for the copies of such useful books as had been imprinted; in regard whereof (they say), we conceive it to be both just and necessary that they should enjoy a property for the sole imprinting of their copies; and we further declare that, unless they

During the reign of Charles II., there were decided several controversies concerning the right of printing certain books, which have been cited as showing that the crown claimed a property in copies analogous to that belonging to the author. The books thus claimed by the king were known as prerogative copies, and comprised the English translation of the Bible and the Common Prayer-book, as well as all extracts from them (such as primers, psalters, and psalms), almanacs, law reports, acts of Parliament, and the Latin Grammar.

The first reported case of this kind was decided in 1666. Atkins, claiming the right as the king's patentee to print all law books, had obtained an injunction restraining the members of the Stationers' Company from printing Rolle's Abridgment. An appeal was taken to the House of Lords, where it was argued that the laws belonged to the king, who paid the judges who pronounced them. The Lords, agreeing "that a copyright was a thing acknowledged at common law," held "that the king had this right, and had granted it to the patentees."[1]

The next case was that of Roper *v.* Streater, decided in 1672. Roper, who had bought from the executors of Mr. Justice Croke the third part of his reports, brought an action against Streater for printing it without authority. Streater was a law patentee, and pleaded the king's grant. The Common Pleas decided in favor of the plaintiff, on the ground that he, "by purchase from the executors of the author, was owner of the copy

particular persons. In 1559, and downward from that time, there are persons fined for printing other men's copies. In 1573, there are entries which take notice of the sale of the copy and the price. In 1582, there are entries with an express proviso, 'that, if it be found any other has a right to any of the copies, then the license touching such of the copies so belonging to another shall be void.'" Willes, J., 4 Burr. 2313.

In 1681, when all legislative protection had ceased, the Stationers' Company made a by-law, which,—after reciting that members of the company had a great part of their estates in copies, and that by the ancient usage of the company such persons had always been reputed the owners of such books or copies as had been entered to them in the register of the company, and ought therefore to have the sole printing of them — provided a penalty for the invasion of such right. A similar by-law was passed in 1694, which, after reciting that copies had been "constantly bargained and sold amongst the members of this company as their property, and devised to children and others for legacies, and to their widows for their maintenance," ordained that no book entered by one member should be printed or sold by another without license. 4 Burr. 2306.

[1] Carter, 89; 4 Burr. 2315.

at common law." This judgment was reversed in the House of Lords, where it was held that "the copy belonged to the king." [1]

The case of the Stationers' Company against Seymour, in 1677, was a controversy between the plaintiffs as grantees of the crown, and the defendant, who had printed Gadsbury's Almanac, without license. The court held that the property of an almanac which has "no particular author" was in the king; and that the "prognostications" added by the defendant "do not alter the case; no more than if a man should claim a property in another man's copy by reason of some inconsiderable additions of his own." [2]

The king's property in prerogative copies was recognized in 1681, in suits brought by the Stationers' Company against Lee [3] and against Wright.[4]

Opinions differ as to the nature of the right thus claimed by the crown. Lord Mansfield emphatically maintained that it was founded on the same principles of property which govern in the case of individuals, and that it could be defended on no other ground.[5] By others it has been regarded as an

[1] Skin. 231; 1 Mod. 257; 4 Burr. 2316.

[2] 1 Mod. 256; 4 Burr. 2316. In 1775, the Common Pleas decided against the validity of the crown patent for the exclusive printing of almanacs. Stationers' Company *v.* Carnan, 2 W. Bl. 1004. See also Stationers' Company *v.* Partridge, 10 Mod. 105; 4 Burr. 2402.

[3] 2 Show. 258. See also Stationers' Company *v.* Parker, Skin. 233.

[4] Skin. 234; 4 Burr. 2328.

[5] "Crown copies are, as in the case of an author, civil property; which is deduced, as in the case of an author, from the king's right of original publication. The kind of property in the crown, or a patentee from the crown, is just the same: incorporeal, incapable of violation but by a civil injury, and only to be vindicated by the same remedy, — an action upon the case, or a bill in equity.

"There were no questions in Westminster Hall before the Restoration, as to crown copies. The reason is very obvious; it will occur to every one that hears me. The fact, however, is so; there were none before the Restoration. Upon every patent which has been litigated since, the counsel for the patentee (whatever else might be thrown out, or whatever encouragement they might have, between the Restoration and Revolution, to throw out notions of power and prerogative), have tortured their invention to stand upon property. Upon Relle's Abridgment, they argued from the Year Books, which are there abridged, that the Year Books, having been compiled at the king's expense, were the king's property, and therefore the printing of them belonged to his patentee. Upon Croke's Reports, they contended that the king paid the judges who made the decisions; *ergo*, the decisions were his. The judges of Westminster Hall thought they belonged to the author; that is, to the purchaser from, or the executor of, the author: but, so far,

exercise of naked prerogative, based on reasons of church and state.[1]

the controversy turned upon property. In Seymour's Case, 1 Mod. 256 (who printed Gadbury's Almanac without leave of the Stationers' Company, who had a patent for the sole printing of almanacs), Pemberton resorted to property. He argued, besides arguing from the prerogative, that an almanac had no certain author: therefore the king has the property; and, by consequence, may grant his property. It was far fetched; and it is truly said that the consequence did not follow. For, if there was no certain author, the property would not be the king's, but common. Pemberton was a very able lawyer, and saw the necessity of getting a property, if he could make it out. . . .

"Acts of Parliament are the works of the legislature; and the publication of them has always belonged to the king, as the executive part, and as the head and sovereign. . . .

"The copy of the Hebrew Bible, the Greek Testament, or the Septuagint, does not belong to the king: it is common. But the English translation he bought; therefore it has been concluded to be his property. If any man should turn the Psalms, or the writings of Solomon or Job, into verse, the king could not stop the printing or sale of such a work: it is the author's work. The king has no power or control over the subject-matter: his power rests in property. His whole right rests upon the foundation of property in the copy, by the common law. What other ground can there be for the king's having a property in the Latin Grammar, which is one of his ancient copies, than that it was originally composed at his expense? Whatever the common law says of property in the king's case, from analogy to the case of authors, must hold conclusively, in my apprehension, with regard to authors." Lord Mansfield, Millar *v.* Taylor, 4 Burr. 2101–2405. See remarks of same judge, 4 Burr. 2402, on the case of the Stationers' Company *v.* Partridge; and 4 Burr. 2404, on the decision in Baskett *v.* University of Cambridge. See also views of Mr. Justice Willes, Millar *v.* Taylor, 4 Burr. 2328–29, 2332.

[1] "Upon the whole of this prerogative claim of the crown, it appears to me, that the right of the crown to the sole and exclusive printing of what is called prerogative copies is founded on reasons of religion or of State. The only consequences to which they tend are of a national and public concern respecting the established religion or government of the kingdom; and have no analogy to the case of private authors. There is no instance of the crown's intermeddling with, or pretending any such right in, private compositions. . . . It is mentioned as one ground of the king's right to print them, that some of these prerogative books were composed at his expense. But in fact it is no private disbursement of the king, but done at the public charge, and part of the expenses of government. It can hardly be contended that the produce of expenses of a public sort are the private property of the king, when purchased with public money. He cannot sell nor dispose of one of those compositions. How, then, can they be his private property, like the private property claimed by an author in his own compositions!" Yates, J., Millar *v.* Taylor, 4 Burr. 2383, 2384.

In moving the judgment of the House of Lords in 1828, in Manners *v.* Blair, 3 Bligh, N. S. 402, which was a controversy involving the right of the crown to grant a patent for the exclusive printing of Bibles, Lord Chancellor Lyndhurst said: "But although the power of the king and his prerogative in England has never been questioned, it has been rested by judges on different principles. Some judges have been of opinion that it is to be founded on the circumstance of the translation of the Bible, having been actually paid for by King James, and its having be-

According to Sir William Blackstone, the king, as the head of the state, had the right of promulgating, and consequently the exclusive privilege of printing, all acts of Parliament, proclamations, orders of council, &c.; and, as head of the church, the right to publish the liturgies and books of divine service; while his claim to the exclusive printing of the Bible rested also on the additional ground of his having paid for the translation. "He is also," says the same authority, "said to have a right by purchase to the copies of such law-books, grammars, and other compositions as were compiled or translated at the expense of the crown." [1]

It has been shown that literary property existed and was recognized during at least a century and a half prior to 1710, when the first copyright statute went into force. What was the origin of this property, the source of its existence? There is not a clause or a word in any of the decrees, acts, or ordinances relating to books from the earliest, passed in 1556, to the latest, in 1692, that can be construed as creating copyright. Whether these enactments were applicable to all authors, or were intended only for the benefit of the members of the Stationers' Company, is immaterial to the present inquiry. They simply provided remedies, more or less complete, for all or a

come the property of the crown, and therefore it has been referred to a species of copyright. Other judges have referred it to the circumstance of the king of England being the supreme head of the church of England, and that he is vested with the prerogative with reference to that character. Other judges have been of opinion, and I confess, for my own part, I am disposed to accede to that opinion, that it is to be referred to another consideration; namely, to the character of the duty imposed upon the chief executive officer of the government, to superintend the publication of the acts of the legislature, and acts of state of that description, and also of those works upon which the established doctrines of our religion are founded, — that it is a duty imposed upon the first executive magistrate, carrying with it a corresponding prerogative. That was the opinion of Lord Camden, as expressed in the case of Donaldson *v.* Becket, 4 Burr. 2408, in most direct and eloquent terms, in this House; that was the opinion also expressed by Chief Baron Skinner, in the case of Eyre and Strahan *v.* Carnan, Court of Exchequer, 1781; and I think that may be collected or inferred to be the opinion of a learned and noble earl, now a member of your Lordships' House, from what fell from that noble and learned lord in the case of the Universities of Oxford and Cambridge *v.* Richardson, 6 Ves. 704."

[1] 2 Com. 410. See also as to prerogative copies, Baskett *v.* University of Cambridge, 1 W. Bl. 105; Baskett *v.* Cunningham, Ibid. 370; Eyre *v.* Carnan, 5 Bac. Abr. Prerog. F. 5; Universities of Oxford and Cambridge *v.* Richardson, 6 Ves. 689; Grierson *v.* Jackson, Ridg. L. & S. 304.

few owners of a species of property not newly created, but found existing. None of them referred to any term during which the remedies were to continue, or abridged in any way the duration of the ownership of the property. Old acts expired and new ones were passed; but before the first and after the last, and independently of all of them, property in copies was a recognized fact.[1] Nor is there any other legislative act during this period to account for the origin of literary property. Its existence, then, could have been only by the common law.

This conclusion is amply confirmed by the authorities. In the earliest reported case concerning literary property, the House of Lords, in 1666, unanimously agreed that "a copyright was a thing acknowledged at common law."[2] Mr. Justice Willes declared that the Star Chamber decree of 1637 "expressly supposes a copyright to exist otherwise than by patent, order, or entry in the register of the Stationers' Company, which could only be by the common law;"[3] and that, in passing the ordinance of 1643, both Houses of Parliament took it for granted that copyrights "could only stand upon the common law."[4] Of the Licensing Act of Charles II., the same jurist said: "The sole property of the owner is here acknowledged in express words as a common-law right; and the legislature who passed that act could never have entertained the most distant idea that the productions of the brain were not a subject-matter of property."[5]

[1] Mr. Justice Aston thought, "This idea of an author's property has been so long entertained that the copy of a book seems to have been not familiarly only, but legally, used as a technical expression of the author's sole right of printing and publishing that work; and that these expressions, in a variety of instruments, are not to be considered as the creators or origin of that right or property, but as speaking the language of a known and acknowledged right, and, as far as they are active, operating in its protection." 4 Burr. 2346.

[2] Atkins's case, Carter, 89; 4 Burr. 2315.

[3] 4 Burr. 2313.

[4] "The licentiousness of libels induced the two Houses to make an ordinance which prohibited printing, unless the book was first licensed and entered in the register of the Stationers' Company. Copyrights, in their opinion, then, could only stand upon the common law; both Houses take it for granted. The ordinance, therefore, prohibits printing without consent of the owner; or importing, if printed abroad, upon pain of forfeiting the same to the owner or owners of the copies of the said books, &c. This provision necessarily supposes the property to exist; it is nugatory if there was no owner. An owner could not at that time exist but by the common law." Ibid. 2314.

[5] "In 1662, the act of 13 & 14 C. II.

The booksellers, who, just before the statute of Anne was passed, petitioned Parliament for additional protection against piracy, admitted that they had a property in copies which could then exist only by the common law.[1] This fact was recognized by Parliament in passing the statute of Anne; and, after this act went into force, it was the uniform practice of the Court of Chancery to grant injunctions protecting common-law copyright in published works. The common-law existence of literary property was expressly affirmed by the Court of King's Bench in Millar *v.* Taylor;[2] whose judgment, as far as it affirmed the existence of the property as a historical fact, has never been reversed. The same doctrine was expressly approved by a majority of the judges, who advised the House of Lords in Donaldson *v.* Becket.[3]

The history of literary property, from the middle of the sixteenth to the close of the seventeenth century, shows: —

First. The existence of such property is traced back by record to 1558, when an entry of copies appears in the register of the Company of Stationers; and, by probability, to the latter part of the fifteenth century, when printing was introduced into England.

Second. There is no legislation during this period creating this property, or conferring ownership; none abridging its perpetuity, or restricting its enjoyment.

Third. Its existence, then, is due to the common law, and

(the Licensing Act) prohibits printing any book, unless first licensed and entered in the register of the Stationers' Company. It also prohibits printing without the consent of the owner, upon pain of forfeiting the book and 6*s.* 8*d.* each copy; half to the king, and half to the owner; to be sued for by the owner in six months; besides being otherwise persecuted as an offender against the act. The act supposes an ownership at common law. And the right itself is particularly recognized in the latter part of the third section of the act, where the chancellor and vice-chancellor of the universities are forbid to meddle with any book or books the right of printing whereof doth solely and properly belong to any particular person or persons. The sole property of the owner is here acknowledged in express words as a common-law right; and the legislature who passed that act could never have entertained the most distant idea that the productions of the brain were not a subject-matter of property. To support an action on this statute, ownership must be proved, or the plaintiff could not recover; because the action is to be brought by the owner, who is to have a moiety of the penalty." 4 Burr. 2314.

[1] See *ante*, p. 22 and note 4.

[2] 4 Burr. 2303.

[3] Ibid. 2408.

this necessary conclusion is supported by contemporary and later authorities.

It is for those who believe with Judge Yates and Lord Camden that literary property "is all ideal," and was unknown in England before the statute of Anne, to explain away this century and a half of its recognized existence. It is for those who, with Lord Macaulay, contend that copyright is a monopoly, who believe with Baron Pollock that it "is altogether an artificial right, a creature of the municipal law, and has no existence by the common law of England,"[1] to point to the legislation that created it or made it a monopoly; and, if the statute of Anne is cited for this purpose, — none earlier can be cited, — it is for them to reconcile with their theory the acknowledged existence of literary property independent of any legislation during the century and a half preceding that statute.

That literary property was shielded from arbitrary and oppressive government interference during this early period of English history, is not claimed. At a time when many rights of the subject were held subordinate to the pleasure of the crown, the title of an author to the fruits of his industry was no exception. When the labors of literary men were neutralized by the despotic regulation and suppression of the publication of books, it was an unwarranted invasion of private property that would not have been tolerated in later times. But the inquiry with which we are now most concerned is, not whether literary property was strictly inviolable in these times, but whether it had an acknowledged existence, — the affirmative of which is denied by those who maintain that copyright is a creature of legislation.

When the Licensing Act had finally expired in 1694, and there was no legislative restriction on the piratical printing of books, men of letters and booksellers began to complain loudly of the evils of piracy. In 1703, 1706, and 1709, the owners

[1] "Copyright is altogether an artificial right, not naturally and necessarily arising out of the social rules that ought to prevail among mankind assembled in communities, but is a creature of the municipal law of each country, to be enjoyed for such time and under such regulations as the law of each state may direct, and has no existence by the common law of England." Jefferys *v.* Boosey, 4 H. L. C. 937.

of copies petitioned Parliament for a law to protect their copyrights more effectively. It was in answer to these appeals that the 8 Anne, c. 19, became a law, in 1710. This was the first English statute distinctly affirming copyright and providing for its protection. It was entitled "An Act for the Encouragement of Learning by vesting the copies of printed books in the authors or purchasers of such copies during the times therein mentioned." The preamble declares that "printers, booksellers, and other persons have of late frequently taken the liberty of printing, reprinting, and publishing, or causing to be printed, reprinted, and published, books and other writings, without the consent of the authors or proprietors of such books and writings, to their very great detriment, and too often to the ruin of them and their families;" and that the object of the act is to prevent "such practices for the future, and for the encouragement of learned men to compose and write useful books."

It provided that the owner of the copyright in any book already printed should have the exclusive right of publishing it for twenty-one years; and that the author of any book not then published should have the sole liberty of publishing it for fourteen years from the time of first publication. At the end of this period, the same right was continued in the author, if living, for another term of fourteen years. Any person who should publish, import, or sell piratical copies was made liable to forfeit such copies to the owner of the copyright, to be by him destroyed, and to pay one penny for every sheet found in his possession. One-half of this penalty was to go to the queen, and the remainder to any person who should sue for it. There was a proviso, however, which permitted the importation and sale of "any books in Greek, Latin, or any other foreign language, printed beyond the seas." That no person might offend against the act through ignorance, it was provided that no book should be entitled to protection unless the title to the copy had been entered, before publication, in the register-book of the Company of Stationers, which should always be kept open for inspection at the hall of the company. The act further required nine copies of every book to be delivered to this company, for the use of the royal library in

London, the universities of Oxford and Cambridge, the four universities in Scotland, Sion College in London, and the Library of the Faculty of Advocates in Edinburgh.

If any bookseller or printer should sell or offer for sale a book "at such a price or rate as shall be conceived by any person or persons to be too high or unreasonable," the price might be reduced and fixed at a reasonable figure by the Archbishop of Canterbury, the Chancellor or Lord-keeper of the Great Seal, the Bishop of London, the Chief Justices of the Queen's Bench and Common Pleas, or other designated officials. This provision was repealed in 1739 by the 12 Geo. II. c. 36.

The act of Anne prohibited any one from importing a book which had been printed without the written consent of the owner of the copyright. There is no reason why this provision should not have been held sufficient to prevent the importation of English copyrighted books reprinted abroad without due authority; excepting of course those reprinted in a foreign language, which came under a special proviso. But in 1739 was passed the 12 Geo. II. c. 36, whose preamble recited that "the duties payable upon paper imported into this kingdom to be made use of in printing greatly exceed the duties payable upon the importation of printed books, whereby foreigners and others are encouraged to bring in great numbers of books originally printed and published in this kingdom, and reprinted abroad, to the diminution of his Majesty's revenue and the discouragement of the trade and manufacture of this kingdom." The statute then provided for a forfeiture of copies, and imposed penalties in the case of the unauthorized importation of all copyrighted books originally published in England and reprinted abroad. This act was temporary; but it was several times renewed.

The act of Anne extended protection to two classes of books: 1, those already published, in which copyright was vested for twenty-one years; 2, those not then published, for which a term of fourteen years was secured. The copyright, therefore, in books of the first class expired at the end of twenty-one years, or in 1731; and hence, whatever protection was granted by the court after that year to a book published before the statute was

passed, must have been on the ground that copyright was founded in the common law. Not fewer than five cases of this kind are recorded in the quarter of a century following 1731. In 1735, injunctions were issued by Sir Joseph Jekyll, Master of the Rolls, against printing a book entitled The Whole Duty of Man, which had first appeared in 1657;[1] and by Lord Talbot, protecting Pope's and Swift's Miscellanies, many of which had been published before 1710.[2] In 1736, Sir Joseph Jekyll granted an injunction protecting Nelson's Festivals and Fasts, which had originally appeared in 1703;[3] and, in 1739, Lord Hardwicke restrained the unauthorized publication of Milton's Paradise Lost, to which the plaintiff derived title under an assignment made by the author, in 1667.[4] Another injunction was granted by this judge, in 1752, against printing an edition of the same poem, with a biography by Fenton, and notes by Bentley and Dr. Newton. The biography and the notes had been published after the statute, and were within its protection; but the poem did not come within the provisions of the act.[5]

All of these books had been originally published before the passing of the copyright statute; and all of the injunctions were granted after the statutory term had expired. None of the cases, therefore, were within the statute. The court did not hesitate to recognize and protect the author's common-law rights in his published work.

In 1760, an action was brought by Tonson against Collins, for piracy of the Spectator, in which the plaintiff claimed the exclusive right of publication by assignment from Addison and Steele. The defence was set up that there was no property in a published work, except that secured by the statute, and that the statutory copyright in the Spectator had expired. The

[1] Eyre *v.* Walker, cited 4 Burr. 2325.

[2] Motte *v.* Falkner, Ibid.

[3] Walthoe *v.* Walker, Ibid.

[4] Tonson *v.* Walker, Ibid.

[5] Tonson *v.* Walker, 3 Swans. 672. Lord Hardwicke thought there might be some question about the plaintiff's right to restrain the publication of the poem; but he granted the injunction against the publication either of the poem, or the notes and biography. "If the inclination of Lord Hardwicke's own opinion," said Mr. Justice Willes, "had not been strongly with the plaintiff, he never would have granted the injunction to the whole, and penned it in the disjunctive; so that printing the poem, or the life, or Bentley's notes, without a word of Dr. Newton's, would have been a breach. The injunction is not barely to the selling of that book, of which Newton's notes made a part, but to future printing." 4 Burr. 2326.

case was found to be one of collusion, and no decision was rendered.[1]

In 1769, the origin and nature of literary property were exhaustively discussed by the judges of the King's Bench, of which Lord Mansfield was chief justice, in the case of Millar *v.* Taylor, which yet stands out as one of the great landmarks in the history of this controversy.[2] The book in controversy was Thomson's Seasons, which had been first published by the poet in 1727–30. The copyright was then sold to Andrew Millar, who was the owner of it in 1763, when Robert Taylor issued an edition without license. In 1766, Millar brought an action for piracy; and, as the term of years secured by the statute of Anne had expired, the direct issue was raised whether a perpetual property, by common law and independent of the statute, remained in the author and his assigns after publication. Lord Mansfield and Justices Aston and Willes maintained the affirmative, in elaborate opinions, while Mr. Justice Yates contended that copyright was the creature of the statute. The judgment of the court was that copyright was founded in the common law, and that it had not been taken away by the statute of Anne, which was intended merely to give for a term of years a more complete protection.

In 1774, the authority of this decision was overruled by the House of Lords, in the case of Donaldson *v.* Becket.[3] Several questions relating to the origin and nature of literary property were submitted to the judges, among whom there was a marked diversity of opinion. A majority held that, by the common law, an author had the exclusive right of publishing his book; and that this right was not, by virtue of the common law, lost or prejudiced by publication. But the only question on which judgment was passed was whether the common-law right in a published book had been destroyed by the statute of Anne. The affirmative was maintained by six, and the negative by five, judges. Lord Mansfield, being a peer, did not express his opinion; but it was well known that he adhered firmly to the view that the common-law right had been in no wise impaired by the statute. Including him, the judges were evenly divided on this question.

[1] Tonson *v.* Collins, 1 W. Bl. 301, 321.
[2] 4 Burr. 2303. [3] Ibid. 2408.

In moving for judgment, Lord Camden made a specious harangue against the rights of authors, and the House of Lords declared that the statute had taken away all common-law rights after publication; and hence that, in a published book, there was no copyright except that given by the statute.[1]

The judgment of the House of Lords very naturally caused much alarm among men of letters, and especially among the London booksellers, who had invested much money in copyrights which they had supposed to be perpetual, but which were now left without protection. Application was made to Parliament for a law vesting in authors and their assigns the copyright of such books as were not protected by the statute of Anne. A bill for that purpose was passed by the House of Commons, in May, 1774; but it was rejected by the Lords, and hence failed to become a law.

The universities now applied to Parliament, and obtained, in 1775, an act "for enabling the two universities in England, the four universities in Scotland, and the several colleges of Eton, Westminster, and Winchester, to hold in perpetuity their copyright in books given or bequeathed to the said universities and colleges, for the advancement of useful learning and other purposes of education."[2] Thus, what was denied to literature was granted to these wealthy corporations.

In 1801, the provisions of the English copyright statutes were extended to Ireland by 41 Geo. III. c. 107; which also provided for the recovery of damages by action in cases of piracy, increased the penalty from one to three pence a sheet, and imposed a heavier tax upon authors, by requiring them to give eleven instead of nine copies to public libraries.

The duration of copyright granted by the Parliament of Anne in 1710, — fourteen years absolute, with a contingent term of the same length, — continued without change till 1814, when it was enlarged to the absolute term of twenty-eight years, without provision for extension, except that, if the author were living at the end of that period, his copyright was to continue during his life.[3]

[1] For a fuller treatment of the cases of Millar *v.* Taylor and Donaldson *v.* Becket, see *ante*, pp. 28 *et seq.*

[2] 15 Geo. III. c. 53. The same privileges were conferred upon Trinity College, Dublin, in 1801, by 41 Geo. III. c. 107.

[3] 54 Geo. III. c. 156.

Early in the reign of Victoria, it was thought to be "high time that literature should experience some of the blessings of legislation," and earnest efforts were made to secure an extension of the term during which authors might enjoy the profits of their works. The movement was begun in Parliament, under the lead of Sergeant Talfourd, in 1837, and ended with the passing of the copyright law of 1842.[1] Sergeant Talfourd and many, if not all, of his supporters believed, and stoutly maintained, that the title of an author to his intellectual productions was the same as that of a land-owner to his estates, and that it was as clearly contrary to right and justice for Parliament to limit the ownership of the former as it would be to abridge that of the latter. The claims of literature, therefore, were presented on their only true basis of property, and not of expediency. But there was so little hope of gaining a complete victory that Parliament was not asked to proclaim the perpetuity of the ownership of literary property, but merely to extend the term of statutory copyright so as to continue for sixty years after the death of the author. This was clearly a compromise of the rights of authors, and was so understood by the friends of the bill; but it was looked upon as a decided advance upon the existing law, and the best that could be hoped for under the circumstances. The result proved that this feeling was well grounded; for so strong was the opposition to the just claims of literature that the term of copyright was fixed at forty-two years, or during the life of the author, and seven years after his death, in case this should be a longer period than forty-two years.

Mr. Sergeant Talfourd represented the cause of letters in the House of Commons with eloquence and perseverance.[2] He

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

[2] "Although I see no reason," said Mr. Sergeant Talfourd, "why authors should not be restored to that inheritance which, under the name of protection and encouragement, has been taken from them, I feel that the subject has so long been treated as a matter of compromise between those who deny that the creations of the inventive faculty, or the achievements of the reason, are the subjects of property at all, and those who think the property should last as long as the works which contain truth and beauty live, that I propose still to treat it on the principle of compromise, and to rest satisfied with a fairer adjustment of the difference than the last act of Parliament affords. I shall propose, subject to modification when the details of the measure shall be discussed, that the term of property in all works of learning, genius, and art, to be produced

was aided by the petitions of the most distinguished British authors, including Wordsworth, Sir Walter Scott, Archibald Alison, Sir David Brewster, Professor Wilson, Thomas Carlyle,

hereafter, or in which the statutable copyright now subsists, shall be extended to sixty years, to be computed from the death of the author; which will at least enable him, while providing for the instruction and the delight of distant ages, to contemplate that he shall leave in his works themselves some legacy to those for whom a nearer, if not a higher, duty requires him to provide, and which shall make 'death less terrible.' . . .

"The term allowed by the existing law is curiously adapted to encourage the lighest works, and to leave the noblest unprotected. Its little span is ample for authors who seek only to amuse; who, 'to beguile the time, look like the time;' who lend to frivolity or corruption 'lighter wings to fly;' who sparkle, blaze, and expire. These may delight for a season, glisten as the fire-flies on the heaving sea of public opinion, — the airy proofs of the intellectual activity of the age; yet surely it is not just to legislate for those alone, and deny all reward to that literature which aspires to endure. Let us suppose an author of true original genius, disgusted with the inane phraseology which had usurped the place of poetry, and devoting himself from youth to its service; disdaining the gauds which attract the careless, and unskilled in the moving accidents of fortune; not seeking his triumph in the tempest of the passions, but in the serenity which lies above them, — whose works shall be scoffed at, whose name made a by-word: and yet who shall persevere in his high and holy course, gradually impressing thoughtful minds with the sense of truth made visible in the severest forms of beauty, until he shall create the taste by which he shall be appreciated; influence, one after another, the master-spirits of his age; be felt pervading every part of the national literature, — softening, raising, and enriching it; and when at last he shall find his confidence in his own aspirations justified, and the name which once was the scorn admitted to be the glory of his age, — he shall look forward to the close of his earthly career as the event that shall consecrate his fame, and deprive his children of the opening harvest he is beginning to reap. As soon as his copyright becomes valuable, it is gone!

"This is no imaginary case. I refer to one who 'in this setting part of time' has opened a vein of the deepest sentiment and thought before unknown; — who has supplied the noblest antidote to the freezing effects of the scientific spirit of the age; — who, while he has detected that poetry which is the essence of the greatest things, has cast a glory around the lowliest conditions of humanity, and traced out the subtle links by which they are connected with the highest, — of one whose name will now find an echo, not only in the heart of the secluded student, but in that of the busiest of those who are fevered by political controversy, — of William Wordsworth. Ought we not to requite such a poet, while yet we may, for the injustice of our boyhood? For those works which are now insensibly quoted by our most popular writers, the spirit of which now mingles with our intellectual atmosphere, he probably has not received through the long life he has devoted to his art, until lately, as much as the same labor, with moderate talent, might justly produce in a single year. Shall the law, whose term has been amply sufficient to his scorners, now afford him no protection, because he has outlasted their scoffs; because his fame has been fostered amidst the storms, and is now the growth of years?" Three Speeches delivered in the House of Commons in Favor of a Measure for an Extension of Copyright. By T. N. Talfourd, Sergeant-at-Law, London, 1840.

Thomas Hood, Thomas Campbell, Charles Dickens, Robert Browning, Douglas Jerrold, Leigh Hunt, Mary Russell Mitford, and others. Among other things, it was said that the existing law was "curiously adapted to encourage the lightest works, and to leave the noblest unprotected;" and that its effect, in the case of many of the best works of literature, was to deprive the author and his children of their property just when it became the most valuable. This, as well as the injustice of terminal copyright in general, was forcibly shown by the facts given in the petition of Sir Archibald Alison. He said that he had given twenty-five years' labor to his History of Europe, and had spent £4,000 in visiting the Continent, and securing the material necessary to its preparation. It was not expected that a work of such magnitude and so costly (the price of the seven volumes being then £4 15s.) would get into general circulation in Great Britain, even under the most favorable circumstances, "till the accuracy of the information it contains is tested by the examination of intelligent persons of all the countries whose transactions it embraces, and its reputation, if it is to attain any, is reflected to this country from the adjoining empires." At that time a third edition of the work had been called for, and it had been translated into French and German. It gave, therefore, good promise of success; yet, judging of the future profits from what he had then received, the author did not expect to be indemnified in less than fourteen years for the actual outlay in its preparation; while, if the work should stand the test of time, it could not "be expected to come into general circulation for many years more, and would probably be on the eve of reaching its highest point at the time when the copyright of it, under the existing law, would expire." [1]

[1] The case of Mr. Alison is representative of a class of authors, by no means small in number, whose works are among the most valuable contributions to literature. His petition was as follows: —

"That, with a view to the collection of the materials and the acquisition of the local information requisite for a work of such magnitude, it was unavoidably necessary for your petitioner to visit in person the principal countries in Europe, and purchase the works, in all its languages, bearing upon so extensive a subject.

"That, during the last twenty-five years, your petitioner has, with this view, six times repaired to the Continent, and repeatedly visited the principal parts of France, Italy, Switzerland,

The key-note of the opposition on this occasion was furnished by Lord Camden's absurd harangue in the last century. It

and Germany; that the cost of these journeys has already exceeded £1,500, and the expense of the books found to be necessary for the compilation of the undertaking has amounted to above £2,000. If your petitioner lives to complete his undertaking, his total expenditure on account of it will be about £4,000.

"That, during the last twenty-five years, he has been engaged, almost without interruption except by his professional avocations, in the study and reading requisite for the collection of his materials; and for the last twelve has been sedulously occupied in the composition of the work, which already extends to seven thick volumes, octavo.

"That the sale of the work of such magnitude, and so costly (the price of the seven volumes being £4 15s.), especially when undertaken by an author wholly unknown to the public, necessarily was at first very slow.

"That it must be obvious to every one acquainted with the subject, that a work of such magnitude and expense, the cost of it when completed being £5 10s. cannot be expected to get into general circulation in this country, even under the most favorable circumstances, till the accuracy of the information it contains is tested by the examination of intelligent persons of all the countries whose transactions it embraces; and its reputation, if it is to obtain any, is reflected to this country from the adjoining empires. It is now undergoing this ordeal, and is in course of publication at Paris in the French language, and of translation at Leipsic into the German.

"That your petitioner has not disposed of the entire copyright of any part of the work, but merely sells to his publishers each successive edition of it as it is called for by the public. Two editions have already been printed, and a third will shortly go to press.

"That your petitioner, judging of the future profits of the work by what he has already received, cannot expect to be indemnified for the actual outlay expended in its prosecution, with the interest at the lowest rate on the sums from the period at which they were advanced, in less than fourteen years.

"That, if the work should stand the test of time and general examination, it cannot be expected to come into general circulation for many years more, and would probably be on the eve of reaching its highest point at the time when the copyright of it, under the existing law, would expire.

"That no person can be more strongly impressed than your petitioner is with the extremely uncertain nature of every literary reputation, and the very small number of works which ever survive more than a few years beyond the period of their publication. But if his history, from the labor and expense bestowed on its composition, is destined to survive its author, and if the sale of it shall continue when the work is finished, at the same average rate at which it has gone on since the publication commenced, he will be reimbursed for his advances in fourteen years from the period of publication; in fourteen more, he will be remunerated at about one-half the rate which he would have obtained if he had devoted the same time and labor on any of the ordinary publications of the day. But at the same rate of sale, should the copyright be continued for thirty or forty years longer, the work would become a property of great value to your petitioner's family."

Mr. Hood's petition was not presented to the august body to whom it was addressed. It contains so much truth and wisdom mingled with wit, that his language may well be given here:—

"The humble petition of the undersigned, Thomas Hood, Sheweth, —

was assumed, as a matter of course, that an author had no more claim to works on which he had devoted years of toil and

"That your petitioner is the pro- prietor of certain copyrights which the law treats as copyhold, but which, in justice and equity, should be his freeholds. He cannot conceive how Hood's Own, without a change in the title-deeds as well as the title, can become Everybody's Own hereafter.

"That your petitioner may burn or publish his manuscripts at his own option, and enjoys a right in and control over his own productions which no press, now or hereafter, can justly press out of him.

"That as a landed proprietor does not lose his right to his estate in perpetuity by throwing open his grounds for the convenience or gratification of the public, neither ought the property of an author in his works to be taken from him, unless all parks become commons.

"That your petitioner, having sundry snug little estates in view, would not object, after a term, to contribute his private share to a general scramble, provided the landed and moneyed interests, as well as the literary interest, were thrown into the heap; but that, in the mean time, the fruits of his brain ought no more to be cast amongst the public than a Christian woman's apples or a Jewess's oranges.

"That cheap bread is as desirable and necessary as cheap books; but it hath not yet been thought just or expedient to ordain that, after a certain number of crops, all cornfields shall become public property.

"That, whereas in other cases long possession is held to affirm a right to property, it is inconsistent and unjust that a mere lapse of twenty-eight or any other term of years should deprive an author at once of principal and interest in his own literary fund. To be robbed by Time is a sorry encouragement to write for Futurity!

"That a work which endures for many years must be of a sterling character, and ought to become national property; but at the expense of the public, or at any expense save that of the author or his descendants. It must be an ungrateful generation that, in its love of cheap copies, can lose all regard for 'the dear originals.'

"That, whereas your petitioner has sold sundry of his copyrights to certain publishers for a sum of money, he does not see how the public, which is only a larger firm, can justly acquire even a share in copyright, except by similar means; namely, by purchase or assignment. That the public, having constituted itself by law the executor and legatee of the author, ought in justice, and according to practice in other cases, to take to his debts as well as his literary assets.

"That, when your petitioner shall be dead and buried, he might with as much propriety and decency have his body snatched as his literary remains.

"That, by the present law, the wisest, virtuousest, discreetest, best of authors, is tardily rewarded, precisely as a vicious, seditious, or blasphemous writer is summarily punished; namely, by the forfeiture of his copyright.

"That, in case of infringement on his copyright, your petitioner cannot conscientiously or comfortably apply for redress to the law whilst it sanctions universal piracy hereafter.

"That your petitioner hath two children, who look up to him not only as the author of the Comic Annual, but as the author of their being. That the effect of the law as regards an author is virtually to disinherit his next of kin, and cut him off with a book instead of a shilling.

"That your petitioner is very willing to write for posterity on the lowest terms, and would not object to the long credit; but that, when his heir shall apply for payment to posterity, he will be referred back to antiquity.

"That, as a man's hairs belong to his head, so his head should belong to his

pounds of sterling than what Parliament might choose to give him. Indeed, the interests of the author appear to have been entirely overlooked in the discussion. The paramount inquiry was directed to the effect that any change in the law might have on the interests of society; — paper-makers, printers, binders, proof-readers, &c. The opposition was based entirely on matters of expediency, and the fact or the possibility that an issue of property, of right, or of justice, might be involved, in no wise became the subject of inquiry. The Solicitor-General thought "that books should be had for the benefit of

heirs; whereas, on the contrary, your petitioner hath ascertained, by a nice calculation, that one of his principal copyrights will expire on the same day that his only son should come of age. The very law of nature protests against an unnatural law which compels an author to write for anybody's posterity except his own.

"Finally, whereas it has been urged, 'if an author writes for posterity, let him look to posterity for his reward,' your petitioner adopts that very argument, and on its very principle prays for the adoption of the bill introduced by Mr. Sergeant Talfourd, seeing that by the present arrangement posterity is bound to pay everybody or anybody but the true creditor." 8 *Hood's* Works (10 vols., London), 105.

The various petitions presented to the House of Commons are given in the volume of speeches published by Sergeant Talfourd. See *ante*, p. 75, end of note.

Much evidence was taken by the Royal Copyright Commissioners, whose report was submitted to Parliament in June, 1878, to the effect, that, unless the duration of copyright is long enough, an author cannot realize a fair reward for the time and money which he has spent on a work of lasting value, and that this fact has a marked tendency to lessen the production of such works. In 1845, Wordsworth, then an old man, told Mr. Alexander Macmillan, the well-known publisher, that he had just begun to receive any considerable sums from the sale of his poems. His returns were then about £300 a year; whereas in 1876, in the opinion of Mr. Macmillan, the copyrights of the poet, if they had not expired, would have been worth £1,000 a year. Minutes of the Evidence taken before the Royal Commission on Copyright, p. 16. Mr. Herbert Spencer published his early works at a great loss. It was twenty-four years before his losses were made up by the increasing value of his copyrights. Ibid. 257. In his opinion, no publisher would have undertaken the publication of the International Scientific Series, unless he had "many years to recoup himself." Ibid. 286. Professor Huxley pointed out the ruinous effect which a short term of protection must have on the production of such a work as Cuvier's *Ossemens Fossiles* which is as valuable and as much consulted now as when it was first published, a half a century ago. And the same, he said, is equally true of the whole class of botanical, zoölogical, and anatomical works, and the great mass of illustrated books relating to physical science. Ibid. 307. A like opinion was expressed by Mr. T. H. Farrer concerning several valuable classical dictionaries which he had edited. Ibid. 277. The testimony of these and other witnesses is to the effect, that the extent and quality of literary production are largely influenced by the opportunities which the law gives to authors to realize the pecuniary reward of their labors.

the public at the lowest possible price; and, therefore, no greater inducement should be held out to authors than may be necessary for securing the production of the desired works;" that "he could never bring himself to support any measure which goes further than to give the authors the *minimum* of inducement to produce their works; and he did not think the legislature is in conscience at liberty to go further." Sir Edward Sugden declared that he was "one of those who thought that there was no common-law copyright in the author beyond the manuscript when it was written, or whilst it remained in his own possession."[1] Mr. Strutt alone of the opposition did not forget that the issue was one of property; for he declared that, "from the moment an author puts his thoughts upon paper, and delivers them to the world, his property therein utterly ceases."[2]

Worthy disciples of Lord Camden were these men. Chief among them was Lord Macaulay, who, it will be supposed, might have understood the merits of a cause so vital to his own profession, and represented it with some degree of intelligence. But, bringing the resources and methods of the rhetorician to the discussion of a theme that needed the mind of a jurist and a statesman, he exerted his influence to enforce the fallacies of Yates and Camden. With Yates, he thought that "copyright is a monopoly, and produces all the effects which the general voice of mankind attributes to monopoly." With Camden, he believed that the author's interests were not to be considered in legislating concerning the fruits of his toil. Going beyond either of them, he declared the "principle of copyright" to be "a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures; and never let us forget, that a tax on innocent pleasures is a premium on vicious pleasures." Groping in such fog as this, it is not strange that Macaulay did not approach the only true ground on which the copyright question can be properly discussed; viz., property. How little he understood the matter on which he was speaking, will be made apparent to the thoughtful by a representative passage from his speech:—

[1] 43 Hans. Parl. Deb. 3d ser. 555. [2] Ibid. 1071.

"We all know how faintly we are affected by the prospect of very distant advantages, even when they are advantages which we may reasonably hope that we shall ourselves enjoy. But an advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps by somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action. It is very probable that, in the course of some generations, land in the unexplored and unmapped heart of the Australasian Continent will be very valuable. But there is none of us who would lay down five pounds for a whole province in the heart of the Australasian Continent. We know that neither we, nor anybody for whom we care, will ever receive a farthing of rent from such a province. And a man is very little moved by the thought that in the year 2,000 or 2,100 somebody who claims through him will employ more shepherds than Prince Esterhazy, and will have the finest house and gallery of pictures at Victoria or Sydney. Now, this is the sort of boon which my honorable and learned friend holds out to authors. Considered as a boon to them, it is a mere nullity; but, considered as an impost on the public, it is no nullity, but a very serious and pernicious reality.

"I will take an example. Dr. Johnson died fifty-six years ago. If the law were what my honorable and learned friend wishes to make it, somebody would now have the monopoly of Dr. Johnson's works. Who that somebody would be it is impossible to say; but we may venture to guess. I guess, then, that it would have been some bookseller, who was the assign of another bookseller, who was the grandson of a third bookseller, who had bought the copyright from Black Frank, the Doctor's servant and residuary legatee, in 1785 or 1786. Now, would the knowledge that this copyright would exist in 1841 have been a source of gratification to Johnson? Would it have stimulated his exertions? Would it have once drawn him out of his bed before noon? Would it have once cheered him under a fit of the spleen? Would it have induced him to give us one more allegory, one more life of a poet, one more imitation of Juvenal? I firmly believe not. I firmly believe that, a hundred years ago, when he was writing our debates for the Gentleman's Magazine, he would very much rather have had twopence to buy a plate of shin of beef at a cook's shop underground. Considered as a reward to him, the difference between a twenty-years' and a sixty years' term of posthumous copyright would have been nothing, or next to nothing. But is the difference nothing to us? I can buy Rasselas for sixpence; I might have had to give five shillings for it. I can buy the Dictionary, the entire, genuine Dictionary, for two guineas, perhaps for less; I might have had to give five or six guineas for it. Do I

grudge this to a man like Dr. Johnson? Not at all. Show me that the prospect of this boon roused him to any vigorous effort, or sustained his spirits under depressing circumstances, and I am quite willing to pay the price of such an object, heavy as that price is. But what I do complain of is, that my circumstances are to be worse, and Johnson's none the better; that I am to give five pounds for what to him was not worth a farthing. The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures; and never let us forget, that a tax on innocent pleasures is a premium on vicious pleasures."[1]

Apply this reasoning to the fruits of manual labor, and the satire becomes plain. Ask what interest the farmer, the merchant, the laborer, may feel in what becomes of his life's earnings after his death, when one of the strongest instincts of the father's heart is that the property left by him shall be enjoyed by his children and keep them from want. Often is this holy feeling the highest stimulus to labor, the chief motive in the accumulation of earnings. It is the will of the parent, as it is then the right of the offspring, that the latter shall succeed to the property of the former. And yet Macaulay asked the Parliament of England what interest an author can have in his works after his death! How much better Disraeli spoke on the same theme: —

"*There are works requiring great learning, great industry, great* labor, and great capital, in their preparation. They assume a palpable form. You may fill warehouses with them, and freight ships. And the tenure by which they are held is, in my opinion, superior to that of all other property; for it is original. It is tenure which does not exist in a doubtful title, which does not spring from any adventitious circumstances. It is not found; it is not purchased; it is not prescriptive. It is original. So it is the most natural of all titles, because it is the most simple and least artificial. It is paramount and sovereign, because it is a tenure by creation. The fault, therefore, that I find, not with the design of the bill, but with the bill itself, is that the title held by such a paramount tenure should for a moment be compromised."[2]

[1] 8 *Macaulay's Works (ed. by Lady Trevelyan)*, 200.
[2] 43 Hans. Parl. Deb. 3d ser. 575.

It is not a pleasant spectacle to contemplate the authors and scholars to whom this century is most indebted begging in vain from the Parliament of Victoria a right which had been enjoyed by the literary men of the Elizabethan age. It is less pleasant to know that their defeat was due to the triumph of such ignorance and sophistry as pervade the notions of Yates, Camden, and Macaulay.

Like the statute of Anne, the 5 & 6 Vict. c. 45, granted copyright in a "book;" but the latter act defined this word "to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published." The statute also provided for the regulation of the copyright in articles published in encyclopædias, reviews, magazines, and periodicals.

The duration of copyright in books fixed by the law of 1842 has continued to the present time.

In the reign of William IV., authors were freed from a part of the oppressive tax which had been unjustly imposed on them for more than a century. The number of copies required to be delivered to public libraries — which had been nine under the act of 1710,[1] and eleven under that of 1801[2] and that of 1814[3] — was reduced to five in 1836,[4] at which number it was continued by the statute of 1842. The last named law, 5 & 6 Vict. c. 45, provides, that a copy of the best edition of every book published shall be delivered to the British Museum; and, if demanded, a copy, "on the paper of which the largest number of copies of such book or edition shall be printed for sale," shall be given to the *Bodleian Library* at Oxford, the Public Library at Cambridge, the Library of the Faculty of Advocates at Edinburgh, and the Library of Trinity College, Dublin.[5]

In 1835 was passed the 5 & 6 Will. IV. c. 65, vesting in authors the sole privilege of publishing their lectures; so that no one, "by taking down the same in shorthand or otherwise in writing, or in any other way, obtain or make a copy," may publish the lecture without the consent of the author. The latter, however, is required to give notice in writing to "two justices living within five miles from the place where such

[1] 8 Anne, c. 19. [2] 41 Geo. III. c. 107.
[3] 54 Geo. III. c. 156. [4] 6 & 7 Will. IV. c. 110. [5] s. 8.

lecture or lectures shall be delivered, two days at the least before delivering the same." The protection granted does not extend to "any lecture or lectures delivered in any university or public school or college, or on any public foundation, or by any individual in virtue of or according to any gift, endowment, or foundation." There is nothing in this statute to prevent any person from publicly delivering a lecture without the consent of the author.

Copyright in prints and engravings was first granted in 1735 by the 8 Geo. II. c. 13, whose provisions have been modified by several later acts. By 7 Geo. III. c. 38, passed in 1767, the term of protection was extended from fourteen to twenty-eight years.

The first statute for the protection of sculpture was the 38 Geo. III. c. 71, passed in 1798; but this was so defective that the law was revised in 1814 by the 54 Geo. III. c. 56, by which copyright is granted for fourteen years, with provision for an extension of fourteen years.

It was not until 1862 that statutory copyright was conferred upon the authors of paintings, drawings, and photographs. By the 25 & 26 Vict. c. 68, passed in that year, such authors, provided they are British subjects, or resident within the dominions of the crown, may acquire the "sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing and the design thereof, or such photograph and the negative thereof, by any means, and of any size, for the term of the natural life of such author, and seven years after his death."

Until 1833, there was no statute securing the exclusive right of representing a dramatic composition, and the few cases which had arisen in the courts gave dramatists little hope of protection for their common-law rights from these tribunals. The act of 3 & 4 William IV. c. 15, was passed in 1833 to meet this want. It gives to the "author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment," the sole liberty of representing, or causing it to be represented, at any place of dramatic entertainment in the British dominions. Protection is extended to both printed and manuscript dramatic compositions. Any person pirating

a play is made liable to the payment of not less than forty shillings for every unlicensed representation, "or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages."

The provisions of this statute were extended to musical compositions by the 5 & 6 Vict. c. 45;[1] and the term of protection for both dramatic and musical compositions was enlarged from twenty-eight years to that prescribed for copyright in books.

Rights of Foreign Authors in England.

In 1838 was passed the first "Act for securing to authors, in certain cases, the benefit of international copyright."[2] The object of this statute was to enable foreign authors to copyright their books in England, and to secure to English authors similar advantages in foreign countries. The Queen was empowered to direct, by an Order in Council, that the author of a book first published in a foreign country should have copyright therein in the United Kingdom for a specified period, by complying with certain prescribed regulations; but only on condition that similar privileges should be conferred by such country upon English authors.

This law related only to books, and contained no provision for conferring upon authors the exclusive right of representing or performing dramatic pieces and musical compositions first published or publicly performed in a foreign country; and did not apply to prints, sculpture, and other works of art. For the protection of such productions, the 7 & 8 Vict. c. 12, was passed in 1844. It repealed the act above cited, but re-enacted its general provisions relating to books, and extended them to prints, articles of sculpture, and other works of art. Provision was also made for conferring upon dramatists whose works had first been given to the public in foreign countries the sole liberty of representing or performing them for a specified period, in any part of the British dominions. While the 7 & 8 Vict. c. 12, provided for extending protection to foreign books in the

[1] s. 20.

[2] 1 & 2 Vict. c. 59.

original language, it declared that nothing in it should be construed to prevent the printing, publication, or sale of translations of foreign works.[1] By the 15 & 16 Vict. c. 12, passed in 1852, provision was made for the protection of translations of books and of dramatic compositions. The act, however, declared that "fair imitations, or adaptations to the English stage," of foreign dramatic and musical compositions, might be made by any person.[2] This provision was repealed in 1875 by the 38 Vict. c. 12, which empowered the Queen, by Order in Council, to protect foreign plays against this species of piracy.

International copyright conventions have been made between Great Britain and the following countries: Prussia and Saxony, in 1846; Brunswick, Thuringian Union, Hanover, and Oldenburg, in 1847; France, in 1851; Anhalt and Hamburg, in 1853; Belgium, in 1854; Prussia (additional), in 1855; Spain, in 1857; and Sardinia, in 1860.

In the general copyright statutes, Parliament has made no express distinction between native and foreign authors. It has granted copyright to "authors," without prescribing any restriction as to nationality. There has been a marked diversity of judicial opinion as to the true meaning of the law on this point. Some jurists have contended that the privileges granted must be presumed to have been intended for British subjects exclusively. Others have maintained that both the spirit and the letter of the law are broad enough to embrace, on equal terms, all authors, whether native or foreign. Prior to 1854, the decisions of the courts on this question were conflicting. In that year, the House of Lords, in the case of Jefferys *v.* Boosey,[3] held, on a divided opinion of the advising judges, that a foreign author, resident abroad, was not entitled to English copyright. In 1868, in the case of Routledge *v.* Low,[4] the same tribunal, protecting the rights of an American author who had been in Canada at the time of the publication of her novel in London, declared that an alien became entitled to English copyright by first publishing in the United Kingdom, provided he were anywhere within the British dominions at the time of

[1] s. 18. [2] s. 6. [3] 4 H. L. C. 815.
[4] Law Rep. 3 H. L. 100.

such publication. This judgment has continued to represent the law.

Copyright Legislation in the United States.

The first legislation on the subject of literary property in the United States appears at the close of the Revolution. In January, 1783, Connecticut passed a "Law for the encouragement of literature and genius," with a preamble setting forth that "it is perfectly agreeable to the principles of natural equity and justice that every author should be secured in receiving the profits that may arise from the sale of his works; and such security may encourage men of learning and genius to publish their writings, which may do honor to their country and service to mankind."[1]

In March of the same year, the legislature of Massachusetts passed "An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions for twenty-one years."[2] The views entertained at that early day in this enlightened Commonwealth, concerning the importance and justice of protecting the rights of authors, are expressed in the strong language of the preamble: —

"Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and ingenious persons in the various arts and sciences: as the principal encouragement such persons can have, to make great and beneficial exertions of this nature, must exist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labor of his mind, — Therefore, to encourage learned and ingenious persons to write useful books for the benefit of mankind, be it enacted," &c. —

The act then declares that all books, treatises, and other literary works shall be the sole property of the authors, if citizens of the United States, their heirs and assigns, for twenty-one years from the date of first publication; and pre-

[1] St. of Conn. (ed. 1786) 133.

[2] 1 Laws of Mass. (ed. 1807) 94.

scribes penalties for violations of this right. This law, as well as that of Connecticut, contained a proviso that its benefits should not extend to the citizens of any other State which had not passed a similar law.

At this time, the subject of literary property was brought before the old Congress by sundry papers and memorials; and on the 2d of May, 1783, the following resolution, reported by Mr. Madison, was adopted: —

"*Resolved*, That it be recommended to the several States to secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their executors, administrators, and assigns, the copyright of such books for a certain time, not less than fourteen years from the first publication; and to secure to the said authors, if they shall survive the term first mentioned, and to their executors, administrators, and assigns, the copyright of such books for another term of time not less than fourteen years, such copy or exclusive right of printing, publishing, and vending the same, to be secured to the original authors or publishers, their executors, administrators, and assigns, by such laws and such restrictions as to the several States may seem proper."[1]

Pursuant to this recommendation, copyright laws were passed by Virginia in 1785,[2] New York in 1786,[3] and by other States, securing to authors, for a limited time, exclusive property in their literary works. Under this system, it was necessary for authors, in order to enjoy the benefits of protection in States other than that in which they resided, to copyright their works in each State having such laws. Authors' rights, therefore, depended on the legislation in the several States, as there was no national law relating to copyright.

In order to afford to literary property, as well as to useful inventions and discoveries, adequate protection throughout the United States by a general law, the Federal Constitution, framed in 1787, empowered Congress "to promote the progress of science and useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."[4] Pursuant to this provision, the first copy-

[1] 8 Journals of Congress, 189. [2] 12 Hening's Statutes at Large, 30.
[3] 2 Laws of New York (Jones & Varick's ed., 1789), 320. [4] Art. 1, s. 8, cl. 8.

right law of the United States was passed May 31, 1790. It was entitled "An Act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned."[1] This statute gave to authors who were citizens or residents of the United States, their heirs and assigns, copyright in maps, charts, and books for fourteen years; and provided for a second term of the same length, if the author should be living at the expiration of the first. The applicant was required, before publication, to deposit, in the clerk's office of the district court in the judicial district where he resided, a printed copy of the title of the book or map, within two months after publication; to publish the record of this fact for four weeks in one or more newspapers printed in the United States; and, within six months after publication, to deliver to the Secretary of State of the United States a copy of the book. The penalty prescribed for publishing, importing, or selling a book in violation of the act was forfeiture of copies to the author or owner, "who shall forthwith destroy the same," and the payment of fifty cents for every sheet found in possession of the offender, — one half to go to the author or owner, and the other half to the United States. The act also provided a remedy against the unauthorized publication of manuscripts belonging to citizens or residents of the United States, — a provision which has been continued by subsequent statutes to the present time.

The next statute relating to copyright was that of April 29, 1802, which went into effect the following January.[2] This required the copy of the record in the district clerk's office, besides being published in a newspaper, to be printed on the title-page of the book, or that immediately following. It also extended the provisions of the act of 1790 to "the arts of designing, engraving, and etching historical and other prints."

The act of Feb. 15, 1819, gave to the circuit courts original cognizance, in equity and at law, of all controversies respecting literary property arising under the laws of the United States."[3]

In 1831, the acts of 1790 and 1802 were repealed, and the law relating to copyright was embodied in one statute.[4] The

[1] 1 U. S. St. at L. 124.
[2] 2 Id. 171.
[3] 3 Id. 481.
[4] 4 Id. 436.
In December, 1830, Mr. Ellsworth from the Committee on the Judiciary,

term of protection was extended from fourteen to twenty-eight years, with provision for a renewal for fourteen years to the author, his widow or children. The conditions to be observed by the author were somewhat changed. He was no longer required, except in the case of a renewal, to publish in a newspaper a copy of the record of filing the title, or to print it on the title-page. The former requirement now disappeared; and, instead of the latter, it became essential to print in the book, or on the map or musical composition, the words which had formerly been used in the case of maps and engravings: "Entered according to act of Congress," &c. A printed copy of the title of the book was to be deposited before publication, and a copy of the book within three months after publication, with the district clerk, who was required to transmit, at least once a year, to the Secretary of State, a copy of such records, with the books deposited. The forfeitures and penalties were similar to those prescribed in the preceding statutes.

Musical compositions were now for the first time expressly provided for, being put on the same footing as books.

By the act of 1834, it was provided that all deeds in writing for the transfer or assignment of copyrights should be recorded in the office where the original copyright had been recorded; and that every such deed which should thereafter be made, and not proved and recorded as prescribed, within sixty days after execution, should be void against any subsequent buyer without notice.[1]

The act of 1846, establishing the Smithsonian Institution, required one copy of every book, map, chart, musical composi-

made to Congress a report, in which the following language was used:—

"Your committee believe that the just claims of authors require from our legislation a protection not less than what is proposed in the bill reported. Upon the first principles of proprietorship in property, an author has an exclusive and perpetual right, in preference to any others, to the fruits of his labor. Though the nature of literary property is peculiar, it is not the less real and valuable. If labor and effort in producing what before was not possessed or known will give title, then the literary man has title perfect and absolute, and should have his reward: he writes and he labors as assiduously as does the mechanic or husbandman. The scholar who secludes himself, and wastes his life, and often his property, to enlighten the world, has the best rights to the profits of those labors: the planter, the mechanic, the professional man, cannot prefer a better to what is admitted to be his own." Reports of Committees, 21st Cong. 2d Sess. (1830–31) Rep. No. 3.

[1] 4 U. S. St. at L. 728.

tion, print, cut or engraving, to be delivered within three months after publication to that institution, and one copy to the Library of Congress.[1] This provision was repealed in 1859, by a statute which further provided that all copyright publications and the records relating to copyrights should be transferred from the State Department to that of the Interior, which was now made the custodian of such publications and records.[2] In 1865, the owner was again required to transmit, within one month after publication, a copy of every book or other copyrighted article to the Library of Congress;[3] and, in 1867, a penalty of twenty-five dollars was imposed for failure to make such delivery.[4]

In 1861, an act was passed providing for an appeal of copyright cases to the Supreme Court of the United States, without regard to the amount in controversy.[5]

In 1865, photographs and negatives were brought within the provisions of the copyright laws.[6]

Until 1856, there was no statute giving to dramatists control over the public representation of their plays. This want was met by the act of August 18 of that year, which conferred upon the author or owner of a dramatic composition, besides the exclusive right of printing and publishing given by previous laws, the sole liberty of performing or causing it to be performed in public. Any person infringing this right was made liable to damages, in a sum not less than one hundred dollars for the first and fifty dollars for every subsequent performance.[7] The provisions of this statute applied only to cases in which copyright was secured under the act of 1831; and, as the benefits of that law were by express words limited to citizen or resident authors, foreign dramatists acquired no rights by the Statute of 1856.

All statutes relating to copyright were repealed in 1870, and the entire law on the subject embodied in one act.[8] No change was made in the duration of copyright. To the things pro-

[1] Act of Aug. 10, 1846, s. 10; 9 U. S. St. at L. 106.

[2] Act of Feb. 5, 1859, ss. 6, 8; 11 U. S. St. at L. 380.

[3] 13 Id. 540.

[4] 14 Id. 395.

[5] 12 Id. 130.

[6] 13 Id. 540.

[7] 11 Id. 138.

[8] Act of July 8, 1870, ss. 85 *et seq.*; 16 U. S. St. at L. 212.

tected by previous statutes were added paintings, drawings, chromos, statues, statuary, and models or designs intended to be perfected as works of the fine arts. A printed copy of the title of every book was required to be filed with the Librarian of Congress before publication; and two copies of the book, to be delivered, within ten days after publication, to the same officer. In the case of paintings and certain other works of art, a description must be filed before and a photographic copy delivered after publication.

In 1873–74, the copyright, with all other statutes of the United States, was revised.[1]

In 1874, it was provided that the copyright notice appearing in a book or on a work of art might be in the form previously in use, or in the words "Copyright, 18—, by A. B."[2]

International Copyright.

The subject of international copyright has been brought before Congress several times, by bill or report; but no law for that purpose has ever been passed. In February, 1837, a petition of British authors, asking protection for foreign works in the United States, was presented to the Senate by Henry Clay.[3] The subject was referred to a select committee, consisting of Messrs. Clay, Preston, Buchanan, Webster, and Ewing of Ohio. In the same month, this committee made a report urging Congress to pass an international copyright law, and submitted a bill for that purpose.[4] In the report was this language: —

"That authors and inventors have, according to the practice among civilized nations, a property in the respective productions of their genius, is incontestable; and that this property should be protected as effectually as any other property is, by law, follows as a legitimate consequence. Authors and inventors are among the greatest benefactors of mankind. They are often dependent exclusively upon their own mental labors for the means of subsistence; and are frequently, from the nature of their pursuits or the constitution of their minds, incapable of applying that provident care to worldly affairs which other

[1] U. S. Rev. St. ss. 4948-4971.
[2] 18 U. S. St. at L. 78.
[3] 2 Senate Documents, 24th Cong. 2d Sess. (1836–37) Rep. No. 134.
[4] Ibid. Rep. No. 179.

classes of society are in the habit of bestowing. These considerations give additional strength to their just title to the protection of the law.

"It being established that literary property is entitled to legal protection, it results that this protection ought to be afforded wherever the property is situated. A British merchant brings or transmits to the United States a bale of merchandise, and the moment it comes within the jurisdiction of our laws they throw around it effectual security. But, if the work of a British author is brought to the United States, it may be appropriated by any resident here, and republished, without any compensation whatever being made to the author. We should be all shocked if the law tolerated the least invasion of the rights of property in the case of the merchandise, whilst those which justly belong to the works of authors are exposed to daily violation, without the possibility of their invoking the aid of the laws.

"The committee think that this distinction in the condition of the two descriptions of property is not just; and that it ought to be remedied by some safe and cautious amendment of the law."

On Feb. 21, 1868, Mr. Baldwin, from the Committee on the Library, reported favorably to the House of Representatives a bill for extending protection to the works of foreign authors. "We are fully persuaded," said the committee, "that it is not only expedient, but in a high degree important, to the United States to establish such international copyright laws as will protect the rights of American authors in foreign countries, and give similar protection to foreign authors in this country. It would be an act of national honor and justice, in which we should find that justice is the wisest policy for nations, and brings the richest rewards."[1]

Bills for extending protection to the works of foreign authors were introduced in the House of Representatives by Mr. Cox of New York, Dec. 6, 1871, and by Mr. Beck of Kentucky, Feb. 21, 1872; and in the Senate, by Mr. Sherman of Ohio, Feb. 21, 1872. Each of these was read twice, referred to the Committee on the Library, and ordered to be printed.[2] On Dec. 18, 1871, a resolution, offered by Mr. Cox, was

[1] House Reports, 40th Cong. 2d Sess. (1867–68) Rep. No. 16. This committee was composed of Senators Morgan of New York, Fessenden of Maine, and Howe of Wisconsin; and Representatives Baldwin of Massachusetts, Pruyn of New York, and Spalding of Ohio.

[2] Cong. Globe, 42d Cong. 2d Sess. (1871–72) parts i. 20, ii. 1174, 1151.

passed by the House, "that the Committee on the Library, be directed to consider the question of an international copyright; and to report to this House what, in their judgment, would be the wisest plan, by treaty or law, to secure the property of authors in their works, without injury to other rights and interests; and, if in their opinion congressional legislation is the best, that they report a bill for that purpose."[1]

The whole subject for the time being seems to have been disposed of by the adverse report made to the Senate, Feb. 7, 1873, by Mr. Morrill of Maine, from the Joint Committee on the Library. This report closed as follows: —

"Your committee are satisfied that no form of international copyright can fairly be urged upon Congress, upon reasons of general equity or of constitutional law; that the adoption of any plan for the purpose which has been laid before us would be of very doubtful advantage to American authors, as a class, and would be not only an unquestionable and permanent injury to the manufacturing interests concerned in producing books, but a hinderance to the diffusion of knowledge among the people and to the cause of universal education; that no plan for the protection of foreign authors has yet been devised which can unite the support of all, or nearly all, who profess to be favorable to the general object in view; and that, in the opinion of your committee, any project for an international copyright will be found upon mature deliberation to be inexpedient."[2]

[1] Cong. Globe, 42d Cong. 2d Sess. (1871–72) part i. 199.

Speeches in favor of Mr. Cox's bill were made in committee of the whole by Mr. Archer of Maryland, March 23, 1872, and afterwards by Mr. Storm of Pennsylvania. Ibid. part iii. 1931, 2410.

On Feb. 12, 1872, Mr. Kelly of Pennsylvania offered the following resolution in the House, which was referred to the Committee on the Library: "Whereas it is expedient to facilitate the reproduction here of foreign works of a higher character than that of those now generally reprinted in this country; and whereas it is in like manner desirable to facilitate the reproduction abroad of the works of our own authors; and whereas the grant of monopoly privileges, in case of reproduction here or elsewhere, must tend greatly to increase the cost of books, to limit their circulation, and to increase the already existing obstacles to the dissemination of knowledge: Therefore, resolved that the Joint Committee on the Library be and it hereby is instructed to inquire into the practicability of arrangements by means of which such reproduction, both here and abroad, may be facilitated, freed from the great disadvantages that must inevitably result from the grant of monopoly privileges such as are now claimed in behalf of foreign authors and domestic publishers." Ibid. part ii. 972.

[2] Senate Reports, 42d Cong. 3d Sess. (1872–73) Rep. No. 409. This committee consisted of Senators Morrill of Maine, Sherman of Ohio, and Howe of Wisconsin; and Representatives Peters of Maine, Wheeler of New York, and Campbell of Ohio.

Thus, Congress has repeatedly refused to grant protection to the works of foreign authors, and in every copyright statute passed since the formation of the government has emphatically declared that such works are legitimate subjects of piracy. This country is put to shame by the legislation of England and other foreign nations on this subject. The English laws, as far as they relate to foreign authors, show a comprehensive liberality, a broad, catholic spirit, not found in those of the United States. Not only are special advantages offered by the international copyright laws to men of letters of any country which will extend reciprocal privileges to English authors, but, in legislating "for the encouragement of learning" in Great Britain, Parliament has made no distinction between native and foreign authors. In the opinion of many statesmen and jurists, the law invites men of learning everywhere to send their productions to the United Kingdom for first publication, that England may become a centre of learning and culture. The most learned judges of the realm, from Lord Mansfield down to Lord Chancellor Cairns, have given this interpretation to the statutes, have maintained that this is the law of the realm. It is true that the decision of the House of Lords in 1854 imposes on a foreign author a condition from which a subject is free;[1] but the former may acquire the full benefit of the statute by his presence within the British dominions at the time of publication. The judgment making even this bodily presence necessary has been shaken to the foundation;[2] and now the Royal Commissioners on Copyright, in their report submitted to Parliament in June, 1878, recommend that, on the condition of first publication in Great Britain, "the benefit of the copyright laws should extend to all British subjects and aliens alike."[3] After reviewing the steady refusal of the United States to grant protection to British authors, either by law or treaty, the commissioners take this enlightened and philosophic position:—

"It has been suggested to us that this country would be justified in taking steps of a retaliatory character, with a view of enforcing inci-

[1] Jefferys *v.* Boosey, 4 H. L. C. 815.

[2] See Chap. IV., Rights of Foreign Authors in Great Britain.

[3] Report of the Royal Commissioners on Copyright, p. xiv, § 64.

dentally, that protection from the United States which we accord to them. This might be done by withdrawing from the Americans the privilege of copyright on first publication in this country. We have, however, come to the conclusion, that, on the highest public grounds of policy and expediency, it is advisable that our law should be based on correct principles, irrespectively of the opinions or the policy of other nations. We admit the propriety of protecting copyright; and it appears to us that the principle of copyright, if admitted, is one of universal application. We therefore recommend that this country should pursue the policy of recognizing the author's rights, irrespective of nationality." [1]

Not less liberal should be the United States. Her gates bearing the inscription *Tros Tyriusque mihi nullo discrimine agetur*, should be opened wide to the authors of all tongues, all races, all creeds. All countries should be one for noble men who labor, in whatever vineyard, for the advancement of knowledge and truth. Whoever shall move Congress to pass a law inviting authors, composers, and artists, of every nation under the sun, to send their treasures of learning, science, and art to our shores, where they shall be protected, will deserve a monument more durable than brass.

[1] Report of the Royal Commissioners on Copyright, p. xxxviii, § 251.

CHAPTER I.

COMMON-LAW PROPERTY IN UNPUBLISHED WORKS.

Literary Property defined. — Literary property is the exclusive right of the owner to possess, use, and dispose of intellectual productions. An intellectual creation without material form may exist in the mind of the author. But it is only when embodied in written or spoken language that it can possess the attributes of property; for it is only by language that it can have any being out of the author's mind, that it can be enjoyed by others, that it can be identified. There can, then, be no property in a production of the mind unless it is expressed in a definite order of words. But the property is not in the mere words alone, — not alone in the one form of expression chosen by the author. It is in the intellectual creation, which language is merely a means of expressing and communicating. The words of a literary composition may be changed by substituting others of synonymous meaning; but the intellectual creation will remain substantially the same. This truth is judicially recognized in the established principle, that the property of the author is violated by an unauthorized use of his composition, with a colorable change of words; the test of piracy being not whether the identical language, the same words, are used, but whether the substance of the production is unlawfully appropriated. So an intellectual production may be expressed in any number of different languages. The thing itself is always the same; only the means of communication is different. The plot, the characters, the sentiments, the thoughts, which constitute a work of fiction, form an immaterial creation, which may be communicated by a hundred different tongues, — by the labial or the sign language of the mute, the raised letters of the blind, the comprehensive characters of stenography. The means of communication

are manifold; but the invisible, intangible, incorporeal creation of the author's brain never loses its identity. The Bible has been translated into all tongues; but its truths, its eloquence, its poetry, have been the same to all nations.

Literary property, then, is not restricted to the one form of language in which thoughts are expressed, but is in the intellectual creation which is embodied in such language. This creation, in whatever language or form of words it can be identified, the author may claim as his property. That there can be no property in thoughts, conceptions, ideas, sentiments, &c., apart from their association, is clear; for they are then incapable of being identified or owned exclusively. But their arrangement and combination in a definite form constitute an intellectual production, a literary composition, which has a distinct being capable of identification and separate ownership, and possessing the essential attributes of property. The property is not in the simple thoughts, ideas, &c., but in what is produced by their association.

The property in an intellectual production is incorporeal, and is wholly distinct from the property in the material to which it may be attached. Indeed, literary property may exist independently of any corporeal substance. It may be as perfect in a production expressed in spoken as in one communicated by written or printed words. A poem when read, a lecture when delivered, a song when sung, a drama when acted, may have all the attributes of property, though not a word has been written or printed. The true test is not whether the thing is corporeal or incorporeal, not whether it is attached to a material substance, but whether it is capable of identification so that exclusive ownership may be asserted. The identity of an intellectual production is secured by the language in which it is expressed; and this is true whether the language be spoken or written. When a composition has not been reduced to writing, it may be more difficult, and in some cases impracticable, to prove the authorship, and thereby to establish a title to ownership. But the manuscript is but a means of proof. And when the title to the ownership is not disputed, or can be satisfactorily established without the existence of a writing, as it may be in many cases, it is immaterial whether the composition has

been reduced to writing, or has been communicated only in spoken words. The Iliad was as valid a subject of property when recited from memory at the Greek festivals as it was when, long afterward, it appeared in written or printed language.[1]

As material property may pass out of the actual or personal possession of the owner, while the legal possession or title is in him, so literary property is within the legal domain of the owner, though it be in the actual possession of another. The owner may part with the paper on which a composition is written, or the book in which it is printed, without forfeiting any proprietary right in the composition itself. The legal title to Clarendon's History was not affected by the fact that a manuscript copy was for a century in the custody of those who were not the owners of the copyright. An intellectual production differs from any material substance in that it is capable of being multiplied or copied indefinitely, and of being used and

[1] "The property in the copy thus abridged, is equally an incorporeal right to print a set of intellectual ideas or modes of thinking, communicated in a set of words and sentences and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever. . . . The property of the copy, thus narrowed, may equally go down from generation to generation, and possibly continue for ever, though neither the author nor his representatives should have any manuscript whatsoever of the work, original, duplicate or manuscript. Mr. Gwynne was entitled, undoubtedly, to the paper of the transcript of Lord Clarendon's History; which gave him the power to print and publish it after the fire at Petersham, which destroyed one original. This might have been the only manuscript of it in being. Mr. Gywnne might have thrown it into the fire had he pleased. But at the distance of near a hundred years, the copy was adjudged the property of Lord Clarendon's representatives; and Mr. Gwynne's printing and publishing it without their consent was adjudged an injury to that property, for which in different shapes he paid very dear." Lord Mansfield, Millar *v.* Taylor, 4 Burr. 2396, 2397.

"A literary composition," said Sir William Blackstone, "as it lies in the author's mind, before it is substantiated by reducing it *into writing*, *has the* essential requisites to make it the subject of property. While it thus lies dormant in the mind, it is absolutely in the power of the proprietor. He alone is entitled to the profits of communicating, or making it public." Tonson *v.* Collins, 1 W. Bl. 322.

In Abernethy *v.* Hutchinson, Lord Eldon doubted whether there could be property in lectures which had not been reduced to writing, and refused to grant an injunction on this ground until the question should be determined at law. 3 L. J. (Ch.) 209; s. c. 1 Hall & Tw. 28. As there was no question in this case that the plaintiff was the author and the owner of the lectures for which he claimed protection, his property therein was in no wise affected by the non-existence of a manuscript.

enjoyed at the same time by an unlimited number of persons. The right of property in it is the exclusive right to own and to use the thing itself. The owner may alone enjoy it, and exclude every other person from its enjoyment; or, without parting with the ownership, he may admit others to a private or personal use of the production. For the latter purpose, a copy is made and given to the user, who becomes the owner of the material copy, with a limited right to use and enjoy the intellectual production. But the production itself remains the property of the owner; and the user acquires no rights of ownership entitling him to multiply copies, or otherwise to make a public use of the work. This is a right of property vested solely in the owner.[1]

Difference between Common-Law and Statutory Right. — Property in intellectual productions is recognized and protected in England and the United States, both by the common law and by the statute. But, as the law is now expounded, there are important differences between the statutory and the common-law right. The former exists only in works which have been published within the meaning of the statute; and the latter, only in works which have not been so published. In the former case, ownership is limited to a term of years; in the latter, it is perpetual. The two rights do not co-exist in the same composition; when the statutory right begins, the common-law right ends. Both may be defeated by publication. Thus, when a work is published in print, the owner's common-law rights are lost; and, unless the publication be in accordance with the requirements of the statute, the statutory right is not secured. The common-law property in a literary composition is violated by any unauthorized public use of it, whether by printing and circulating copies, or by reading it in public. Statutory copyright may be infringed by the circulation of copies; but not by publicly reading copies.[2]

Copyright Defined. — Copyright is the exclusive right of

[1] "No disposition," said Lord Mansfield, "no transfer of paper upon which the composition is written, marked or impressed, though it gives the power to print and publish, can be construed a conveyance of the copy, without the author's express consent to print and publish, much less against his will." 4 Burr. 2396.

[2] Statutory playright in a dramatic composition may be violated by publicly reading it.

the owner to multiply and to dispose of copies of an intellectual production.[1] It is the sole right to the copy or to copy it. The word is used indifferently to signify the statutory and the common-law right of the owner in a literary or musical composition or work of art. As there are essential differences between the two rights, one is sometimes called copyright after publication, or statutory copyright; and the other, copyright before publication, or common-law copyright. Copyright is also used synonymously with literary property. Thus, the exclusive right of the owner publicly to read a literary composition, to exhibit a work of art, or to represent a drama, is often called copyright. This is not strictly correct; and, especially in the case of dramatic compositions, there are reasons for distinguishing in name the right of multiplying copies from that of representation. This latter right may well be called playright, for reasons which are given elsewhere.[2]

The Nature and Extent of Common-Law Rights.

In what Productions. — Two principles are settled in English and American jurisprudence: 1. At common law, the owner of an unpublished literary composition has an absolute property therein.[3] 2. When the composition is published in print, the common-law right is lost.[4]

[1] The 5 & 6 Vict. c. 45, s. 2, defines copyright "to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the word is herein applied." Copyright in a book, as secured by the American statute, is "the sole liberty of printing, reprinting, publishing, . . . and vending the same." U. S. Rev. Sts. s. 4952.

[2] See beginning of Chap. XIII.

[3] Br. Webb *v.* Rose, cited 4 Burr. 2330; Forrester *v.* Waller, Ibid. 2331; Manley *v.* Owen, Ibid. 2329; Duke of Queensbury *v.* Shebbeare, 2 Eden, 329; Millar *v.* Taylor, 4 Burr. 2303; Abernethy *v.* Hutchinson, 1 Hall & Tw. 28; Prince Albert *v.* Strange, 2 De G. & Sm. 652; on ap. 1 Mac. & G. 25; Turner *v.* Robinson, 10 Ir. Ch. 121, 510. Am. Jones *v.* Thorne, 1 N. Y. Leg. Obs. 408; Bartlett *v.* Crittenden, 4 McLean, 300, 5 Id. 32; Little *v.* Hall, 18 How. 165, 170; Banker *v.* Caldwell, 3 Minn. 94; Paige *v.* Banks, 13 Wall. 608; Parton *v.* Prang, 3 Cliff. 537; Carter *v.* Bailey, 64 Me. 458; Kiernan *v.* Manhattan Quotation Telegraph Co., 50 How. Pr. (N. Y.) 194. To the same effect are the authorities cited in the following note and in notes 1, 2, 3, p. 128. See also the authorities cited in considering the common-law property in dramatic compositions, Chap. XIII.

[4] Br. Donaldson *v.* Becket, 4 Burr. 2408; Colburn *v.* Simms, 2 Hare, 543; Chappell *v.* Purday, 14 Mees. & W. 303; Jefferys *v.* Boosey, 4 H. L. C. 815; Reade *v.* Conquest, 9 C. B. n. s. 755; Rooney *v.* Kelly, 14 Ir. Law Rep. n. s. 158; Midwinter *v.* Hamilton, 10

It may be regarded as conceded that the same is true of all kinds of intellectual productions which have been made the subject of statutory copyright, including maps,[1] charts, musical compositions, engravings,[2] photographs, paintings,[3] works of sculpture, &c. In short, all productions of literature, the drama, music, and art, are within the protection of the law. "The property of an author or composer of any work," said Lord Chancellor Cottenham, "whether of literature, art or science, in such work unpublished and kept for his private use or pleasure, cannot be disputed, after the many decisions in which that proposition has been affirmed or assumed."[4]

The Author's Rights absolute before Publication. — The property of an author in his intellectual production is absolute until he voluntarily parts with all or some of his rights.[5] There is no principle of law by which he can be compelled to publish it or to permit others to enjoy it.[6] He has a right

Mor. Dict. of Dec. 8295; on ap. (Midwinter *v.* Kincaid) 1 Pat. App. Cas. 488; Hinton *v.* Donaldson, 10 Mor. Dict. of Dec. 8307; Cadell *v.* Robertson, Id. Lit. Prop. App. p. 16; on ap. 5 Pat. App. Cas. 493. **Am.** Wheaton *v.* Peters, 8 Pet. 591; Pulte *v.* Derby, 5 McLean, 328; Stowe *v.* Thomas, 2 Wall. Jr. 547; Stevens *v.* Gladding, 17 How. 447; Wall *v.* Gordon, 12 Abb. Pr. n. s. (N. Y.) 349; Rees *v.* Peltzer, 75 Ill. 475; Boucicault *v.* Wood, 2 Biss. 34.

[1] Rees *v.* Peltzer, *supra*.

[2] Prince Albert *v.* Strange, *infra*.

[3] Turner *v.* Robinson, 10 Ir. Ch. 121, 510; Parton *v.* Prang, 3 Cliff. 537; Oertel *v.* Wood, 40 How. Pr. (N.Y.) 10; Oertel *v.* Jacoby, 44 How. Pr. (N. Y.) 179.

[4] Prince Albert *v.* Strange, 1 Mac. & G. 25, 42. In the same case, Vice-Chancellor Bruce said: "Such then being, as I believe, the nature and foundation of the common law as to manuscripts independently of Parliamentary additions or subtractions, its operations cannot of necessity be confined to literary subjects. That would be to limit the rule by the example. Wherever the produce of labor is liable to invasion in an analogous manner, there must, I suppose, be a title to analogous protection or redress." 2 De G. & Sm. 652, 696.

In Tipping *v.* Clarke, 2 Hare, 383, the court did not doubt the existence of common-law property in unpublished books of account.

[5] "The right of the author before publication we may take to be unquestioned, and we may even assume that it never was, when accurately defined, denied. He has the undisputed right to his manuscript; he may withhold it, or he may communicate it, and communicating, he may limit the number of persons to whom it is imparted, and impose such restrictions as he pleases upon their use of it. The fulfilment of the annexed conditions he may proceed to enforce, and for their breach he may claim compensation." Lord Brougham, Jefferys *v.* Boosey, 4 H. L. C. 962.

[6] "There is no law which can compel an author to publish. No one can determine this essential matter of publication but the author. His manuscripts, however valuable, cannot without his consent be seized by his creditors as property." McLean, J., Bartlett *v.* Crittenden, 5 McLean, 37.

to exclude all persons from its enjoyment; and, when he chooses to do so, any use of the property without his consent is a violation of his rights. He may admit one or more persons to its use, to the exclusion of all others; and, in doing so, he may restrict the uses which shall be made of it. He may give a copy of his manuscript to another person, without parting with his literary property in it.[1] He may circulate copies among his friends, for their own personal enjoyment, without giving them or others the right to publish such copies.[2]

[1] Duke of Queensbury *v.* Shebbeare, 2 Eden, 329; Thompson *v.* Stanhope, Amb. 737.

[2] Prince Albert *v.* Strange, 2 De G. & Sm. 652; on ap. 1 Mac. & G. 25; Bartlett *v.* Crittenden, 4 McLean, 300, 5 Id. 32.

"The nature of the right of an author in his works is analogous to the rights of ownership in other personal property, and is far more extensive than the control of copying after publication in print, which is the limited meaning of copyright in its common acceptation, and which is the right of an author, to which the statute of Anne relates. Thus, if after composition the author chooses to keep his writings private, he has the remedies for wrongful abstraction of copies analogous to those of an owner of personalty in the like case. He may prevent publication; he may require back the copies wrongfully made; he may sue for damages if any are sustained; also, if the wrongful copies were published abroad, and the books were imported for sale without knowledge of the wrong, still the author's right to his composition would be recognized against the importer, and such sale would be stopped. . . . Again, if an author chooses to impart his manuscript to others without general publication, he has all the rights for disposing of it incidental to personalty. He may make an assignment either absolute or qualified in any degree. He may lend, or let, or give, or sell any copy of his composition, with or without liberty to transcribe, and if with liberty of transcribing, he may fix the number of transcripts which he permits. If he prints for private circulation only, he still has the same rights, and all these rights he may pass to his assignee. About the rights of the author, before publication, at common law, all are agreed." Erle, J., Jefferys *v.* Boosey, 4 H. L. C. 867.

"Undoubtedly," said Mr. Justice Clifford, "the author of a book, or of an unpublished manuscript, or of any work of art, has at common law, and independently of any statute, a property in his work until he publishes it or it is published by his consent or allowance; and that property unquestionably exists in pictures as well as in any other work of art. He has the undisputed right to his manuscript; he may withhold or may communicate it, and communicating, he may limit the number of persons to whom it shall be imparted, and impose such restrictions as he pleases upon the use of it. He may annex conditions, and proceed to enforce them, and for their breach he may claim compensation. Jefferys *v.* Boosey, 4 H. L. C. 815, 962; Millar *v.* Taylor, 4 Burr. 2396; Duke of Queensbury *v.* Shebbeare, 2 Eden, 329. Numerous other decided cases also affirm the same proposition, that the author of an unpublished manuscript has the exclusive right of property therein, and that he may determine for himself whether the manuscript shall be made public at all; that he may, in all cases, forbid its publication by another before it has been published by him or by his consent or allowance." Parton *v.* Prang, 3 Cliff. 518.

So, also, without forfeiting his rights, he may communicate his work to the general public, when such communication does not amount to a publication within the meaning of the statute. Thus, in the United States, a manuscript lecture, sermon, or any literary composition, may be delivered or read to the public by the author, or a dramatic or musical composition publicly performed, and no person without the consent of the author acquires the right to make a similar public use of it, or to print it.[1] And the same is true in England of literary compositions which are not dramatic.

Literary Property Personal, and may be transferred by Parol. —The literary property in an unpublished work is personal, and is subject to the same general rules which govern personal property. It may be transmitted by bequest, gift, sale, operation of law, or any mode by which personal property is transferred. "This property in a manuscript, is not distinguishable from other personal property. It is governed by the same rules of transfer and succession, and is protected by the same process, and has the benefit of all the remedies accorded to other property so far as applicable."[2]

While there has been much discussion as to the necessity of a writing in assigning statutory copyright, it has never been disputed, and is well settled, that the literary property in an unpublished work may be transferred by word of mouth.[3] "Personal property," said Mr. Justice Clifford, "is transferable by sale and delivery; and there is no distinction in that respect, independent of statute, between literary property and property of any other description."[4]

[1] See Chap. XIII.

[2] Allen, J., Palmer *v.* De Witt, 47 N. Y. 538.

[3] Turner *v.* Robinson, 10 Ir. Ch. 121, 510; Little *v.* Gould, 2 Blatchf. 165, 362; Lawrence *v.* Dana, 2 Am. L. T. R. n. s. 402; Palmer *v.* De Witt, 47 N. Y. 532; Parton *v.* Prang, 3 Cliff. 537. "The first section of the English statute of the 8 Anne, c. 19, distinctly recognizes the right to transfer and assign copyright by the common law, although assignments under that act must be in writing and witnessed. The case of Power *v.* Walker, 3 Maule & S. 7, shows that it was the statute and not the common law which required that the assignment should be in writing. It would be a waste of time to add more than that the copyright is incident to the ownership, and passes at the common law with a transfer of the work of art." Smith, M. R., Turner *v.* Robinson, 10 Ir. Ch. 142.

[4] Parton *v.* Prang, 3 Cliff. 550. "Owners of personal property," continued the same judge, "have the right to sell and transfer the same as

No Rights Lost by Parting with Manuscript. — When the owner parts with his manuscript, he does not transfer the exclusive right to copy it, unless there be an express or implied agreement to that effect. Where the second Lord Clarendon had given to Mr. Gwynne the manuscript of his father's History of the Reign of Charles II., and said that "he might take a copy thereof, and make use of the same as he should think fit," the court held, "it was not to be presumed that Lord Clarendon, when he gave a copy of the work to Mr. Gwynne, intended that he should have the profit of multiplying it in print; that Mr. Gwynne might make every use of it except that."[1] And so when Lord Chesterfield told Mrs. Stanhope that she might keep certain letters which he had written to his son, whose widow she was, it was held that he "did not mean to give her leave to print and publish them."[2] Southey did not lose his rights in his manuscript by letting it remain twenty-three years in the possession of a bookseller.[3] "To make a gift of a copy of the manuscript," said Mr. Justice McLean, "is no more a transfer of the right or abandonment of it, than it would be a transfer or an abandonment of an exclusive right to republish, to give the copy of a printed work."[4]

inseparable incidents of the property; and the author or proprietor of a manuscript or picture possesses that right as fully, and to the same extent, as the owner of any other personal property, the same being incident to the ownership. Sales may be absolute or conditional, and they may be with or without qualifications, limitations, and restrictions; and the rules of law applicable in such cases to other personal property must be applied in determining the real character of a sale of literary property. Proper attention to these considerations will furnish the true explanation of many, if not all, the cases referred to by the complainant, which are supposed to support the second proposition for which he contends. Beyond doubt the right of first publication is vested in the author; but he may sell and assign the entire property to another; and if he does so, his assignee takes the entire property, and it is a great mistake to suppose that any act of Congress, at the date of the sales of the picture in this case required that such an assignment should be in writing; and the pleadings show that the sale and delivery in each case were absolute and unconditional, and without any qualification, limitation, or restriction, showing that the entire property was transferred from the complainant and became vested in the respondent."

[1] Duke of Queensbury *v.* Shebbeare, 2 Eden, 329.

[2] Thompson *v.* Stanhope, Amb. 737.

[3] Southey *v.* Sherwood, 2 Meriv. 435. The injunction was refused on other grounds.

[4] Bartlett *v.* Crittenden, 5 McLean, 41.

But an unconditional sale of a painting is a transfer of the entire property in it.[1]

Limited Assignment. — The owner may make an absolute or a limited assignment of his rights. He may convey the exclusive right to publish his manuscript in one country, and reserve to himself the exclusive right of publication in another.[2] So also he may transfer the sole liberty of representing an unpublished drama in any place, without parting with the similar right for any other place.[3]

Foreigners' Rights.— Whatever may be the disabilities of an alien under the copyright statutes, his rights at common law are the same as those of a citizen.[4] "This incorporeal right or property may be possessed by any one who may acquire or hold personal property in England, as far as the right of property depends upon the common law. The right or property is merely personal; and an alien friend, by the common law, has as much capacity to acquire, possess and enjoy such personal right or property as a natural-born British subject."[5] "The alienage of the author," said the New York Court of Appeals, "is no obstacle to him or his assignee in proceeding in our courts for a violation, or to prevent a violation of his rights of property in his unpublished works."[6]

[1] Parton *v.* Prang, 3 Cliff. 537. See also Turner *v.* Robinson, 10 Ir. Ch. 121, 510.

[2] See Chap. VI.

[3] See Chap. XV., Transfer of Playright.

[4] Jefferys *v.* Boosey, 4 H. L. C. 815; Keene *v.* Wheatley, 9 Am. Law Reg. 33; Crowe *v.* Aiken, 2 Biss. 208; Palmer *v.* De Witt, 47 N. Y. 532.

[5] Wightman, J., Jefferys *v.* Boosey, 4 H. L. C. 885. "By the common law of England," said Maule, J., "aliens are capable of holding all sorts of personal property and exercising all sorts of personal rights." Ibid. 895.

[6] Palmer *v.* De Witt, 47 N. Y. 540. "Real property," said Allen, J., in delivering the opinion of the court, 538, "is governed by the *lex loci rei sitæ*, and an alien can only acquire and have title as permitted by the local law. But not so as to personalty. In Calvin's case (7 Coke, 17 *a*), it was held that 'an alien friend may, by the common-law, have, acquire, and get within the realm by gift, trade, or other lawful means, any treasure or goods personal whatsoever, as well as any Englishman, and may maintain action for the same.' This has always been accepted as the common law of the United States. An alien friend may resort to the tribunals of this State for the prosecution of any right recognized by our laws, or the redress of any wrong cognizable by our courts.

"The right to literary property is as sacred as that to any other species of property. The courts of the State are open to an alien friend pursuing his property, and seeking to recover it from a wrong-doer; and there is nothing in any positive law, or in the policy of the government, which would close the door against the same alien friend

Violation of Common-Law Rights.

The owner's common-law rights are invaded when, without his consent, his manuscript is published in print,[1] when his dramatic or musical composition is publicly performed,[2] or when copies of his work of art are either publicly circulated or exhibited.[3] He is entitled to prevent or to restrain by injunction the unlawful use of his work, and to recover by an action at law for the damages he has sustained.

By Public Reading or Delivery of Lecture. — There is no reported case in which it has been expressly held that the unauthorized delivery in public of an unpublished lecture, or the public reading of a manuscript, is a violation of the owner's common-law rights. But the principle is clear that such use of an unpublished production is piratical. It is the same in principle as the unlicensed representation of a manuscript play. When Abernethy, the distinguished surgeon, sought to restrain the publication in the Lancet of unpublished lectures which he had delivered at St. Bartholomew's Hospital in London, Lord Eldon was "clearly of opinion that when persons were admitted as pupils or otherwise to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of shorthand, yet they could do

seeking protection for the fruits of his mental labor, by restraining its publication against his wishes. The protection offered by the common law to literary labor is very slight at the best; but, such as it is, it is accorded to an alien friend and citizen alike, and both are regarded with equal favor.

"In declaring the rules of law and applying legal remedies for the redress or prevention of wrong, there is no distinction between the right of the banker to his bills and bonds, embezzled and found here in the possession of a wrong-doer, and the right of an author to his manuscript clandestinely or surreptitiously taken and brought here for publication, to his prejudice and the destruction of all its value as property. Both resort to the courts for the protection of acknowledged rights of property, and are entitled to the remedies given by law."

[1] **Br.** Webb *v.* Rose, cited 4 Burr. 2330; Forrester *v.* Waller, Ibid. 2331; Duke of Queensbury *v.* Shebbeare, 2 Eden, 329; Macklin *v.* Richardson, Amb. 694; Millar *v.* Taylor, 4 Burr. 2303; Abernethy *v.* Hutchinson, 1 Hall & Tw. 28. **Am.** Bartlett *v.* Crittenden, 4 McLean, 300, 5 Id. 32; Palmer *v.* De Witt, 47 N. Y. 532; Boucicault *v.* Hart, 13 Blatchf. 47. To the same effect are the cases in which the publication of letters has been enjoined, cited *post*, p. 128, notes 1, 2, 3.

[2] See Chap. XIII.

[3] Prince Albert *v.* Strange, 2 De G. & Sm. 652; on ap. 1 Mac. & G. 25; Turner *v.* Robinson, 10 Ir. Ch. 121, 510.

that only for the purposes of their own information, and could not publish for profit that which they had not obtained the right of selling." [1]

By Copying Works of Art. — In Turner *v.* Robinson,[2] the defendant was charged with piracy, in having made for sale copies of a painting representing the death of Chatterton. He denied direct copying, but admitted that he had seen the original while on exhibition, and said that he had made his photographs from an arrangement of figures, objects, and scenery, which he had prepared in his own gallery. He further admitted that he had made the arrangement from his recollection of the painting, and with a view of presenting a stereoscopic photograph of the same representation as that given by the painting. The court did not hesitate to declare that this was an unlawful use of the plaintiff's property. "The Stereoscopic Slides," said the Lord Justice of Appeal, "are not photographs taken directly from the picture, in the ordinary mode of copying; but they are photographic pictures of a model itself copied from, and accurately imitating in its design and outline, the petitioner's painting. It is through this medium that the photograph has been made a perfect representation of the painting. Thus the object contrived and achieved, and the consequent injury, are the very same as if the copy had, in

[1] Abernethy *v.* Hutchinson, 1 Hall & Tw. 40. Lord Eldon, however, doubted whether there could be property in lectures which had not been reduced to writing, and granted an injunction on the ground of breach of confidence.

In Keene *v.* Kimball, 16 Gray (82 Mass.), 551, Hoar, J., said: "We do not intend in this decision to intimate that there is any right to report, phonographically or otherwise, a lecture or other written discourse which its author delivers before a public audience, and which he desires again to use in like manner for his own profit, and to publish it without his consent, or to make any use of a copy thus obtained. The student who attends a medical lecture may have a perfect right to remember as much as he can, and afterward to use the information thus acquired in his own medical practice, or to communicate it to students or classes of his own, without involving the right to commit the lecture to writing, for the purpose of subsequent publication in print or by oral delivery. So any one of the audience at a concert or opera may play a tune which his ear has enabled him to catch, or sing a song which he may carry away in his memory, for his own entertainment or that of others, for compensation or gratuitously, while he would have no right to copy or publish the musical composition." See also language of McLean, J., Bartlett *v.* Crittenden, 4 McLean, 303, 304, quoted *post*, p. 122.

[2] 10 Ir. Ch. 121, 510.

breach of confidence, been made on the view, and by the eye; and no court of justice can admit that an act illegal in itself can be justified by a novel or circuitous mode of effecting it. If it is illegal, so must the contrivance be by means of which it was effected."[1]

By Exhibiting Copies. — In Prince Albert *v.* Strange,[2] the defendant was enjoined not only from exhibiting copies of etchings which he had taken from plates unlawfully obtained, but also from selling descriptive catalogues of such etchings. It was contended on behalf of the defendant, that while the owner might prevent the sale or public exhibition of copies of the drawings, it was no violation of any rights of property to publish a mere description of them. The soundness of this distinction was not recognized by the court. "It being admitted," said Lord Cottenham, "that the defendant could not publish a copy, that is an impression of the etching, how in principle does a catalogue, list, or description differ? A copy or impression of the etching would only be a means of communicating knowledge and information of the original, and does not a list and description do the same? The means are different, but the object and effect are similar; for in both the object and effect is to make known to the public more or less of the unpublished work and composition of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others."[3]

This ruling was doubtless correct in this case, because the etchings had been kept wholly private by the owners, and had in no sense been published. But when drawings, paintings, statues, or any works of art, have been published by being publicly exhibited, there seems to be no principle of property which will enable the owner to prevent another from publishing a verbal description of them. When a thing is kept in strict privacy, the owner may have a right to say that even a description of it shall not be made public; but when the thing itself is published, as it may be by being publicly exhibited, though the owner's rights of property are not lost by such publication,

[1] 10 Ir. Ch. 521.
[2] 2 De G. & Sm. 652; on ap. 1 Mac. & G. 25.
[3] 1 Mac. & G. 43.

it is difficult to see how in law they are prejudiced by a mere description in writing of the work.

In what Court Redress Sought. — In the United States, actions, and suits for the infringement of common-law rights, must be brought in a State court, unless a federal court has jurisdiction by virtue of the citizenship of the parties; in which case redress may be sought in either tribunal.[1]

Character of the Work.

In the case of statutory copyright, the theory of the law is that a work, to be entitled to protection, must be original, and innocent, and have some literary, art, or other value, which will contribute to the information, instruction, or enjoyment of others than the owner. It is true that the requirements of the law as to value are by no means exacting, and that statutory copyright may be secured for a production whose merit is little more than nothing. But the statute was not intended to protect a thing utterly destitute of any value as a literary or art production. The question now arises, whether the same principles govern literary property at common law; and whether all protection is to be denied to a production which is not original, valuable, or innocent.

At common law, the author has two general remedies for the protection of his property in a work which he has not himself made public in any way. He is entitled, 1, to prevent its unauthorized publication; 2, to claim damages which he has sustained by such publication. We shall first consider whether the former remedy exists when the work is without the qualities essential to statutory copyright.

Originality. — With respect to originality, the principle seems to be the same whether statutory or common-law protection is claimed. For this consideration affects directly the title of the property. If a person claims to be the owner of an intellectual production, on the ground that it is the creation of his own mind, it is obvious that his title will fail when there is an entire absence of originality, when the production is a mere copy of something else.

[1] See Chap. XII.

Literary Merit. — Is it essential that a manuscript, a statue, or a painting shall have literary or art merit, however little, to be entitled to the protection of the common law? The sound doctrine would seem to be that value, at least market or commercial value, is not an essential attribute of this kind of property. What may be the literary or art merit of the work, what value it may have to the public, or how far it may be useful to society, are not legitimate subjects of inquiry in determining the owner's exclusive right to its control before publication. Property may exist in that which has no commercial value. A person may own a useless swamp, a barren crag, or a sterile waste so worthless that he cannot give it away; yet it belongs to him, and the law will aid him in preventing another from appropriating it, or otherwise unlawfully using it. The same is true of intellectual property. A manuscript may be void of literary qualities, a painting destitute of merit, a statue without art excellence. Yet it may be valued by the owner; and, whether it is or not, he has a right to say that it shall not be made public, or used without his consent. It is immaterial for what purpose the work has been produced, or whether the author did or did not intend it for public use. Were the rule otherwise, the author might be wrongly subjected at any moment to humiliation, loss of reputation, or substantial injury, by the publication of his production against his will. "The question, however," said Vice-Chancellor Bruce, "does not turn upon the form or amount of mischief or advantage, loss or gain. The author of manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, salable or unsalable, they shall not without his consent be published." [1]

[1] Prince Albert *v.* Strange, 2 De G. & Sm. 664. "What, however," continued the same judge, "can be the defendant's right or that of any person but the owners of the plates to this benefit? It is for them to use, or bestow or withhold, nor can a stranger be allowed to say that they do not want it. They alone are entitled to decide whether, and when, and how, and for whose advantage their property shall be made use of." Ibid. 698.

"What then is the foundation at common law of this exclusive right? Does it exist only when the manuscript is intended to be published? or does it depend upon its pecuniary value or intrinsic merits as a literary composition? To each question we think the reply may be confidently given certainly not. In none of the cases is there any reference to these circumstances or any of them as necessary to be averred or proved in order to establish the rights of the author or the jurisdiction of the court; and in some

This doctrine has been fully recognized in the case of letters, which are considered further on in this chapter; and the principles which have been judicially affirmed in such cases are equally applicable to all kinds of unpublished works.

Writings not Innocent. — The publication of an immoral, seditious, blasphemous, or libellous work, is looked upon as unlawful; and for that reason it has been held that such a work cannot be the subject of statutory copyright.[1] Hence, when the author has published a work of this kind, he is powerless to prevent any other person from republishing it, and he is not entitled to recover for damages sustained through loss of profits by such unauthorized publication.

This principle was extended to unpublished works by Lord Eldon, who held that the common law affords no protection for a manuscript which is not innocent. The question was brought before him in 1817, when the poet Southey applied for an injunction to restrain the publication of Wat Tyler. This poem had been written in 1794, and sent by the poet to a bookseller, who decided not to publish it. The manuscript was not returned to the author; and twenty-three years afterward the poem was published for the first time by the defendant, who had by some means obtained the manuscript, or a copy, without the knowledge or consent of the author. The motion for an injunction was opposed on the ground that the poem was seditious, and therefore the author was entitled to no protection. This view of the law was adopted by Lord Eldon, who, misapplying a *dictum* of Chief Justice Eyre, refused to grant the injunction until Southey should establish his rights at law, and said: "If this publication is an innocent one, I apprehend that I am authorized by decided cases, to say that whether the author did or did not intend to make a profit by its publication, he has a right to an injunction to prevent any

the admitted facts repel the supposition that such proofs could be required. . . . We can perceive no reason for doubting that the exclusive property of an author rests exactly upon the same ground as that of a manufacturer or artist — a painting may be a wretched daub — a statue, a lamentable abortion; yet, should either be purloined by an enemy with the view to secure profits to himself, or to disgrace the artist by its public exhibition, a court of equity would renounce its principles should it refuse to protect the owner, the unfortunate artist, by a peremptory injunction." Duer, J., Woolsey *v.* Judd, 4 Duer (N. Y.), 386.

[1] See Chap. III.

other person from publishing it. If, on the other hand, this is not an innocent publication, in such a sense as that an action would not lie in case of its having been published by the author, and subsequently pirated, I apprehend that this court will not grant an injunction."[1]

In holding that an author has no right to prevent the publication of a work which he cannot lawfully publish, Lord Eldon overlooked a vital distinction between literary property at the common law and copyright as regulated by the statute. The latter is a right which exists only in a published work, and which entitles the owner to control the publication of a work after he has himself published it. The right relates solely to publication, which is the foundation of the right. When the publication is unlawful, it is clear that the right cannot be enforced; for the statute will not aid one person in restraining another from publishing what neither has a right to publish. Hence, when the protection of the statute is sought, it is proper to inquire whether the character of the work is such as will render its publication unlawful.

But to apply this principle to unpublished works will be destructive of valuable rights of property therein. For a work whose general publication may be objectionable or unlawful may be put to innocent and legitimate uses without being generally published. This fact is recognized by the common law, which does not restrict the rights of property in an unpublished work to its publication, but protects the owner in every harmless use of it. Even though he may not privately or confidentially communicate it to a limited number of persons, for restricted uses, he has a right to keep it to himself, and to say that no person without his consent shall publish or use it in any way whatever. This right to exclude others from its use is as inviolable as the right to publish.[2] The two rights are distinct

[1] Southey *v.* Sherwood, 2 Meriv. 437. "So the injunction," says Lord Campbell, "was refused; and hundreds of thousands of copies of Wat Tyler, at the price of one penny, were circulated over the kingdom." 10 Lives of the Chancellors (5th English ed.), 257.

[2] "Upon the principle, therefore, of protecting property it is that the common law, in cases not aided nor prejudiced by statute, shelters the privacy and seclusion of thoughts and sentiments committed to writing and desired by the author to remain not generally known." Bruce, V. C., Prince Albert *v.* Strange, 2 De G. & Sm. 695.

and independent. The right to publish may be defeated by the fact that the work cannot be lawfully published; but this consideration cannot prejudice the right to prevent publication.

The theory of Lord Eldon is based on the ground that a work immoral, seditious, or libellous, is unlawful, and therefore entitled to no protection. It rests solely on the assumed unlawful character of the production. But the law takes no cognizance of these obnoxious qualities until the work is published. The violation of the law consists in publishing the offensive matter. Publication is the essence of the wrong. Whatever may be the character of the work, it is innocent and harmless in the eye of the law while the owner keeps it to himself; and, because he cannot make any public use of it, he does not thereby lose the right to possess and enjoy it himself, and to exclude others from its use.

Question of Damage affected by Character of Production.— The above considerations apply in determining the right of an author to prevent the unlicensed publication of his work. But the principle is different when he seeks to recover for a loss of profits which he has sustained by such publication. In such case, the market-value of the work will be a legitimate subject of inquiry. For, when the profits of publication are claimed, it must appear that the work can be lawfully published; and it is obvious that the author is not entitled to such profits, when the publication is unlawful by reason of being immoral, seditious, libellous, or blasphemous.[1]

This doctrine was referred to by Lord Chief Justice Eyre, in a case which is not reported, but was cited by Sir Samuel Romilly in his argument in Southey *v.* Sherwood.[2] Dr. Priestley, having lost certain unpublished manuscripts in consequence of a mob in Birmingham, brought an action for damages against the hundred, in which he offered to prove by booksellers that the manuscripts were of great pecuniary value for publication. The defence set up was that Dr. Priestley had been in the habit of publishing works injurious to the administration of the gov-

[1] Whether the author may maintain an action for damages, other than the loss of profits, for the unlicensed publication of an obnoxious manuscript, is a question which will not be examined here. It can hardly be considered a question of property.

[2] 2 Meriv. 437.

ernment; but no evidence to that effect was offered. The Lord Chief Justice is reported to have said that, "if any such evidence had been produced, he should have held it fit to be received against the claim made by the plaintiff."

This ruling was correct; for the question of damages would have been clearly affected by proof showing that the publication of the manuscripts by the author would have been unlawful by reason of their seditious character. And to this extent only go the expressed views of the Chief Justice who presided at the trial. But this *dictum*, on which Lord Eldon based his decision in Southey *v.* Sherwood, gives no support whatever to the doctrine there affirmed. There was a vital distinction between the two cases. Southey claimed the right to prevent publication; whereas Dr. Priestley sued for the loss of profits, which he alleged he might have realized by publication.[1]

Publication.

We may now inquire what is a publication of an intellectual production, and what kind of a publication it is that works a forfeiture of the owner's common-law rights. Properly speaking, a work is published when it is communicated to the general public. Literary, dramatic, and musical compositions may be published by being read, represented, or performed, or by the circulation of printed or manuscript copies. Paintings, works of sculpture, and similar productions, are published when publicly exhibited. In short, to publish a thing is to make it public by any means or in any manner of which it is capable of being communicated to the public.[2] At common law, the

[1] Lord Campbell has sharply criticised the decision of Lord Eldon in Southey *v.* Sherwood, and also that in Wolcott *v.* Walker. See Chap. III., note.

[2] In Prince Albert *v.* Strange, Vice-Chancellor Bruce held, that to publish a descriptive catalogue of etchings or drawings amounts to a publication of them. 2 De G. & Sm. 652, 694. In Turner *v.* Robinson, it was held that printing in a magazine an engraving of a painting was a publication of the engraving, but not of the painting. "It is by publication of the thing itself," said the court, "that the common-law right is lost, and not by the publication of something else." 10 Ir. Ch. 121, 133. And so the court said that the publication of a bust would not be a publication of the statue itself. Ibid.

If publication of an engraving of a picture is not a publication of the picture itself, publication of a descriptive catalogue of etchings cannot be a publication of the etchings. What the court meant in Prince Albert *v.*

word publication may be used in this large sense; but it has a more restricted signification when used with reference to the statutes conferring copyright. The latter meaning will be considered after it has been shown that the common-law rights in a work are forfeited only when it is published within the meaning of the statute.

Author's Rights after Publication not lost by Common Law, but taken away by Statute. — At common law, the ownership of literary property is not lost by any publication of the work. A literary composition may be published in print or read to the public, a dramatic or musical composition may be publicly performed, a work of art may be publicly exhibited, without prejudice to the owner's rights or the remedies for the protection of those rights. The rights and the remedies are the same after as before publication. When these rights are lost by publication, it is not by force of the common law, but by operation of the statute, as it has been judicially construed. This principle is put beyond doubt by the judgment pronounced by the House of Lords in 1774 in Donaldson *v.* Becket.[1] Before this decision was rendered, the courts of chancery had uniformly recognized and protected common-law copyright in printed books;[2] and the court of King's Bench, after an exhaustive examination of the question, had affirmed, in Millar *v.* Taylor,[3] that the exclusive rights of an author in his work were not lost by publication, either by operation of the common law or of the statute. In Donaldson *v.* Becket, the House of Lords held that there was no copyright in a printed book, except that given by the statute. But this judgment was based on the ground that the common-law right had been taken away by the statute. To this extent it overruled Millar *v.* Taylor. But it left undis-

Strange was, that the plaintiff's common-law property in the etchings was violated by a publication of a descriptive catalogue. What the court meant in Turner *v.* Robinson was, that the owner's common-law rights in the painting were not lost when he published an engraving of it. It was further argued in the latter case that the sale of the painting by the owner amounted to a publication destructive of the common-law property in the painting. The Master of the Rolls said that this theory was "destitute of all color of foundation." 10 Ir. Ch. 143.

[1] 4 Burr. 2408.

[2] Eyre *v.* Walker, Motte *v.* Falkner, Walthoe *v.* Walker, Tonson *v.* Walker, cited 4 Burr. 2325; Tonson *v.* Walker, 3 Swans. 672.

[3] 4 Burr. 2303.

turbed the principle affirmed in the latter case, that publication does not, by force of the common law, work an abandonment of the owner's rights. Nine of the twelve judges summoned in Donaldson *v.* Becket were of opinion that, by the common law, the copyright in a book is not lost by its publication in print. The decision of the House of Lords was not against this doctrine, and may fairly be assumed to have been in harmony with it.[1] This judgment of the highest judicial tribunal of England has since continued to be the controlling authority on the law and the principles involved in the question under consideration.

It is true that the Supreme Court of the United States held, in Wheaton *v.* Peters, that the statute of 1790 did not sanction an existing right, but created one.[2] The reason given for this conclusion was, that the common law of England relating to literary property did not prevail in the United States. This doctrine, if it ever had any support, may now be regarded as exploded.[3] The court further held that, even if the common law did prevail in this country, as the statute of Anne had been construed in England to have taken away the common-law property in published works, the same construction should be given to the act of Congress. This is the only ground which can support the decision of the court, and this rests solely on the precedent of Donaldson *v.* Becket. The law, as declared by the House of Lords in that case, was followed with approval by the Supreme Court in Wheaton *v.* Peters, and it has been followed in every English and American decision which affirms the doctrine, that there can be no copyright after publication, except under the statute. Hence, the doctrine may be regarded as well grounded, both in England and the United States, that, when an author loses his rights by publishing his work, it is by operation of the statute, and not of the common law. This principle has an important bearing in determining the common-law rights of authors in their productions, and will serve to make the law clear in some cases whose adjudication might otherwise be attended with doubt and difficulty, and perhaps injustice.

[1] See *ante*, pp. 37, 42. [2] 8 Pet. 591, 654. [3] See *ante*, p. 47.

When Common-Law Rights are Lost by Publication.—In determining whether the author's rights are forfeited by a publication of his work, two tests are to be applied: 1, whether there is any statute relating to the species of production for which protection is sought, or governing the kind of right which is claimed; 2, whether the work has been published within the meaning of the statute. The former inquiry will be first considered.

As the owner of any work has by the common law an exclusive right to publish it, and that right is not lost after publication by virtue of the common law, but is taken away solely by operation of the statute, it is obvious that, if no statute has been passed, the force of the common law will not be annulled. It is equally true that, when a statute is passed to regulate copyright in a certain class of works, it may destroy the common-law right after publication in any work embraced within its operation, but not in one of a different class to which the statute does not apply. Thus, the statute of Anne related exclusively to books. It did not apply to works of art, and hence could not take away or change the owner's common-law rights in such works. But the statutes since passed regulating the copyright in paintings and works of sculpture will doubtless be held to have the same effect on the common-law property in such productions as the statute of Anne had in the case of books. So, also, the act of Anne regulated only the right of printing books. Hence, it could not properly be construed to take away the exclusive right of the author at common law publicly to perform his unprinted plays. But the 3 & 4 Will. IV. c. 15, which regulates playright, may be held to annul the corresponding common-law right.

The second test to be applied in determining whether the common-law right is destroyed by publication is, whether the work has been published within the meaning of the statute. The statute does not apply to a work not so published, and hence can have no effect on the common-law rights therein.

What, then, is a publication within the meaning of the statute? This question is more fully considered in treating the same topic in another connection.[1] It is there shown that

[1] See Chap. V., Publication.

no English or American statute regulating copyright in a literary composition takes effect until the composition is published in print, or by the public circulation of copies. Until such publication takes place, the common-law rights continue in full force. Hence, the owner of a literary composition which has not been published in print or by the circulation of copies may read it or permit it to be read in public, without any prejudice to his common-law rights therein.[1]

This statement must be qualified in the case of dramatic compositions under the English, but not the American, law. In the United States, there is no statute governing the right of representing or performing a manuscript dramatic or musical composition. Hence, the common-law rule applies, and the owner's rights are not lost by the public representation or performance of such composition.[2] The law was the same in England[3] until the 3 & 4 Will. IV. c. 15, was passed, which, as extended and amended by the 5 & 6 Vict. c. 45, s. 20, now regulates the exclusive right of representing and performing dramatic and musical compositions. These statutes apply to manuscript as well as to printed productions, and, within their meaning, the public representation or performance of a manuscript composition is a publication. On the principle that common-law copyright in a book is lost by publishing it in print, the common-law playright in a manuscript dramatic or musical composition must be forfeited by its public representation or performance.[4]

Before the existence of statutory copyright in paintings, it was properly held by the Irish Chancery Court that the owner's common-law rights in a painting were not prejudiced by his public exhibition of it, or by the publication in a magazine of an engraving and a description of the painting.[5] But, since

[1] Abernethy *v.* Hutchinson, 1 Hall & Tw. 28; Bartlett *v.* Crittenden, 4 McLean, 300, 5 Id. 32; Keene *v.* Kimball, 16 Gray (82 Mass.), 545; Boucicault *v.* Fox, 5 Blatchf. 87.

[2] See Chap. XIII.

[3] Coleman *v.* Wathen, 5 T. R. 245; Morris *v.* Kelly, 1 Jac. & W. 461. See also Macklin *v.* Richardson, Amb. 694.

[4] See Chap. XIII.

[5] Turner *v.* Robinson, 10 Ir. Ch. 121, 510. "If there was no statute protecting copyright in literary works," said the Master of the Rolls, "and Sir Walter Scott had read out Waverley to a large party of friends, it is idle to say that such would have amounted to a publication, so as to have deprived him of his common-law right; and the painter or the owner of a painting,

this decision was rendered, a statute has been passed regulating the copyright in paintings.[1] Copyright in works of sculpture is likewise governed by statute.[2] In the United States, also, paintings and sculpture are subjects of statutory protection. Whether the common-law property in such works is lost by the public exhibition of the original, or by the circulation of engravings, photographs, or other copies, will depend on what is a publication of the work within the meaning of the statute. This is a difficult question, which is considered elsewhere in this work.[3]

The conclusion, then, to which we are brought is, that no common-law rights in a work are lost by publication, unless there be a statute to take away these rights, and unless the work be published within the meaning of the statute. This principle, as has been seen, was in effect affirmed in Donaldson *v.* Becket,[4] and in Wheaton *v.* Peters,[5] by the highest judicial tribunals of England and of the United States, whose judgments are still supreme.

But, inferior courts have in some cases lost sight of it, and hence have given weight to considerations which were clearly irrelevant. Thus, in Turner *v.* Robinson, it was held that the owner's common-law rights in a painting were not lost by its public exhibition.[6] This was sound, because there was then no statute to take away these rights. But the court attached much importance to the fact that the painting was exhibited for the special purpose of securing subscribers for an engraving of it, and to the fact that the public had been warned, by notice, against taking photographic or other copies of the work. Neither of these considerations had any true bearing on the question. So, also, in the United States, there is no statute

who exhibits it at such exhibitions as those of London, Dublin, and Manchester, and, having regard to the object of such exhibitions, should be considered as allowing it to be viewed by the public, on a tacit understanding that an improper advantage would not be taken of the privilege thus granted; and I am disposed to think, without reference to the letters I have read, that such an exhibition would not be a publication so as to deprive a painter, or the owner of a painting of his common-law right." Ibid. 140.

[1] 25 & 26 Vict. c. 68.

[2] 54 Geo. III. c. 56. See also 13 & 14 Vict. c. 104, s. 6.

[3] See Chap. V., Publication.

[4] 4 Burr. 2408.

[5] 8 Pet. 591, 654.

[6] 10 Ir. Ch. 121, 510.

regulating the right of representing manuscript plays. This right is governed solely by the common law, and hence is not lost or prejudiced by the public performance of the play. But, in several cases involving this question, the courts have elaborately discussed every principle which could be brought to bear on the subject but the right one, and have gravely affirmed or recognized theories which are as absurd as they were irrelevant. Such, for instance, are the notions that a "restrictive notice" to the audience is necessary to save the property in a manuscript drama from being lost by public representation, and that the right of representing a play against the will of the owner may be acquired by means of the memory of any person who has witnessed its public performance.[1]

The owner's common-law rights are not lost by a publication which is made without his authority. In that case, the act is not his, and he cannot rightly be held responsible for what is done without his knowledge or consent.[2] But long acquiescence may amount to abandonment.[3]

Private Circulation of Copies not a Publication. — It may sometimes be difficult to determine whether the use which the owner makes of his production does or does not amount to a publication within the meaning of the statute. There is no doubt that the general unrestricted circulation of printed copies is such a publication, and the principle would seem to be the same when manuscript copies are so circulated.[4] But it is clear that a private circulation for a restricted purpose is not a publication. Thus, in Prince Albert *v.* Strange,[5] it appeared that Queen Victoria and her husband had given to their intimate friends lithographic copies of drawings and etchings, which they had made for their own amusement. This was held to be a private circulation of copies, and hence not a publication.[6]

In Bartlett *v.* Crittenden[7] it appeared that the plaintiff, who was a teacher of book-keeping, had written his system of

[1] See Chap. XIII.

[2] Boucicault *v.* Wood, 2 Biss. 34, 39; Crowe *v.* Aiken, 2 Biss. 208; Palmer *v.* De Witt, 2 Sweeny (N. Y.), 530, 551; on ap. 47 N. Y. 532; Shook *v.* Neuendorf, 11 Daily Reg. (N. Y.) 985.

[3] See acquiescence considered in Chaps. XI., XIII.

[4] See Chap. V., Publication.

[5] 2 De G. & Sm. 652; on ap. 1 Mac. & G. 25.

[6] See also Keene *v.* Wheatley, 9 Am. Law Reg. 33.

[7] 4 McLean, 300, 5 Id. 32.

instruction on separate cards, for the convenience of giving instruction to his pupils. He had permitted them to copy these cards for their own convenience, and to enable them to instruct others. The defendant published copies of the cards which he had obtained while a pupil in the school; and maintained that the complainant, by permitting his manuscripts to be so copied, had abandoned them to the public. The Circuit Court of the United States held this to be a private circulation of copies, which did not prejudice the owner's common-law rights. "The students of Bartlett who made these copies," said Mr. Justice McLean, "have a right to them and their use as originally intended. But they have no right to a use which was not in the contemplation of the complainant and of themselves when the consent was first given. . . . The lecturer designed to instruct his hearers, and not the public at large. Any use, therefore, of the lectures, which should operate injuriously to the lecturer, would be a fraud upon him for which the law would give him redress."[1] This action was brought under section 9 of the act of 1831; but it could not have been maintained if the use which the owner had permitted to be made of his manuscript had amounted to a publication within the meaning of the statute.

A recent case in the Supreme Court of New York presents a question as difficult as it is novel.[2] It appeared that the plaintiff, Kiernan, had bought from the Stock and Gold Telegraph Company the exclusive right to use their foreign financial news in a certain part of the city of New York, for the period of fifteen minutes after its receipt. This news was collected in Europe, and transmitted by cable to this country by the Associated Press, from whom the Stock and Gold Company had acquired the exclusive right of use, in New York City, for the period of thirty minutes after its receipt. As soon as received, the news was telegraphed by Kiernan and the Stock and Gold Company to their respective customers, and in all parts of the city was exposed to public gaze by means of printed tapes connected with stock indicators. The Manhattan Quotation Telegraph Company, which was also engaged in

[1] 4 McLean, 303, 304. See also Abernethy v. Hutchinson, 1 Hall & Tw. 28.

[2] Kiernan v. Manhattan Quotation Telegraph Co., 50 How. Pr. (N. Y.) 194.

the business of supplying foreign financial news to its customers, had copied telegrams from Kiernan's bulletins and tapes, as well as from those of the Stock and Gold Company. On the ground of an invasion of his common-law property, Kiernan applied for an injunction to restrain the Manhattan Company from supplying to their customers the information thus obtained.

It is clear that, before it is forfeited by publication, there is a common-law property in valuable facts and information which have been collected and utilized by skill, diligence, and expense. The pivotal question here was, whether there had been a publication in the statutory meaning of that word. It is well settled in this country, as has been seen, that a literary composition is published, within the meaning of the statute, when printed copies are publicly circulated; and that the owner's rights are thereby lost, unless protected by statute. On the other hand, it is equally clear that publicly to represent a drama, or to communicate any literary composition to the public by word of mouth, is not such a publication as will prejudice the owner's common-law rights. But which of these rules governs when the communication to the public is by means of bulletins and printed tapes exposed in public places? If this is a publication analogous to the ordinary public circulation of printed copies, it is destructive of the owner's common-law rights. If it is not, those rights are not thereby prejudiced. The court was of opinion that this case was governed by the same principle as that which applies in the case of dramatic performances and the delivery of lectures, and held that giving news to the public in the manner described is not such a publication as will destroy the owner's common-law rights.

Whether this decision can be successfully defended on established legal principles, is a question attended with much doubt. The difficulty is in satisfactorily determining a question of fact. If such news had been published in a newspaper, or if it had been given to subscribers on printed sheets, there is little doubt that this would have amounted to a publication within the meaning of the statute. And yet it may be pertinently asked, Wherein is the principle different, whether the information be communicated to the public in this way or by means

of telegraphic copies printed on bulletins? In both cases the matter is printed, and copies are circulated. In neither is the communication private, or restricted as to persons. In both it may be and is read by the general public as soon as it is printed. It is true that the news is intended primarily for the benefit of those who pay for its use; but, nevertheless, it is communicated to the general public. The matter in a newspaper or book is primarily for the benefit of buyers; but a general circulation of copies is none the less a publication. It would seem, therefore, that a communication of the kind under consideration is more nearly analogous to an ordinary publication in print than it is to a publication by word of mouth. But it is a doubtful and difficult question, whose solution will not be attempted here.

The common-law property in dramatic and musical compositions is more fully treated under the head of Playright.[1]

Statutory Protection for Manuscripts.

There can be no statutory copyright in an unpublished work. But in the United States a remedy for the unauthorized publication of a manuscript is specially given by the statute. Section 4967 of the existing law[2] declares, that "every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, if such author or proprietor is a citizen of the United States, or resident therein, shall be liable to the author or proprietor for all damages occasioned by such injury." Section 9 of the act of 1831 gave similar redress for damages, and also a remedy by injunction to prevent or restrain the unauthorized publication.[3] The latter remedy is not expressly given by the subsisting statute; but it has been held that the owner is entitled, under the statute, to an injunction restraining the unlicensed publication of his manuscript.[4]

To entitle a person to the benefit of this provision, it is not necessary that the whole of his manuscript shall be published

[1] Chap. XIII.
[2] U. S. Rev. St.
[3] 4 U. S. St. at L. 438.
[4] Boucicault *v.* Hart, 13 Blatchf. 47.

without his consent. The question is whether a substantial part has been published.[1]

There is no reason to doubt that the section under consideration embraces any manuscript for which a copyright may be obtained.[2] But it has been questioned whether it applies to a manuscript which is not a proper subject of copyright.[3] It is hardly reasonable to suppose that Congress intended to legislate for the protection of writings utterly worthless to the public, or wanting in the qualities of originality and innocence essential to sustain copyright. Ordinary private letters which have any value for publication are undoubtedly within the scope of this section;[4] but this is hardly true of letters which have no such value.[5]

A more difficult question is, whether this section operates in favor of a resident assignee of a foreign author. There is nothing in its language to prevent this construction, and the opinion has been judicially expressed that such is its effect.[6]

[1] Bartlett *v.* Crittenden, 4 McLean., 300, 5 Id. 32.

[2] Bartlett *v.* Crittenden, *supra*; Little *v.* Hall, 18 How. 165, 170; Parton *v.* Prang, 3 Cliff. 537.

[3] Palmer *v.* DeWitt, 47 N. Y. 535. "It may be doubtful," said Allen, J., "whether the act of Congress of 1831, c. 16, s. 9, 4 U. S. St. at L. 438, gives an action in respect to manuscripts, other than such as may be the subject of a copyright, under the laws of the United States."

In Bartlett *v.* Crittenden, 4 McLean, 304, McLean, J., said: "It is contended that the manuscripts are incomplete, and if published in their present state, could not be protected by a copyright; that an unfinished manuscript or book, which gives only a part of the thing intended to be written or published, can be of no value, and if printed no relief could be given, as no damage would be done. . . . But such is not the character of complainant's manuscripts. They may not be complete for publication. . . . But the cards contain the framework of the system."

[4] After maintaining that a person has property in the letters which he has written, Mr. Justice Story said: "It appears to me that the copyright act of 1831, c. 16, s. 9, fully recognizes the doctrine for which I contend. It gives by implication to the author, or legal proprietor of any manuscript whatever, the sole right to print and publish the same, and expressly authorizes the courts of equity of the United States to grant injunctions to restrain the publication thereof, by any person or persons, without his consent." Folsom *v.* Marsh, 2 Story, 113.

[5] In Woolsey *v.* Judd, 4 Duer (N. Y.), 379, it was held, that at common law the writer was entitled to prevent the publication of a letter which had *no literary value whatever*. But, said Duer, J.: "We think it a doubtful question, whether the act of Congress of 1831, broad as its terms certainly are, was intended to apply, and ought, therefore, to be construed as applying to cases like the present; but it is to the courts of the United States that the decision of the question properly belongs." Ibid. 382.

[6] Keene *v.* Wheatley, 9 Am. Law Reg. 45.

But copyright will not vest in a book written by a foreign author; and, if section 4967 applies only to productions for which copyright may be obtained, it follows that it gives no redress for the unauthorized publication of a manuscript which a citizen or resident has bought from a foreigner. As Congress, in granting copyright, expressly legislated for the protection of the literary productions of native authors, it is reasonable to suppose that the protection extended to manuscripts was intended only for those of citizen or resident authors. But, as has been said, the statute is not express on this point; and its meaning remains for judicial determination.

Section 4967 does not prohibit the public representation of an unpublished drama.[1]

A painting is not a manuscript within this provision of the statute.[2]

Section 9 of the statute of 1831 prohibited the publication of a manuscript "without the consent of the author or legal proprietor first obtained as aforesaid." The words "as aforesaid" evidently referred to a preceding section,[3] which declared it to be unlawful to publish a copyrighted book without the written consent of the owner, signed by two or more witnesses. Section 4967 of the Revised Statutes does not prescribe that the consent to publish a manuscript shall be in writing, and

[1] Keene *v.* Wheatley, 9 Am. Law Reg. 33; Boucicault *v.* Hart, 13 Blatchf. 47.

[2] Parton *v.* Prang, 3 Cliff. 537. Considering section 9 of the act of 1831, Mr. Justice Clifford said: "Manuscripts of every kind are embraced in that section; but pictures are not named in the provision, and cannot be regarded as entitled to that special protection, unless it be held that the word manuscript includes pictures, which is affirmed by the complainant and denied by the respondent; and that issue presents the principal question in the case." Ibid. 514. After showing that an unpublished painting could not be considered a manuscript within the meaning of the law, he continued: "Unsupported as the proposition of the complainant is by any legal adjudication, the argument of the respondent is a forcible one, that the construction of section 9 of the copyright act must be controlled by the well-established rule that the words of a statute, if of common use, are to be taken in their natural, plain, obvious and ordinary signification and import, unless it clearly appears from the context or other parts of the enactment that the words were intended to be applied differently from their ordinary or their legal acceptation.

"Nothing is shown in the context of the enactment to favor the theory of the complainant; and, inasmuch as the usual and ordinary signification and import of the two words is opposed to such a theory, it is difficult to see how it can be adopted without doing violence to the most approved canons of construction." Ibid. 546.

[3] s. 6; also, s. 7.

makes no reference to any part of the statute which requires a written consent. Nor does there appear to be any reason why a person may not be fully authorized to publish a manuscript by the oral consent of the owner.

The English statutes contain no provision similar to the one under consideration, for the protection of manuscripts.

Letters.

Property in Writer after Transmission. — The same general principles which underlie and govern the property of an author in his manuscript or other unpublished work apply also to letters written in the course of an ordinary correspondence. The law recognizes in these literary property which belongs to the writer, and continues in him after the letters have passed into the hands of the receiver. The theory of this is, that, in making a written communication to another, the writer does not consent to part with any right of property therein; but simply gives to the receiver the privilege of reading the letter for his own benefit, without the right to make any public use of its contents. The principle in this case is the same as when the owner of a manuscript permits another to read it, or to take a copy. The former does not lose, and the latter does not acquire, any right of literary property therein.[1] Even where the writer declined to accept the letters when the receiver offered to return them and said that the latter might keep them, it was held that he did not intend to abandon his literary property in them, or to give to the receiver the right to publish them.[2]

Whatever remedies the owner of a manuscript is entitled to, for the protection of his property, may be rightly claimed by the writer of a letter after its transmission. He may prevent the receiver from publishing it without authority, or making of it any other use not within his implied privileges as receiver. This doctrine was judicially recognized as early as 1741, when Curl, the London bookseller, was enjoined from selling a volume containing the private correspondence between Pope and Swift, which had been published in Ireland

[1] Duke of Queensbury *v.* Shebbeare, 2 Eden, 329.
[2] Thompson *v.* Stanhope, Amb. 737.

and reprinted in England without authority. When the case came before Lord Hardwicke on a motion to dissolve the injunction, it was contended on the part of the defendant, first, that ordinary private letters, written without any intention of publication, are not entitled to protection; and, second, that a letter sent by one person to another is a gift to the receiver, who thereby becomes vested with the entire property in it. Lord Hardwicke pronounced these theories unsound, and held that it was immaterial whether the letters had or had not been written for publication; that before transmission there was an absolute property in the writer; that the receiver acquired only a special or qualified property, extending, perhaps, to the paper, but not to the contents of the letter, and that this gave him no right of publication. The injunction, therefore, was continued as to the letters written by Pope, but dissolved as to those which he had received, and over which he clearly had no control.[1] The general principles laid down in this case have become the recognized law in England[2] and in the United States.[3]

It is well settled that the right of the author to restrain the unlicensed publication of his letters is not based on considerations of policy or social ethics. Publication may cause broken friendship, wounded feelings, humiliation, or distress; it may be for dishonorable purposes, and indicate on the part of the wrong-doer a baseness that should be held up to universal scorn. But these are matters of which no judicial cognizance has been taken in the adjudicated cases on this point. Where the right has been recognized, it has been on the principle of property; where the existence of the right has been denied, it has been on the ground that the writer failed to show a proprietary title. "The question will be," said Lord Eldon, "whether the bill has stated facts of which the court can take

[1] Pope *v.* Curl, 2 Atk. 342.

[2] Thompson *v.* Stanhope, Amb. 737; Cadell *v.* Stewart, 10 Mor. Dict. of Dec. Lit. Prop. App. p. 13; Granard *v.* Dunkin, 1 Ball & B. 207; Perceval *v.* Phipps, 2 Ves. & B. 19; Gee *v.* Pritchard, 2 Swans. 402; Palin *v.* Gathercole, 1 Coll. 565; Oliver *v.* Oliver, 11 C. B. N. S. 139; Howard *v.* Gunn, 32 Beav. 462.

[3] Denis *v.* Leclerc, 1 Martin (Orleans T.) 297; Folsom *v.* Marsh, 2 Story, 100; Wetmore *v.* Scovell, 3 Edw. Ch. (N. Y.) 515; Hoyt *v.* Mackenzie, 3 Barb. Ch. (N. Y.) 320; United States *v.* Tanner, 6 McLean, 128; Woolsey *v.* Judd, 4 Duer (N. Y.), 379; Eyre *v.* Higbee, 22 How. Pr. (N. Y.) 198; Grigsby *v.* Breckinridge, 2 Bush (Ky.), 480.

notice as a case of civil property which it is bound to protect. The injunction cannot be maintained on any principle of this sort, that if a letter has been written in the way of friendship, either the continuance or the discontinuance of that friendship affords a reason for the interference of the court."[1] "We must be satisfied," said the court in Woolsey *v.* Judd, "that the publication of private letters without the consent of the writer, is an invasion of an exclusive right of property which remains in the writer, even when the letters have been sent to and are still in the possession of his correspondent."[2] Whether publication may be restrained as a breach of private confidence or contract, is a question which it is not important to discuss here; for the doctrine is sound in principle, and is well settled by authority, that the writer may control his letters on the ground of property.[3]

[1] Gee *v.* Pritchard, 2 Swans. 413.

[2] 4 Duer (N. Y.), 384; see also Grigsby *v.* Breckinridge, 2 Bush (Ky.), 486.

"An injunction restraining the publication of private letters must stand upon this foundation, that letters, whether of a private nature or upon general subjects, may be considered as the subject of literary property." Plumer, V. C., Perceval *v.* Phipps, 2 Ves. & B. 24.

[3] In Folsom *v.* Marsh, 2 Story, 111, Mr. Justice Story said, that, if the receiver "attempt to publish such letter or letters on other occasions not *justifiable*, a *court of equity* will prevent the publication by an injunction, as a breach of private confidence, or contract, or of the rights of the author." This, however, was not one of the grounds on which the decision in the case was based; and, moreover, Judge Story recognized fully the principle of property in the writer. In Gee *v.* Pritchard, Lord Eldon held that an injunction could not be maintained on the principle of wounded feelings or broken friendship. In Wetmore *v.* Scovell and in Hoyt *v.* Mackenzie, the threatened publication was a clear breach of honor. But the court, while deprecating the act of the defendant, held that it was not a ground for judicial interference. In Woolsey *v.* Judd, Judge Duer emphatically asserted that the jurisdiction of the court could not be placed on the ground of morals. His views of the law on this point were expressed in the following language: —

"We believe that few, who reflect upon the mischievous consequences which would certainly result from the unrestrained and frequent publication of private and confidential letters, will dissent from the opinion that it is highly desirable, looking to the best interests of society, that courts of equity should possess and firmly exercise the jurisdiction which is questioned. Our own views and feelings, we do not hesitate to declare, correspond entirely with those which Mr. Justice Story, in the most elaborate and useful of his works, has very forcibly expressed. We agree with him, that the unauthorized publication of such letters, unless in cases where it is necessary to the vindication of the rights or conduct of the party against unjust claims or imputations, is, perhaps, one of the most odious breaches of private confidence, of social duty, and of honorable feelings which can well be imagined. It strikes at the root of that free interchange of advice,

The ownership of the property gives the writer not only the exclusive right of publishing the letter, but also entitles him to withhold it from publication. The very act of unlicensed publication, without regard to the purposes for which it is done or its consequences, is an invasion of the property of the writer; since he has a right to say that what he has written shall not be published without his consent. Therefore, in seeking to prevent a threatened publication, or to restrain a publication which has been made against his will, it is immaterial whether the writer does or does not intend to publish the letter. Nor is it necessary for him to allege or show that the unlicensed

opinions and sentiments, which seem essential to the well-being of society, and may involve whole families in great distress from the public display of facts and circumstances which were reposed in the bosom of others, in the fullest and most affecting confidence that they should remain for ever inviolable secrets. 2 Eq. Jur. § 946.

"But, although, with Mr. Justice Story, we cannot do otherwise than condemn a practice which springs from the motives, and leads to the consequences which he has depicted, and which, from the feelings of resentment it is calculated to provoke, is dangerous to the peace as well as the morals of the community, we must not be understood to assert, that these considerations are alone sufficient to justify the interposition of a court of equity.

"It is not necessary to deny, that upon these grounds alone the jurisdiction of the court cannot safely be placed. A court of equity is not the general guardian of the morals of society. It has not an unlimited authority to enforce the performance, or prevent the violation, of every moral duty. It would be extravagant to say that it may restrain, by an injunction, the perpetration of every act which it may judge to be corrupt in its motives, or demoralizing, or dangerous in its tendency. We advance no such doctrine, and we fully admit that an injunction can never be granted, unless it appears that the personal legal rights of the party who seeks the aid of the court, are in danger of violation; and as a general rule, that the injury to result to him from such violation, if not prevented, will be irreparable. It must be shown that a right is endangered which the law defines and is bound to protect, and that the mandate of the court is its only adequate protection; but when, by proof of these facts, the jurisdiction is established, we cannot doubt that considerations of public good and public policy may furnish motives, and powerful motives, for its prompt and effectual exercise. They may invest the legal right with an importance and dignity that would not otherwise belong to it, and convert the protection of a single individual into an extensive public benefit.

"It being conceded that reasons of expediency and public policy can never be made the sole basis of civil jurisdiction, the question whether upon any ground the plaintiff can be entitled to the relief which he claims remains to be answered; and it appears to us that there is only one ground upon which his title to claim and our jurisdiction to grant, the relief can be placed. We must be satisfied that the publication of private letters, without the consent of the writer, is an invasion of an exclusive right of property which remains in the writer, even when the letters have been sent to, and are still in the possession of his correspondent." 4 Duer (N. Y.), 383.

publication is for the purpose of gain, or that he will thereby sustain pecuniary damage, or suffer in his reputation or feelings. His right to withhold his expressed thoughts from publication is as inviolable as his right to publish them.[1]

Nor is the right of the author limited to preventing or restraining a publication in print. At the common law, as has been shown, the unauthorized representation of a manuscript drama, the public reading of an unpublished literary composition, the exhibition of copies of a painting or statue, is a publication which invades the owner's rights of property. To make any public use of the production is to publish it. Hence a letter may be published not only by printing it, but also by reading it in public, or by circulating copies of it, though such copies be in manuscript. Any such public use of the letter, without the consent of the writer, is a violation of his rights.[2]

In all the cases which have been reported, the writer has sought merely to restrain the publication of his letters, or to recover possession of them.[3] In none has he claimed damages. Hence the question whether the writer is entitled to recover damages for the unlicensed publication of his letters by the

[1] "It is immaterial whether the publication is for the purpose of profit or not. If for profit the party is then selling, if not for profit, he is giving that, a portion of which belongs to the writer." Lord Eldon, Gee *v.* Pritchard, 2 Swans. 415.

"Not only is the right of property in the author not subject to the limitation which some have supposed to exist, but it is absolute as well as unlimited. When he applies for an injunction, it is not necessary that he should aver that he desires to take from the defendants, or to secure to himself the profits of publication. As owner, he has an absolute right to suppress as well as to publish; and he is as fully entitled to the protection and aid of the court, when suppression is his sole and avowed object as when he intends to publish." Duer, J., Woolsey *v.* Judd, 4 Duer (N. Y.), 387. See also Denis *v.* Leclerc, *infra*.

[2] In Denis *v.* Leclerc, 1 Martin (Orleans T.), 297, it appeared that the defendant, after he had been enjoined from publishing a letter, notified the public that a copy of the letter had been annexed to his answer in the suit, and might be seen at the clerk's office. It was also proved that he had permitted two persons to read the letter at his office. It was held that annexing a copy to the answer would have been justifiable, had it been necessary or done with a good motive; but the court found that the letter was irrelevant to the pleadings, and had not been annexed for any legitimate purpose of the suit. For publishing the letter by this means, and by showing it to two persons, the defendant was fined fifty dollars for contempt of the injunction which had been granted.

[3] See Grigsby *v.* Breckinridge, 2 Bush (Ky.), 480.

receiver, or by a third person, has not been adjudicated. But there can be no reasonable doubt that, when damages have been sustained, a remedy at common law exists, on the principle that every author is entitled to recover for the damages caused by the unauthorized publication of his work.

When Property is not in Writer. — Cases may arise in which the writer will not be considered as the owner of the property in the letters which he has written, and hence will not be entitled to restrain their publication. Thus, letters written by one person employed by another, and relating to the business affairs of the latter, will rightly be considered as the property of the employer who pays the writer for such services. In a recent English case, it was held that the letters which an officer of an insurance company had written in the discharge of his official duties became the property of the company.[1] The same principle applies to letters written by officers of the government. Mr. Justice Story based the right of the government to publish, or to prevent the publication of, such official correspondence, on the ground of public policy.[2] This principle is not here disputed; but it is clear that the government is the rightful owner of the literary property in the letters which its servants have written in the discharge of their official duties.

Letters without Literary Value. — The question has been much discussed, whether the principle that a writer has a property in his letters after transmission, which the law will protect,

1 Howard *v.* Gunn, 32 Beav. 462.

2 "In respect to official letters addressed to the government or any of its departments by public officers, so far as the right of the government extends, from principles of public policy, to withhold them from publication, or to give them publicity, there may be a just ground of distinction. It may be doubtful whether any public officer is at liberty to publish them, at least in the same age, when secrecy may be required by the public exigencies, without the sanction of the government. On the other hand, from the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right and even the duty of the government to give them publicity, even against the will of the writers. But this is an exception in favor of the government, and stands upon principles allied to, or nearly similar to, the rights of private individuals, to whom letters are addressed by their agents to use them and publish them upon fit and justifiable occasions. But assuming the right of the government to publish such official letters and papers under its own sanction and for public purposes, I am not prepared to admit that any private persons have a right to publish the same letters and papers, without the sanction of the government, for their own profit and advantage." Folsom *v.* Marsh, 2 Story, 113.

is limited to those having literary merit, or is equally applicable to ordinary letters of business or friendship, and which have no value for purposes of publication. We have seen that, in Pope *v.* Curl,[1] Lord Hardwicke overruled the objection that private letters, written without any view to publication, were not entitled to protection. But the literary value of the letters in this case appears not to have been questioned. The theory that a letter without any literary value is not entitled to protection is traced to an *obiter dictum* of Sir Thomas Plumer, in Perceval *v.* Phipps.[2] It has received no other support from any English judge. In the subsequent case of Gee *v.* Pritchard, Lord Eldon remarked, that it would be "extremely difficult to say where the distinction is to be found between private letters of one nature and private letters of another nature."[3] In the United States Circuit Court in 1841, Mr. Justice Story declared, "that the author of any letter or letters (and his representatives), whether they are literary compositions or familiar letters, or letters of business, possess the sole and exclusive copyright therein; and that no persons, neither those to whom they are addressed nor other persons, have any right or authority to publish the same, upon their own account or for their own benefit."[4] The theory announced by Sir Thomas Plumer was expressly affirmed by the New York Court of Chancery, in Wetmore *v.* Scovell,[5] decided in 1842, and in Hoyt *v.* Mackenzie,[6] decided in 1848; in each of which the court refused to grant an injunction in favor of the writer, restraining an unlicensed publication of his letters for dishonorable purposes. The refusal was on the sole ground that the letters were without literary merit, and had no value for purposes of publication. These decisions were sharply criticised, and overruled by the full bench of the Superior Court, in 1853, in Woolsey *v.* Judd.[7] The complainant in this case sought to restrain the publication of a single letter. He did not claim

[1] 2 Atk. 342.

[2] "Though the form of familiar letters might not prevent their approaching the character of a literary work, every private letter upon any subject, to any person, is not to be described as a literary work, to be protected upon the principle of copyright." 2 Ves. & B. 28.

[3] 2 Swans. 426.

[4] Folsom *v.* Marsh, 2 Story, 110.

[5] 3 Edw. Ch. (N. Y.) 515.

[6] 3 Barb. Ch. (N. Y.) 320.

[7] 4 Duer (N. Y.), 379.

that it had any literary value, or that, by its threatened publication, he would sustain pecuniary damage, or any injury to his reputation or feelings. The issue, therefore, was simply whether his property in what he had written gave him a right to say that no one should publish it without his consent. In a thorough discussion of the subject, the court maintained that there was no ground for any distinction in law between letters having and those not having literary merit, and affirming the doctrine so clearly expounded by Judge Story, held, that "every letter is, in the general and proper sense of the term, a literary composition," which cannot lawfully be published by the receiver, or any third person, without the consent of the writer, except for purposes of vindication. This doctrine has been approved by the Kentucky Court of Appeals,[1] and is supported by the weight of authority. It is also based on sound principles.

The theory that property exists only in letters of literary value has no foundation in reason or principle. Is a letter written by an author to have the benefit of protection, because it will command a price in the publisher's market, while that of the merchant is outlawed, although the information it contains may be of the highest pecuniary value in the marts of trade? The correspondence of merchants, bankers, and other business men is frequently freighted with information of great value. Its untimely publication may be a serious loss to the owner, its possession a prized gain to the possessor. Is protection to be denied to such letters because they lack literary value? It is not true that the contents of a letter, in order to possess the attributes of property, must have a value, either in literary or commercial markets, or that a letter is valuable to the writer only as far as it may be useful to others. The value of the composition for purposes of publication will enter into the question of damages, when the writer seeks to recover for a loss of profits which he has suffered by unlicensed publication. But, when it is sought to prevent or to restrain publication, the court cannot rightly require the owner to prove that his property is valuable to the community. His

[1] Grigsby *v.* Breckinridge, 2 Bush (Ky.), 480. See also Denis *v.* Leclerc, 1 Martin (Orleans T.), 297.

ownership entitles him to say that his composition shall not be published. What value it may have to society, or how far it may be useful to the public, is immaterial. A letter may be without literary value, and destitute of any quality to render it useful to the community, and yet it may be valuable to the writer. A brief business note may play an important part in commercial transactions. A communication relating to domestic matters, though void of general interest, may be valued by a circle of relatives and treasured by their descendants. Publication may bring upon the writer financial embarrassment, humiliation, or substantial injury. Whatever may be the nature of the letter, its merit, or its value, the law gives to the writer the right to determine what use, not within the implied purposes for which it is sent, shall be made of its contents. It has never been doubted that this right exists before the letter has gone from the writer; and it is equally clear that the right is not lost by the transmission of the letter.

Rights of Receiver. — What rights the receiver has in a letter has not been clearly defined. It is conceded that the material on which it is written becomes his property. In Pope *v.* Curl, Lord Hardwicke expressed the opinion that "possibly the property in the paper may belong to him."[1] This doctrine was expressly affirmed in the recent English case of Oliver *v.* Oliver,[2] where it was held that the receiver becomes the owner of the material property in the letter, and may maintain an action for detinue against any person into whose possession the letters have passed. In this case the action was brought against the writer, to whom the letters had been voluntarily returned by the receiver. The question of fact was submitted to the jury, whether the letters had been returned with the understanding that the writer might keep them as his own property, or whether they had been merely deposited with him as a bailee. The jury found the latter to be the fact, and the court held that the material property in the letters belonged to the receiver. In harmony with this doctrine, it has been held by the Kentucky Court of Appeals that the writer has no legal remedy for recovering his letters after they have passed into the posses-

[1] 2 Atk. 342.

[2] 11 C. B. N. S. 139.

sion of the receiver.[1] Hence the receiver is not bound to preserve the letters for the benefit of the writer. He may destroy them as soon as received. There seems to be no principle of property to prevent him from giving them to another; but such person would thereby acquire no rights of publication.[2] It has never been claimed that the receiver, with an exception which will be considered further on, acquires any property in the contents of the letter, or any right to publish it without the consent of the writer.[3] In Pope *v.* Curl it was expressly held that Pope had no right to interfere with the publication of the letters which had been written to him by Swift, for the good reason that they were the literary property of the latter.[4] The privileges of the receiver are restricted to a private use of the letter. He may have a right to read it to others, or to let others read it, when such reading does not amount to a publication. But, without the express or implied consent of the writer, he is not entitled to make of the letter any use which may be properly considered as a publication.

In Eyre *v.* Higbee, it was held by the New York Supreme Court, that letters written by Washington to his secretary, Colonel Tobias Lear, were not salable assets in the hands of the administrator of the latter, but that they belonged to the widow and next of kin.[5]

May Receiver Publish for Purposes of Vindication? — The doctrine has gained currency that the receiver of a letter acquires in its contents a special or qualified property or right, which entitles him to publish it for the purpose of vindicating his reputation from false charges or unjust imputations made by the writer. This theory was first announced in 1813, by Sir Thomas Plumer, who on this ground dissolved an injunction,

[1] Grigsby *v.* Breckinridge, 2 Bush (Ky.), 480. See also Granard *v.* Dunkin, *infra*.

[2] Grigsby *v.* Breckinridge, *supra*.

[3] This statement must be qualified by a reference to Granard *v.* Dunkin, 1 Ball & B. 207, wherein the Irish Chancery Court, in 1809, granted an injunction in favor of the executrix of Lady Tyrawley, enjoining the threatened publication of letters which had been written to the latter, and ordering them to be delivered to the former. The decree for such delivery was proper, because the property in the paper had belonged to Lady Tyrawley; but she had acquired no title to the literary property in the letters which had been received by her, and hence there was no ground on which the injunction against publication could rest.

[4] 2 Atk. 342.

[5] 22 How. Pr. (N. Y.) 198.

which had been granted by Lord Eldon, restraining the defendant in Perceval *v.* Phipps from publishing letters written by the plaintiff.[1] This question has not been a direct issue in any other reported case; but the views of Sir Thomas Plumer are supported by *dicta* in two American cases.[2] In one of these, Mr. Justice Story declared in emphatic, but extrajudicial, language that the receiver is entitled to publish a letter for purposes of vindication; but, in his treatise on Equity Jurisprudence, he has expounded the law to the contrary.[3]

[1] 2 Ves. & B. 19.

[2] Folsom *v.* Marsh, 2 Story, 111; Woolsey *v.* Judd, 4 Duer (N. Y.), 407. Lord Eldon would not deny that there might be a case, such as that of Perceval *v.* Phipps, "where the acts of the parties supply reasons for not interfering;" but in the case before him he found that publication was not necessary to vindicate the receiver, and held that whatever right to publish the latter might have had he renounced by returning the letters to the writer, although he retained copies. Gee *v.* Pritchard, 2 Swans. 402, 426. In Palin *v.* Gathercole, 1 Coll. 565, the defendant, on motion to dissolve the injunction which had been granted restraining him from publishing certain letters written by the plaintiff, pleaded that their publication was for the purpose of vindicating his reputation. Vice-Chancellor Bruce, without passing on the merits of the question, held that the deferdant was barred from making this defence, and refused to dissolve the injunction.

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

It seems to be conceded that the privilege of publication for vindicatory purposes is personal to the receiver, and cannot be exercised by a third person, either with or without the consent of the receiver.[1]

The doctrine that the receiver acquires the right to publish a letter for the purpose of vindicating himself against charges or imputations made by the writer, although it has received strong extrajudicial approval, is in conflict with the fundamental principles on which all the cases relating to property in letters have been decided. These cases have been, and all similar cases must be, determined on principles of property. Protection has been extended to the writer, because he has literary property in the letter which he has written, and because his rights are not lost by the transmission of the letter. Unlicensed publication by the receiver of a letter has been declared unlawful, on the sole ground that it is a violation of the literary property therein. The receiver can acquire no right to make a public use of the literary property in a letter, unless he has the consent of the writer, or has become vested with a right of ownership. His right to publish is to be determined exclusively on principles of property. But the privilege of publication for purposes of vindication is not a right of property, and cannot be defended on any principles of

to subserve their own private purposes of interest or curiosity or possession." § 948.

2 Story, 110.

In his Equity Jurisprudence, the same authority says: "For the purposes of public justice, publicly administered, according to the established institutions of the country, in the ordinary modes of proceeding, private letters may be required to be produced and published. But it by no means follows, that private persons have a right to make such publications on other occasions, upon their own notion of taking the administration of justice into their own hands, or for the purpose of vindicating their own conduct, or of gratifying their own enmity, or of indulging a gross and diseased public curiosity, by the circulation of private anecdotes, or family secrets, or personal concerns." Vol. ii.

This doctrine is manifestly contrary to the views above quoted from the opinion in Folsom *v.* Marsh. The decision in this case was rendered in 1841. The first edition of the Equity Jurisprudence appeared in 1836. But it cannot be said that the latest or the modified views of Judge Story on this question were expressed in the judicial opinion cited; for the exposition of the law given in the first edition of the Equity Jurisprudence was retained unchanged in the following editions, of which the third was published in 1843, — two years before the author's death, and two years after Folsom *v.* Marsh had been decided.

[1] Folsom *v.* Marsh, 2 Story, 111; Woolsey *v.* Judd, 4 Duer (N. Y.), 379, 407.

property. To give to the receiver this privilege is to empower him to publish valuable literary compositions, for the purpose of redressing a real or supposed injury to himself, and thus to destroy a safeguard which the law has guaranteed to the property of the writer. It makes the receiver the sole judge of whether the wrong is real or fancied, and empowers him, in order to redress an alleged injury to himself, to inflict a greater one upon the writer. The law specially provides remedies for injuries done to the reputation. If the receiver of a letter has suffered in reputation or feelings by any thing said, written, or done by the writer, he is left to seek redress by the means usual and proper in such cases. He has no right to take the law into his own hands, as it were, and to appropriate the property of another, in order to remedy a wrong for which the law has specially provided.

CHAPTER II.

WHAT MAY BE COPYRIGHTED.

In the United States, statutory copyright may be obtained for a book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or negative thereof, painting, drawing, chromo, statue, statuary, and a model or design intended to be perfected as a work of the fine arts.[1] The copyright in all these productions is governed by the same statute, and is secured for the same term and on the same conditions. Substantially the same things may be copyrighted in England; but protection is provided by different statutes, and the copyright granted is not the same for all kinds of productions.

Books.

The word "book" has been used in the English and American copyright statutes since the first one was passed, in the reign of Queen Anne. In England, its meaning was not defined by Parliament till 1842. In the United States it has been left entirely to judicial determination.

Great Britain. — As used in this connection, the word has received a far more comprehensive signification than it has in ordinary use. In England, it is defined by statute "to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published."[2] Long before the meaning of the word had been thus defined by the legislature, a construction, not less liberal, had been given to it by the judiciary. As early as 1777, the Court of King's Bench held a sonata to be a book or writing, within the meaning of the statute of Anne,[3] and all

[1] U. S. Rev. St. s. 4952.

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

[3] Bach *v.* Longman, Cowp. 623. "The words of the act of Parliament,"

musical compositions were treated as books before they were mentioned in the statute of Victoria.[1] In 1803, Lord Ellenborough was inclined to think that the words of a song called Abraham Newland, published on a single sheet of paper, could not be considered a book. He therefore nonsuited the plaintiff, but reserved the question for the opinion of the court. The Court of King's Bench afterward set aside the nonsuit, and ordered a new trial. The case does not appear to have been brought to trial again.[2] In 1788, the copyright in "a certain

said Lord Mansfield, "are very large: 'books and other writings.' It is not confined to language or letters. Music is a science; it may be written and the mode of conveying the ideas is by signs and marks. A person may use the copy by playing it; but he has no right to rob the author of the profit, by multiplying copies and disposing of them to his own use. If the narrow interpretation contended for in the argument were to hold, it would apply to algebra, mathematics, arithmetic, hieroglyphics. All these are conveyed by signs and figures. There is no color for saying that music is not within the act."

"Books and other writings" were mentioned in the preamble of the act; but in the enacting clause the word book alone was used.

[1] See authorities cited *post*, p. 175, note 3. In D'Almaine *v.* Boosey, 1 Y. & C. Exch. 299, Lord Abinger said: "I spent three or four days at Stationers' Hall in order to ascertain what entries were made under the act of Parliament, and I found not only that short publications on single sheets of paper were entered as books, but also a great deal of music. There is no doubt, therefore, that printed music, in whatever form it may be published, is to be considered in reference to proceedings of this nature, as a book."

[2] Hime *v.* Dale, 2 Camp. 27, note *b*. Mr. Erskine at the bar maintained that a broad meaning should be given to the word book as used in the statute. He contended "that the legislature could never have meant to make the operation of the statute depend upon the type in which any composition is printed, or the form in which it is bound up. This song might easily have been extended over several sheets, and rendered a duodecimo volume. In Bach *v.* Longman, Cowp. 623, it was decided that music is within the act, and musical compositions most generally appear in this fugitive form. It never occurred to the Lord Chancellor who directed the issue, or to Lord Mansfield, or any of the judges who decided the case, that the form of the publication could make any difference; and therefore it is not stated. If a different construction were put upon the act, many productions of the greatest genius, both in prose and verse, would be excluded from its benefits. But, might the papers of the Spectator, or Gray's Elegy in a Country Church-yard, have been pirated as soon as they were published, because they were first given to the world on single sheets? The voluminous extent of a production cannot in an enlightened country be the sole title to the guardianship the author receives from the law. Every man knows that the mathematical and astronomical calculations which will enclose the student during a long life in his cabinet, are frequently reduced to the compass of a few lines; and is all this profundity of mental abstraction, on which the security and happiness of the species in every part of the globe depend, to be excluded from the protection of British jurisprudence?

"But there is nothing in the word

musical air, tune, and writing," on one sheet, was protected;[1] and, in 1809, a single sheet of music was held to be a book within the meaning of 8 Anne, c. 19. In the latter case, "the judges seemed unanimously of opinion that it could not depend upon the form of the publication whether it were entitled to the privileges of the statute or not; that a composition on a single sheet might well be a book within the meaning of the legislature."[2] In a later case, wherein copyright was claimed under 54 Geo. III. c. 156, in a piece of instrumental music, Chief Justice Abbott, in delivering the judgment of the King's Bench, expressed the opinion that "any composition, whether large or small, is a book within the meaning of this act of Parliament."[3]

United States.—The comprehensive meaning given to the word book, in England, has been adopted in this country.[4] "A book within the statute need not be a book in the common and ordinary acceptation of the word; viz., a volume made up of several sheets bound together; it may be printed only on one sheet, as the words of a song or the music accompanying it. . . . The literary property intended to be protected by the act is not to be determined by the size, form, or shape in which it makes its appearance, but by the subject-matter of the work. Nor is this question to be determined by reference to lexicog-

book to require that it shall consist of several sheets bound in leather, or stitched in a marble cover. Book is evidently the Saxon *boc*, and the latter term is from the *beech-tree*, the rind of which supplied the place of paper to our German ancestors. The Latin word *liber* is of a similar etymology, meaning originally only the bark of a tree. Book may therefore be applied to any writing; and it has often been so used in the English language. Sometimes the most humble and familiar illustration is the most fortunate. The Horn Book, so formidable to infant years, consists of one small page protected by an animal preparation, and in this state it has universally received the appellation of a book. So, in legal proceedings, the copy of the pleadings after issue joined, whether it be long or short, is called the paper book or the demurrer book. In the Court of Exchequer, a roll was anciently denominated a book, and so continues in some instances to this day. An oath as old as the time of Edward I. runs in this form: 'And you shall deliver into the Court of Exchequer a book fairly written,' &c. But the book delivered into court in fulfilment of this oath, has always been a roll of parchment."

[1] Storace *v.* Longman, 2 Camp. 27, note *a*.

[2] Clementi *v.* Golding, 2 Camp. 32.

[3] White *v.* Geroch, 2 Barn. & Ald. 298.

[4] Clayton *v.* Stone, 2 Paine, 382; Scoville *v.* Toland, 6 West. Law Jour. 84; Drury *v.* Ewing, 1 Bond, 540.

raphers to ascertain the origin and meaning of the word book. It will be more satisfactory to inquire into the general scope and object of the legislature, for the purpose of ascertaining the sense in which the word book was intended to be used in the statute." [1] In a recent case, the Circuit Court of the United States held that a diagram with directions for cutting garments printed on a single sheet was a book within the meaning of the statute.[2]

A mere label [3] capable of no other use than to be pasted on

[1] Thompson, J., Clayton *v.* Stone, 2 Paine, 383, 386.

[2] Drury *v.* Ewing, 1 Bond, 540. The plaintiff claimed copyright in a chart entitled, "The ladies' chart for cutting dresses and basques for ladies, and coats, jackets, &c., for boys." Mr. Justice Leavitt gave the following reasons why this should be entitled to protection as a book: —

"As a first impression from an inspection of the chart, the mind repudiates the conclusion that it is a book; and when the point was first suggested it occurred to me it would require a forced construction of the statute to bring it fairly within the meaning of that term. The chart, as printed and published for use, is contained on one large sheet, representing a series of diagrams interspersed with printed instructions as to the mode of using them in taking measurements for and cutting certain parts of ladies' dresses. As necessary to the practical use of the diagrams, they are pasted on thick paper or paste-board, corresponding with and showing precisely the forms of the diagrams. The exact dimension and form of every part of the garment intended to be cut is indicated by a series of numerals placed along the outer edges of the diagrams thus arranged and by means of dots or marks at the proper figures, the exact size and course of each section of the garment is ascertained with mathematical precision. Now it may well be conceded, that the chart as printed on the sheet, or as pasted in parts for practical use, is not a book, according to the more popular sense of the word. But in giving effect to the statute according to its obvious design and spirit I can see no necessity for restricting the word to a volume. . . . I am therefore inclined to adopt the liberal construction given by the English courts to their statute, and to hold that Mrs. Drury's chart is within the protection of our statute. She could doubtless have given it to the world in a succession of sheets bound together and constituting a volume, but it is obvious that the chart for practical purposes is more easily understood, and therefore more useful, printed on a single sheet large enough to exhibit all the diagrams at one view. I cannot perceive why her rights as an authoress or inventress should be prejudiced by this form of publication. If the chart, as the court is bound, for reasons before intimated, to presume is original with her, — the product of thought and mental toil, — her claim is by no means destitute of merit and she is justly entitled to all the benefits which the law confers.

". . . Adopting this view of the law it is not necessary to decide whether Mrs. Drury's copyright can be sustained as a chart or print. These words are used in the statute as legitimate subjects of a copyright, and it would not imply a very forced construction to hold that the copyrighted work of Mrs. Drury's is included in one or both of these terms. The authorities, I think, would fully sustain such a conclusion." Ibid. 545–548.

[3] Scoville *v.* Toland, 6 West. Law

a bottle, and a scoring-sheet or "tablet,"[1] used in the game of cricket, have been held not to be books within the law.

While, then, the legislature has passed laws for the protection of literary property in "books," without specifying more definitely the kinds of compositions intended to be included, the courts have construed those laws so as to embrace within their protection the entire field of honest literary labor. Hence, the literary productions in which valid copyright will subsist are almost, if not quite, as unlimited in variety as are the productions themselves. Books entitled to the protection of copyright embrace the profoundest work on the universe and the simplest rhyme for the nursery; the most fascinating production of the imagination and the dryest catalogue of names.

All Contents of Book covered by Copyright. — The copyright protects the whole and all the parts and contents of a book. When the book comprises a number of independent compositions, each of the latter is as fully protected as the whole.[2] And so the copyright protects not only the text, but also any engravings, illustrations, figures, &c., contained in the book.[3] The copyright will not extend to any part which is not a proper subject of copyright. But the fact that a part may not be entitled to protection does not affect the copyright in the rest. The copyright is valid to the extent of the matter which will stand all the tests of the law.[4] "The courts of justice," said Lord Kenyon, "have been long laboring under an error, if an author have no copyright in any part of a work unless he have an exclusive right to the whole book."[5]

Jour. 84; Coffeen *v.* Brunton, 4 McLean, 516. The act of June 18, 1874, provides for the registration of labels in the patent-office. See *post*, p. 178.

[1] Page *v.* Wisden, 20 L. T. N. S. 435.

[2] White *v.* Geroch, 2 Barn. & Ald. 298; D'Almaine *v.* Boosey, 1 Y. & C. Exch. 288.

[3] Roworth *v.* Wilkes, 1 Camp. 94; Wilkins *v.* Aikin, 17 Ves. 422; Bradbury *v.* Hotten, Law Rep. 8 Exch. 1; Cobbett *v.* Woodward, Law Rep. 14 Eq. 407. "It appears to me that a book must include every part of the book: it must include every print, design or engraving which forms part of the book, as well as the letter-press therein; which is another part of it." Parker, V. C., Bogue *v.* Houlston, 5 De G. & Sm. 275.

[4] Barfield *v.* Nicholson, 2 Sim. & St. 1; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402. "There are numerous cases showing that where the parts of a work can be separated, there may be copyright in any distinct part of it. . . . It matters not whether the copyright is for the entire work or for a part only." Giffard, V. C., Low *v.* Ward, Law Rep. 6 Eq. 418.

[5] Cary *v.* Longman, 1 East, 360.

Title Alone not Subject of Copyright. — The mere title of a book, magazine, newspaper, or other publication, is not a subject of copyright.[1] A title is treated as a trade-mark, in which the owner's rights are recognized and protected on general principles of equity.[2] In the United States, the title of any publication may doubtless be registered under the statute relating to trade-marks.[3] In such case, the owner may become entitled to the statutory remedies; provided, of course, the title registered has the requisites of a valid trade-mark.

New Editions.

Successive editions of a work which do not differ from the first are covered by the original copyright. This will not

[1] **Am.** Osgood *v.* Allen, 1 Holmes, 185; Jollie *v.* Jaques, 1 Blatchf. 618, 627; Benn *v.* Leclerq, 18 Int. Rev. Rec. 94; Isaacs *v.* Daly, 7 Jones & Sp. (39 N. Y. Superior Ct.) 511. **Br.** Correspondent Newspaper Co. *v.* Saunders, 12 L. T. N. S. 540; Maxwell *v.* Hogg, Law Rep. 2 Ch. 307; Kelly *v.* Hutton, 3 Id. 708. In Osgood *v.* Allen, Mr. Justice Shepley said: —

"By the plain terms of the statute, the copyright protected is the copyright in 'the book,' the word book being used to describe any literary composition. Although a printed copy of the title of such book is required before the publication to be sent to the librarian of Congress, yet this is only as a designation of the book to be copyrighted, and the right is not perfected under the statute until the required copies of such copyright book are, after publication, also sent. It is only as part of the book and as the title to that particular literary composition, that the title is embraced within the provision of the act. It may possibly be necessary in some cases, in order to protect the copyrighted literary composition, for courts to secure the title from piracy, as well as the other productions of the mind of the author in the book. The right secured by the act, however, is the property in the literary composition, the product of the mind and genius of the author, and not in the name or title given to it. The title does not necessarily involve any literary composition; it may not be, and certainly the statute does not require, that it should be the product of the author's mind. It is not necessary that it should be novel or original. It is a mere appendage which only identifies and frequently does not in any way describe the literary composition itself or represent its character. By publishing, in accordance with the requirements of the copyright law, a book under the title of the life of any distinguished statesman, jurist, or author, the publisher could not prevent any other author from publishing an entirely different and original biography under the same title. When the title itself is original and the product of the author's own mind, and is appropriated by the infringement, as well as the whole or a part of the literary composition itself, in protecting the other portions of the literary composition courts would probably also protect the title. But no case can be found either in England or this country in which, under the law of copyright, courts have protected the title alone separate from the book which it is used to designate." *Supra*, 192.

[2] See authorities cited in considering titles in latter part of Chap. XI.

[3] U. S. Rev. St. ss. 4937–4947.

protect any new matter in a subsequent edition, for the obvious reason that such matter was not in existence when the copyright vested.[1] Another copyright, however, may be obtained for any edition which is substantially different from the preceding ones. Such edition is regarded by the law as a new and original work.

Whether an independent copyright will vest in any subsequent edition will depend on the amount of new matter which it contains, or the extent and character of the revision which has been made in the preceding edition. A simple reprint of the original, or other previous edition, will be entitled to no other protection than is given to the preceding edition. In such case, there is nothing new on which to found a valid claim for copyright. On the other hand, a subsequent edition may contain much new matter, or a thorough recast of the old. It may be so enlarged or condensed, or otherwise revised, as to become substantially a new work. As such, it will be entitled to copyright. But between these two extremes of a simple reprint and a substantially new work may arise cases of so-called new editions, which will present questions of extreme nicety and great difficulty in determining whether there is a basis for a new copyright. The main question is to be determined by the facts in each case. The general rule is that each successive edition, which is substantially different from the preceding ones, or which contains new matter of substantial amount or value, becomes entitled to copyright as a new work.[2] It is immaterial whether the new edition is produced by condensing, expanding, correcting, rewriting, or otherwise altering the original; or by adding notes, citations, &c. Nor is it

[1] Farmer *v.* Calvert Lithographing, Engraving, and Map-Publishing Co., 5 Am. L. T. R. 168, 173; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402, 415.

[2] **Br.** Tonson *v.* Walker, 3 Swans. 672; Cary *v.* Faden, 5 Ves. 24; Cary *v.* Longman, 1 East, 358; Hedderwick *v.* Griffin, 3 Sc. Sess. Cas. 2d ser. 383; Black *v.* Murray, 9 Id. 3d ser. 341. **Am.** Gray *v.* Russell, 1 Story, 11; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402; Banks *v.* McDivitt, 13 Blatchf. 163.

In Black *v.* Murray, Lord Ardmillan said: "A new edition is not necessarily a subject of copyright, but it may be so. There must be some originality in it; it may be in new thought, or in new illustration, or in new explanatory and illustrative annotation, or even, in some peculiar instances, in simply new arrangement. If, in any of these respects, there is independent mental effort, then, in the result of that mental effort, there may be copyright." *Supra*, 353.

essential that the new edition shall be an improvement on the old. The question is simply whether it is substantially different.

The requirements of the law with respect to the extent and value of the new or revised matter are not exacting. But, while the changes and additions may be very limited in extent and importance, they must be substantial in both of these respects. A few merely colorable alterations in the text, or the addition of a few unimportant notes, will not be enough to sustain copyright.[1] In Hedderwick *v.* Griffin, in the Scotch Court of Session, the plaintiff claimed copyright in a revised edition of Dr. Chalmers's works.[2] The revision, which had been made by the author himself, consisted chiefly in a change of titles of certain articles, a few corrections in language and typography, and the omission of some passages which had appeared in former editions. There was no British copyright in the original works. The court was of opinion that the

[1] In Black *v.* Murray, Lord Kinlock said: "I think it clear that it will not create copyright in a new edition of a work, of which the copyright has expired, merely to make a few emendations of the text, or to add a few unimportant notes. To create a copyright by alterations of the text, these must be extensive and substantial, practically making a new book. With regard to notes, in like manner, they must exhibit an addition to the work which is not superficial or colorable, but imparts to the book a true and real value, over and above that belonging to the text. This value may perhaps be rightly expressed by saying that the book will procure purchasers in the market on special account of these notes. When notes to this extent and of this value are added, I cannot doubt that they attach to the addition the privilege of copyright. The principle of the law of copyright directly applies. There is involved in such annotation, and often in a very eminent degree, an exercise of intellect and an application of learning, which place the annotator in the position and character of author, in the most proper sense of the word. The skill and labor of such an annotator have often been procured at a price which cries shame on the miserable dole which formed to the author of the text his only remuneration. In every view, the addition of such notes as I have figured puts the stamp of copyright on the edition to which they are attached. It will still of course remain open to publish the text, which *ex hypothesi* is the same as in the original edition. But to take and publish the notes will be a clear infringement of copyright." 9 Sc. Sess. Cas. 3d ser. 355.

[2] 3 Sc. Sess. Cas. 2d ser. 383.

"The extent of the alterations in which the copyright was claimed," says the report, "might be judged of from the fact that the whole of the alleged piracies, amounting to seventy-four in number, and scattered over five hundred and sixty-eight closely printed octavo pages, in very small type, when collected together, would not occupy half a page out of the five hundred and sixty-eight." Ibid. 386.

alterations were insufficient to sustain copyright, and further-held that the plaintiff's title was not good.

The copyright in each edition will extend from the date of that edition, and will be wholly independent of the copyright in any preceding one.[1]

There is no limit to the number of editions of the same work for which copyrights may thus be obtained. It is immaterial whether the copyright in the original, or any preceding, edition has or has not expired. In the latter case, no one but the author, or some one with his authority, has a right to publish a new edition.[2] But any one may revise or annotate and republish a book not protected by copyright, and obtain a valid copyright for the new edition.[3]

As early as 1801, in a case where the plaintiff had republished Patterson's Road Book, with extensive corrections and alterations made by himself, Lord Kenyon, in delivering the opinion of the King's Bench, said that "certainly the plaintiff had no title on which he could found an action to that part of his book which he had taken from Mr. Patterson's; but it is as clear that he had a right to his own additions and alterations, many of which were very material and valuable; and the defendants are answerable at least for copying those parts in their book."[4]

Questions may arise as to whether the copyright in any edition covers simply the revised parts and the new matter, or extends equally to the entire work, including the parts reprinted from a former edition. This also must be determined by the character of the revision. If the entire work is rewritten, copyright will attach to the whole. And this may be true when the text has been generally amended and revised. But if the

[1] Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402, 416; Murray *v.* Bogue, 1 Drew. 353.

[2] Sweet *v.* Cater, 11 Sim. 572.

[3] Tonson *v.* Walker, 3 Swans. 672; Gray *v.* Russell, 1 Story, 11.

[4] Cary *v.* Longman, 1 East, 358. See also Cary *v.* Faden, 5 Ves. 24, in which the same work was in controversy. It appeared that Patterson's Road Book was copyrighted, and that the plaintiff had no authority to revise and publish it. Hence the remark of the Lord Chancellor, in Cary *v.* Faden: "What right had the plaintiff to the original work? If I was to do strict justice, I should order the defendants to strike out of their book all they have taken from the plaintiff, and reciprocally the plaintiff to take out of his all he has taken from Patterson."

new edition is simply a reprint of the text of a preceding one, with additions in the form of new chapters, or paragraphs, or foot-notes; in other words, if the new matter is wholly distinct and separable from the old, although being a continuation of or an addition to it, the new copyright, as a general rule, will cover only what is new.[1] So, also, if only a separable part of a book has been revised, — as, for instance, one or two chapters, — the new copyright, in general, will not extend to the unchanged parts. No one without authority will be entitled to publish this new or revised matter, either separately or in connection with the original. But when the copyright in the original has expired, its unauthorized publication will not infringe any revised edition.

Any person will be entitled to copyright in his annotated edition of the work of another, provided he has a right so to use the original. In such case, the copyright will protect the annotations as combined with the text.[2]

Is Change of one Word enough to create Title to Copyright in New Edition. — In the Scotch case of Black *v.* Murray,[3] the interesting question was discussed, whether an edition of a poem of eleven stanzas, which differed from the original in but a single word, became thereby entitled to copyright. The poem was Sir Walter Scott's Glenallan's Earl. As originally published, it contained these lines: —

> "Were I Glenallan's Earl this tide,
> And ye were Roland Cheyne,
> The spear should be in my horse's side,
> And the bridle upon his mane."

In preparing the ballad for a new edition of the Antiquary, Scott made a marked improvement by substituting "spur" for "spear" in the third line of the stanza here quoted. With this exception, the second edition of the ballad was a reprint of the original in which the copyright had expired. Lord Deas contended that the question of copyright was to be determined in this case, not by the extent of the revision, but by the change

[1] Cary *v.* Longman, 1 East, 358; Black *v.* Murray, 9 Sc. Sess. Cas. 3d ser. 341.

[2] Tonson *v.* Walker, 3 Swans. 672; Black *v.* Murray, *supra*; Lawrence *v.* Dana, 4 Am. L. T. R. N. S. 402; Banks *v.* McDivitt, 13 Blatchf. 163.

[3] *Supra*.

wrought in the author's meaning. "I cannot think," he said, "that merely because the alteration consists in one word, that is necessarily conclusive against its being of sufficient importance to create copyright in the new edition. A word may often be of very great importance. I suggested, in the course of the discussion, the supposition that, in a new edition of the Bible, the first verse in Genesis, instead of bearing, 'In the *beginning* God created the heaven and the earth,' were made to run, 'In the *end* God created the heaven and the earth,' this would not the less alter or affect the whole book, because the alteration consisted in a single word. . . . We must look to what the poem is about. It is simply this: The knight says in substance to his squire Roland Cheyne, 'Here is this hostile chieftain coming upon us with twenty thousand men, and we are only two hundred. It would be disgraceful to run, and yet to fight would be wondrous peril. What would you do if you were in my place?' The squire's answer is:—

> 'Were I Glenallan's Earl this tide,
> And ye were Roland Cheyne,
> The spur should be in my horse's side,
> And the bridle upon his mane.'

That is to say, that if he were the earl he would slacken the bridle, put spurs to his horse, and ride straight at the foe. Can anybody read that verse with the context, and suppose the meaning to be that he would lay the bridle on the horse's mane, and thrust his spear into the horse's side? It would not make such nonsense, if you were to hold him to have been made to say that the spear would be *at* his horse's side, or *on* his horse's side. Still it would be weak. The spear may be supposed to have been previously in its proper place like the rest of the accoutrements; and what the squire is speaking about is the alteration he would make for rushing at the enemy full speed. He would lay the bridle on the horse's mane, and strike the spur into his side. The sense is destroyed if you make it any thing else. The whole edition was published with that blot. I would not keep a copy of that edition in my library if the other could be had, or without correcting it, if it could not. It would unquestionably be a blot of a most disagreeable kind. The alteration

was, in my opinion, a material alteration ; and I am, therefore, of opinion that the second edition of the poem was copyright."[1]

Lord Kinlock expressed a decided opinion that the change of a single word was not enough to create a title to copyright. The other two judges, the Lord President and Lord Ardmillan, considered it unnecessary to determine this question ; because the defendant, in republishing the poem, while copying the plaintiff's revised reading, had also changed a word in one of the stanzas, which introduced a reading different from that found in either the original or the revised edition of the ballad. The court regarded this as evidence that the defendant was not guilty of "a slavish adherence to the copyright edition," and

[1] 9 Sc. Sess. Cas. 3d ser. 351–352. Lord Deas further said : "The case before us is the case of a poem of eleven verses only, which no one can read without seeing that it is a beautifully finished composition, the alteration of a single word of which may be sufficient to mar the whole. The alteration of a word in any one verse might be material. Suppose, for instance, that in the second verse, where it says, —

'The cronachs cried on Bennachie,
And down the Don and a',"

it had been written, —

'The *children* cried on Bennachie,
And down the Don and a',"

that would have made the whole thing ludicrous. Or, suppose in the next verse, where it is said, —

'They saddled a hundred milk-white steeds,
They hae bridled a hundred black,
With a chafron of steel on each horse's head
And a good knight upon his back,'

it had been said in the last line, 'and a *woman* upon his back,' what kind of an effect would that have had? Again, take the last verse : —

'My horse shall ride through ranks sae rude,
As through the moorland fern,'

meaning that he would ride as easily through the hostile ranks as he would through the moorland fern. But suppose the word 'and' had been substituted for 'as,' so that he was made to say, —

'My horse shall ride through ranks sae rude
And through the moorland fern,'

that would not have been ludicrous like the above examples, but it would have been so weak and meaningless as to have destroyed the vigor of the whole poem. It is impossible to say, therefore, that the alteration of a word may not be of great importance. Mention was made, a little ago, of the song we are all familiar with, The Flowers of the Forest. Now, suppose that the first line of that song, as published, had been, 'The fowls of the forest,' or perhaps, 'The fools of the forest.' The last, for any thing I know, might have been defended by those who defend 'spear' in the present instance; for, Shakespeare has made classical 'a fool i' the forest,' and Sir Walter was fond of introducing a sylvan character of that kind into his novels. But I think few people would doubt that the author who corrected the word 'fowls' or 'fools,' in the only edition he found in circulation of his song, into 'flowers,' would have had copyright in the new edition, although he had none in the old.

"The question, therefore, comes to be, not the extent of the alteration in the present instance, but whether it was material." Ibid. 351–353.

held, in the language of the Lord President, that "the proprietors of the copyright must just console themselves with the reflection that while the pirate has here stole a very little bit of their property, he has spoiled the poem otherwise by an emendation of his own."[1]

While this decision does not determine the question whether in any case the change of a single word may be sufficient to create a title to copyright in a new edition, the discussion is important as showing that when a material change has been wrought in the substance of a composition by very slight alterations in its form, the court will consider the effect produced, — the improved meaning, rather than the extent of the verbal changes.

Compilations.

The doctrine is well settled in England and the United States, that existing materials selected from common sources, and arranged and combined in an original and useful form, become a proper subject of copyright. This is equally true whether the compilation consist wholly of selected matter, or of such matter combined with original composition; and, in either case, it is immaterial whether the materials are obtained from published or unpublished sources, or whether the selections are used bodily, or their substance is given in the language of the compiler. Such works are often the result of industry, learning, and good judgment, and are useful and valuable contributions to knowledge. They are entitled to, and will receive, the same protection extended to productions wholly original.[2]

[1] 9 Sc. Sess. Cas. 3d ser. 350.

[2] "Copyright may justly be claimed by an author of a book who has taken existing materials from sources common to all writers, and arranged and combined them in a new form, and given them an application unknown before, for the reason that in so doing he has exercised skill and discretion in making the selections, arrangement, and combination, and having presented something that is new and useful, he is entitled to the exclusive enjoyment of his improvement as provided in the copyright act. Books 'made and composed' in that manner are the proper subjects of copyright; and the author of such a book has as much right in his plan, arrangement, and combination of the materials collected and presented, as he has in his thoughts, sentiments, reflections, and opinions, or in the modes in which they are therein expressed and illustrated; but he cannot prevent others from using the old material for a different purpose. All he acquires by virtue of the copyright is 'the sole right and liberty of

These principles have been judicially recognized in the case of the following productions: general miscellaneous compilations;[1] annotations consisting of common materials;[2] dictionaries;[3] books of chronology;[4] gazetteers;[5] itineries, road and guide books;[6] directories;[7] maps and charts;[8] calendars;[9] catalogues;[10] mathematical tables;[11] a list of hounds;[12] abstracts of titles to lands;[13] and collections of statistics,[14] statutory forms,[15] recipes,[16] and designs.[17]

The compilation may consist of common facts and information which the compiler himself has reduced to writing, as in the case of a catalogue or a directory; of materials obtained from manuscripts, as a collection of statistics taken from unpublished official records;[18] or of selections made from

printing, reprinting, publishing, and vending such book' for the period prescribed by law. Others may use the old materials for a different purpose, but they cannot copy and use his improvement, which includes his plan, arrangement, and combination of the materials, as well as the materials themselves, of which the book is made and composed." Clifford, J., Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 423.

[1] **Br.** Jarrold *v.* Houlston, 3 Kay & J. 708; Pike *v.* Nicholas, 20 L. T. N. S. 906, on ap. Law Rep. 5 Ch. 251; Mack *v.* Petter, Law Rep. 14 Eq. 431; Hogg *v.* Scott, 18 Id. 444. **Am.** Gray *v.* Russell, 1 Story, 11; Emerson *v.* Davies, 3 Id. 768; Webb *v.* Powers, 2 Woodb. & M. 497; Greene *v.* Bishop, 1 Cliff. 186; Lawrence *v.* Cupples, 9 U. S. Pat. Off. Gaz. 254.

[2] Story's Executors *v.* Holcombe, 4 McLean, 306; Lawrence *v.* Dana, 2 Am. Law T. R. N. S. 402; Banks *v.* McDivitt, 13 Blatchf. 163; Black *v.* Murray, 9 Sc. Sess. Cas. 3d ser. 341.

[3] Barfield *v.* Nicholson, 2 Sim. & St. 1; Spiers *v.* Brown, 6 W. R. 352.

[4] Trusler *v.* Murray, 1 East, 362, note.

[5] Lewis *v.* Fullarton, 2 Beav. 6.

[6] Cary *v.* Faden, 5 Ves. 24; Cary *v.* Longman, 1 East, 358; Murray *v.* Bogue, 1 Drew. 353.

[7] Kelly *v.* Hooper, 4 Jur. 21; Kelly *v.* Morris, Law Rep. 1 Eq. 697; Morris *v.* Ashbee, 7 Id. 34; Mathieson *v.* Harrod, Ibid. 270; Morris *v.* Wright, Law Rep. 5 Ch. 279; Kelly *v.* Hodge, 29 L. T. N. S. 387.

[8] Blunt *v.* Patten, 2 Paine, 393, 397; Stevens *v.* Cady, 14 How. 528; Stevens *v.* Gladding, 17 Id. 447; Farmer *v.* Calvert Lithographing, Engraving, & Map-Publishing Co., 5 Am. L. T. R. 168; Rees *v.* Peltzer, 75 Ill. 475; Stannard *v.* Lee, Law Rep. 6 Ch. 346.

[9] Matthewson *v.* Stockdale, 12 Ves. 270; Longman *v.* Winchester, 16 Id. 269.

[10] Wilkins *v.* Aikin, 17 Ves. 422; Hotten *v.* Arthur, 1 Hem. & M. 603; Hogg *v.* Scott, Law Rep. 18 Eq. 444.

[11] M'Neill *v.* Williams, 11 Jur. 344; King *v.* Reed, 8 Ves. 223, note; Baily *v.* Taylor, 3 L. J. (Ch.) 66, 1 Russ. & My. 73.

[12] Cox *v.* Land & Water Journal Co., Law Rep. 9 Eq. 324.

[13] Banker *v.* Caldwell, 3 Minn. 94.

[14] Scott *v.* Stanford, Law Rep. 3 Eq. 718; Maclean *v.* Moody, 20 Sc. Sess. Cas. 2d ser. 1154; Walford *v.* Johnston, Ibid. 1160, note.

[15] Alexander *v.* Mackenzie, 9 Sess. Cas. 2d ser. 748.

[16] Rundell *v.* Murray, Jac. 311.

[17] Grace *v.* Newman, Law Rep. 19 Eq. 623.

[18] Scott *v.* Stanford, Law Rep. 3 Eq. 718; Maclean *v.* Moody, 20 Sc. Sess. Cas. 2d ser. 1154.

published works. But in all cases the compiler must have a right to use the materials constituting his compilation. They must be gathered from common sources; or, if they are not, he must have authority to appropriate them, unless the use made of them be such as not to amount to piracy. He cannot make other than a "fair use" of a copyrighted publication, without the consent of the owner.

Materials need not be new. — It is no objection to the copyright in a compilation that the compiler is not the author of its component parts; that all the materials used may be found in other publications. Selecting, arranging, and combining existing materials in a useful form is recognized by the law as an act of authorship, and as creating a title to exclusive ownership.[1] In Lawrence *v.* Dana, where the plaintiff claimed

[1] "It is a great mistake to suppose, because all the materials of a work or some parts of its plan and arrangements and modes of illustration, may be found separately, or in a different form, or in a different arrangement, in other distinct works, that therefore, if the plan or arrangement or combination of these materials in another work is new, or for the first time made, the author, or compiler, or framer of it, (call him which you please,) is not entitled to a copyright. The reverse is the truth in law, and, as I think, in common sense also. It is not, for example, in the present case, of any importance that the illustrating of lessons in Arithmetic by attaching unit marks representing the numbers embraced in the example, may be found by dots in Wallis's *Opera Mathematica*, (p. 28); or in Colburn's Arithmetic in the form of upright linear marks, in a pamphlet detached from the main work. That is not what the plaintiff purports to found his copyright upon. He does not claim the first use or invention of unit marks for the purpose above mentioned. The use of these is a part of and included in his plan; but it is not the whole of his plan. What he does claim is: 1, the plan of the lessons in his book; 2, the execution of that plan in a certain arrangement of a set of tables in the form of lessons to illustrate those lessons; 3, the gradation of examples to precede each table in such manner as to form with the table a peculiar and symmetrical appearance of each page; 4, the illustration of his lessons by attaching to each example unit marks representing the numbers embraced in the example. It is, therefore, this method of illustration in the aggregate that he claims as his invention; each page constituting of itself a complete lesson; and he alleges that the defendants have adopted the same plan, arrangement, tables, gradation of examples and illustrations by unit marks, in the same page, in imitation of the plaintiff's book, and in infringement of his copyright, and, in confirmation of this statement, he refers to divers pages of his own book in comparison with divers pages of the book of the defendants.

"Now I say that it is wholly immaterial whether each of these particulars, the arrangement of the tables and forms of the lessons, the gradation of the examples to precede the tables, the illustration of the examples by unit marks, had each existed in a separate form in different and separate works before the plaintiff's work, if they had never been before united in one combination or in one work, or on one page

copyright in his annotations to Wheaton's International Law, the notes consisted chiefly of materials taken from common sources. But to gather this matter from other works on international law, public documents, pamphlets, newspapers, magazines, &c., arrange, digest, and combine it with Wheaton's text, required research, expense, learning, and judgment. The result was a work of great value, due to the labors of the editor, and as such was entitled to copyright not less than is a production wholly original.[1] So in Black *v.* Murray, protection was claimed for Lockhart's annotated edition of Scott's Minstrelsy of the Scottish Border. The copyright in the text had expired. Of the two hundred notes added by the editor, it appeared that only fifteen were original, while the rest were quotations. But the court placed a high value on the work of the editor, who with great literary research and judgment had made apt selections, and skilfully applied them to illustrate Scott's ballads.[2] So, in Banks *v.* McDivitt,[3] the compilation consisted of notes and citations of authorities appended to statutes. The statutes were public property, and the use of the authorities cited was open to all persons. But the com-

in the manner in which the plaintiff has united and connected them. No person had a right to borrow the same plan and arrangement and illustrations and servilely to copy them into any other work. The same materials were certainly open to be used by any other author, and he would be at liberty to use unit marks and gradations of examples and tables and illustrations of the lessons and to place them in the same page. But he could not be at liberty to transcribe the very lessons and pages and examples and illustrations of the plaintiff, and thus to rob him of the fruits of his industry, his skill, and his expenditures of time and money." Story, J., Emerson *v.* Davies, 3 Story, 782.

[1] 2 Am. L. T. R. N. S. 402.

[2] 9 Sc. Sess. Cas. 3d ser. 341.

Lord President Inglis said: "It seems to me that notes of this kind are almost chiefly valuable in bringing together and in combination, the thoughts of the same author in different places, or the thoughts of other authors, or of critics, bearing upon the point that is under consideration; and nothing could better illustrate it than a number of the notes which we see in these very volumes, and which are exceedingly interesting and valuable as matter of literary and critical taste and judgment. The quotations are in many places most apposite, and highly illustrative of the text, and exceedingly interesting to the reader; and certainly the selection and application of such quotations from other books may exercise as high literary faculties as the composition of original matter. They may be the result both of skill and of labor and of great literary taste; and therefore I think the circumstance that the notes consist to a great extent of quotations is any thing but a disparagement of their value." Ibid. 345.

[3] 13 Blatchf. 163.

bination of the citations with the statutes was a valuable and useful work, in which copyright was held to vest.

But a mere copy or reprint of common materials, without novelty or value in their arrangement or combination, is not entitled to copyright as a compilation; for in such case there is nothing to represent authorship on the part of the compiler.[1]

Copyright is in Arrangement and Combination of Materials. — No protection is given to the component parts of a compilation independently of their arrangement and combination. Of these, the compiler is not the author, and he can have no exclusive property in what is common and open to all. Nor is the arrangement and combination, independently of the materials themselves, a proper subject of copyright.[2] It would be a monopoly harmful to learning, and therefore opposed to the purpose of copyright laws, to give to any one the right to say that his mode of using common materials, his arrangement or combination or plan of treatment, shall not be followed in any subsequent publication. The copyright vests in the materials as combined and arranged; in the union of form and substance. Any one may use the same materials in a different combination, or adopt a similar arrangement for different selections. But no person can copy both the substance and the arrangement of a compilation, and use the same materials in the same form, without committing piracy.[3]

[1] Hedderwick *v.* Griffin, 3 Sc. Sess. Cas. 2d ser. 383. See also Rundell *v.* Murray, Jac. 311; Jollie *v.* Jaques, 1 Blatchf. 318.

[2] Pike *v.* Nicholas, Law Rep. 5 Ch. 251; Mack *v.* Petter, Law Rep. 14 Eq. 431; Webb *v.* Powers, 2 Woodb. & M. 497; Farmer *v.* Calvert Lithographing, Engraving, & Map-Publishing Co., 5 Am. L. T. R. 168; Lawrence *v.* Cupples, 9 U. S. Pat. Off. Gaz. 254.

[3] **Br.** Barfield *v.* Nicholson, 2 Sim. & St. 1; Murray *v.* Bogue, 1 Drew. 353; Jarrold *v.* Houlston, 3 Kay & J. 708; Spiers *v.* Brown, 6 W. R. 352. **Am.** Gray *v.* Russell, 1 Story, 11; Emerson *v.* Davies, 3 Id. 768; Greene *v.* Bishop, 1 Cliff. 186; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402; Banks *v.* McDivitt, 13 Blatchf. 163.

In Lawrence *v.* Dana, *supra*, 429, Mr. Justice Clifford said: —

"Judge Story held, in the case of Emerson *v.* Davies, 3 Story, 780, that every author had a copyright in the plan, arrangement, and combination of his materials, and in his mode of illustrating his subject, if it be new and original; and it was also held, in Greene *v.* Bishop, 1 Cliff. 190, that there may be a valid copyright in the plan of a book, as connected with the arrangement and combination of the materials; and no doubt is entertained that both those decisions were correct; but it is a mistake to suppose that a subsequent writer can be held to have

But when the compiler does not use the common matter in the exact form in which he finds it, but gives its substance in his own language, —translates, abridges, revises, or otherwise changes its form,—he performs an act of authorship which gives to the matter so used the character of an original composition. Thus, in Lawrence *v.* Dana,[1] it appeared that some of the notes in which copyright was claimed consisted of *verbatim* quotations; and in these the compiler had no exclusive property apart from their arrangement and combination with Wheaton's text. But, in preparing others, he had rewritten, digested, or abridged the original; and, in some instances, he had made translations from foreign languages. Such notes were his own productions, within the meaning of the law; and no one had a right to appropriate them, with or without their arrangement and combination.

In the cases wherein copyright has been recognized in compilations of matter taken from published works, such matter has been more or less elaborated by the compiler, so as to create in him some title to authorship; or it has been combined with some other composition in the form of annotations. But the principle which has governed in these cases must extend to a compilation of literary selections whose language is not changed by the compiler, and which are not used for purposes of annotation. Thus, valuable selections of poems, or prose compositions, are sometimes made and arranged with reference to their subject-matter; proverbs, quotations, &c., may be compiled so as to form useful collections; hymns may be selected and classified with a view to their use on appropriate occasions.[2] Compilations of this kind may have a material value,

infringed a book where he has not borrowed any of the materials of which the book is composed. New materials are certainly the proper objects of copyright; and old materials, when subsequently collected, arranged, and combined in a new and original form, are equally so; and in either case the plan, arrangement, and combination of the materials are as fully protected by the copyright as the materials embodied in the plan, arrangement, and combination. Damages may be recovered in either of the supposed cases for the infringement of the property protected by the copyright; but the property in the latter case consists chiefly, if not entirely, in the plan, arrangement, and combination of the materials collected and presented in the book, as any other person may collect from the original sources the same materials, and arrange and combine them in any other manner not substantially the same as that of the antecedent author."

[1] 2 Am. L. T. R. N. S. 402.

[2] Marzials *v.* Gibbons, Law Rep. 9 Ch. 518.

due to the choice and arrangement of the selections; and, in such case, there seems to be no reason why they may not be proper subjects of copyright.[1]

Abridgments, Digests, Translations, and Dramatizations.

The law is well settled that productions of these kinds are proper subjects of copyright, and all are governed by the same principle. He who honestly abridges, translates, or dramatizes, reproduces a work in a new and useful form; and for the results of his labor, skill, and learning he will be entitled to the same protection extended to original compositions. But, to be entitled to copyright, the production must be something more than a mere copy of the whole or parts of the original. It must be the result of independent labor other than that of copying, and there must be substantial and valuable fruits of authorship on the part of the maker.

A genuine abridgment is a reproduction of the matter or substance of a larger work in a condensed form, and in language which is not a mere transcript of that of the original. But to reduce the size of a work by copying some of its parts and omitting others creates no title to authorship; and the result will not be an abridgment entitled to protection, within the meaning of the law.[2] A digest is governed by the same principle.[3] The title of a translator is founded on the simple fact that he has made the translation. He is not required to make any other change in the original than to reproduce it in other language.[4]

Whether the translation or abridgment has been made with learning and skill, or otherwise, is a matter of which the law

[1] In Rundell *v.* Murray, where a collection of recipes for cookery and other domestic purposes was in controversy, Lord Eldon said: "If the plaintiff had composed these receipts, or embodied and arranged them in a book she would have a copyright in it; but if she had only collected them and handed them over to Mr. Murray, I do not apprehend that they would be the subject of copyright." Jac. 314.

[2] Gray *v.* Russell, 1 Story, 11; Folsom *v.* Marsh, 2 Id. 100; Story's Executors *v.* Holcombe, 4 McLean, 306; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402. Other cases relating to abridgments are cited in Chap. IX.

[3] Sweet *v.* Benning, 16 C. B. 459.

[4] Wyatt *v.* Barnard, 3 Ves. & B. 77; Rooney *v.* Kelly, 14 Ir. Law Rep. N. S. 158; Emerson *v.* Davies, 3 Story, 768; Shook *v.* Rankin, 6 Biss. 477; Shook *v.* Rankin, 3 Cent. Law Jour. 210.

takes no cognizance. The question is, whether there has been real abridging or translating, or mere copying. Nor is it material how closely two rival productions may resemble each other, provided each is the result of independent labor. Protection may be secured for an abridgment or translation of any work not protected by copyright. Any number of persons may make a similar use of a common original, and each will be entitled to copyright in his own production. So any one may acquire copyright for an abridgment or translation of a copyrighted work, provided he has the consent of the owner so to use it. But it is maintained elsewhere that, to make such use of a copyrighted work, without due authority, is piracy.[1]

The above principles apply equally to dramatizations, which are considered in another part of this work.[2]

Law Reports.

The report of a law case generally consists of two parts: 1, the opinion delivered by the court; 2, the matter prepared by the reporter. The latter usually comprises the head-notes, giving a digest of the decision, a statement of the facts of the case, a synopsis of the arguments of the counsel, and such other matters as are sometimes added to make the report complete.

Matter Prepared by Reporter. — It is settled, both in England and in the United States, that valid copyright may be acquired by a reporter for those parts of a report of which he is the author or compiler.[3] The head-notes, additional citations in

[1] See Chap. IX.

[2] See dramatizations considered in Chap. XIV.; also, Chap. IX.

[3] **Br.** Butterworth *v.* Robinson, 5 Ves. 709; Saunders *v.* Smith, 3 My. & Cr. 711; Sweet *v.* Shaw, 3 Jur. 217; Sweet *v.* Maugham, 11 Sim. 51; Hodges *v.* Welsh, 2 Ir. Eq. 266; Sweet *v.* Benning, 16 C. B. 459. **Am.** Wheaton *v.* Peters, 8 Pet. 591, 654; Backus *v.* Gould, 7 How. 798; Little *v.* Gould, 2 Blatchf. 165, 362; Little *v.* Hall, 18 How. 165; Cowen *v.* Banks, 24 How. Pr. 72; Paige *v.* Banks, 7 Blatchf. 152, on ap. 13 Wall. 608; Chase *v.* Sanborn, 6 U. S. Pat. Off. Gaz. 932; Banks *v.* McDivitt, 13 Blatchf. 163.

Referring to the decision in Wheaton *v.* Peters, Mr. Justice Story, who was one of the judges who concurred in it, said: "It was held that the opinions of the court, being published under the authority of Congress, were not the proper subject of private copyright. But it was as little doubted by the court that Mr. Wheaton had a copyright in his own marginal notes, and in the arguments of counsel as prepared and arranged in his work. The cause went back to the Circuit Court for the purpose of further inquiries as to the fact, whether the requisites of the act of Congress had been complied with or not by Mr. Wheaton.

the form of foot-notes, the statement of facts and abstract of arguments of counsel, represent the results of the labor and the authorship of the reporter; but, in reporting the opinion delivered by the court, he gives a mere copy of what he is not the author. In this he can have no exclusive rights, although he may have written a *verbatim* report of it from the lips of the judges. So, when the head-notes are prepared by the judge, as they sometimes are, the reporter has no rightful claim to copyright in them; for, in such case, he is the mere copyist of what another is the author.[1] Nor is the reporter entitled to any copyright when he is employed on the condition that the exclusive property in the results of his labor shall belong to the State; for then he has voluntarily parted with his rights.[2] But, in such case, he does not lose his title to reports prepared by him after the expiration of his term of office, and when he is no longer employed or paid by the State.[3]

Abridgments, Digests, and Selections of Cases.—There is no principle to prevent a person from acquiring a valid copyright for a *bona fide* abridgment, digest, or synopsis of any judicial decision, whether it be obtained from oral delivery in court or from any published report; provided, of course, that the decision is common property, or, if not, that the reporter has authority so to use it. Indeed the head-notes, in which the exclusive property of the reporter has been recognized, are but a digest of the decision. So, a selection and arrangement of cases relating to a particular branch or subject of the law may have a material value as a compilation due to the labor, judgment, and learning of the compiler. Exclusive property in such a work may be acquired on the principle that a compilation consisting wholly of old materials is recognized as a proper subject of copyright.

Opinions of the Court.—I have seen no sound, clear exposition of the law governing copyright in judicial decisions. In the

This would have been wholly useless and nugatory, unless Mr. Wheaton's marginal notes and abstracts of arguments could have been the subject of a copyright, for that was all the work, which could be the subject of copyright; so that if Mr. Peters had violated that right, Mr. Wheaton was entitled to redress." Gray *v.* Russell, 1 Story, 21.

[1] Chase *v.* Sanborn, 6 U. S. Pat. Off. Gaz. 932.

[2] Little *v.* Gould, 2 Blatchf. 165, 362.

[3] Little *v.* Hall, 18 How. 165. See this case considered in Chap. VII.

English cases, wherein protection has been given to legal reports, the courts have not expressly declared whether the copyright claimed by or through the reporter vested only in the matter prepared by him, or extended also to the opinion itself.[1] In the United States, it has been held that neither the reporter nor the judge can acquire copyright in the judgment pronounced by the court; and the opinion seems to have been entertained that such production is not a proper subject of copyright.[2] In Wheaton *v.* Peters, the Supreme Court of the United States was "unanimously of opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right."[3] It has not been expressly declared in any modern case that copyright will vest in a judicial decision; but the law on this point may be easily determined.

May be Copyrighted by Government. — Property in judicial decisions is governed by the same general principles that apply to all literary compositions. They are a proper subject of copyright; and when the provisions of the law are complied with, as in the case of other productions, they will be entitled to the same protection accorded to any copyrighted work. Where such protection has been denied, the decision of the court could not rightly have been otherwise; for the reason that the copyright had not been properly secured, or the plaintiff's title was defective. It is obvious that the copyright in an opinion written or delivered by a judge cannot be acquired by a reporter or the first publisher on the ground of authorship, for the reason that he is not the author. It is not less clear that the judge who pronounces the decision is not entitled to the copyright therein, because he is not the owner of the property. Hence, neither in the judge nor in the reporter will a valid copyright vest, except by a derivative title. The copyright must be secured by the owner of the property; and all difficulty disappears when it is determined who is the owner. Elsewhere it is shown that any person who employs another to prepare a work may, by virtue of the contract of

[1] See the English cases cited, *ante*, p. 159, note 3.

[2] Wheaton *v.* Peters, 8 Pet. 591, 654; Little *v.* Gould, 2 Blatchf. 165, 362. See other American cases cited, *ante*, p. 159, note 3.

[3] 8 Pet. 668. See remarks of Mr. Justice Story, *ante*, p. 159, note 3.

employment, become the owner of the literary property therein.[1] On this principle, the people who employ and pay judges are the rightful owners of the literary property in the opinions written by them. Hence, the United States government may secure to itself the copyright in the decisions pronounced in the federal courts, and each State may do the same with the opinions of its own judges. And the government may confer upon any person the right of securing, or the copyright after it has been secured. Of course the State, as in the case of an individual, may lose its exclusive right of property, and it usually does, by permitting the work to be published without being copyrighted; or, it may declare by its constitution or by statute that such decisions shall be public property.[2] But, if the government chooses to retain its property, and takes the steps required in the case of every literary composition for its protection, a valid copyright may be secured.

The doctrine that the State may have an exclusive property in the decisions of its judges, although the courts appear to have lost sight of it in more recent times, was advanced in England more than two centuries ago. In 1666, the House of Lords, affirming the judgment of the Lord Chancellor who had granted an injunction against members of the Stationers' Company, held that Atkins had acquired from the king the exclusive right of printing Rolle's Abridgment.[3] So, in 1672, the same tribunal reversed the decision of the Common Pleas, that the property in the third part of Croke's reports was in Roper, who had derived his title from the executors of the reporter,

[1] See Chap. IV.

[2] The constitution of New York adopted in 1846, art. vi. s. 22, declared that "the legislature shall provide for the speedy publication of all statute laws, and of such judicial decisions as it may deem expedient. And all laws and judicial decisions shall be free for publication by any person." The language of this section is somewhat varied in the constitution as amended in 1867. See art. vi. s. 23. In Littie *v.* Gould, 2 Blatchf. 165, 362, it was held that the provision in the constitution of 1846 did not affect the exclusive property claimed by the State, in the parts of the reports of the Court of Appeals consisting of the notes and references prepared by the State reporter who had been appointed pursuant to the statute of 1850, c. 245. Section two of this act provided that "the copyright of any notes or references made by the State reporter to any of said reports shall be vested in the Secretary of State for the benefit of the people of this State." See also Chase *v.* Sanborn, 6 U. S. Pat. Off. Gaz. 932.

[3] Atkin's Case, cited 4 Burr. 2315, reported Carter, 89; Bac. Abr. Prerog. F. 5.

and held that "the copy belonged to the king," by whom the defendant Streater had been licensed to print.[1] Whether the king's rights were affirmed on the principle of property or prerogative does not appear from the reports of the cases. One of the grounds on which Atkin's case was argued was that of property in the king, who paid the judges. Lord Mansfield emphatically maintained that the judgment of the Lords rested solely on this ground, and that it could be defended on no other.[2]

[1] Roper *v.* Streater, cited 4 Burr. 2316; s. c. Skin. 234; 1 Mod. 257; Bac. Abr. Prerog. F. 5.

[2] Millar *v.* Taylor, 4 Burr. 2401 *et seq.* See *ante*, p. 63, note 5. The doctrine of the king's exclusive right to publish the acts of Parliament was recognized in Baskett *v.* University of Cambridge, decided in 1758, by the King's Bench, of which Lord Mansfield was Chief Justice. 1 W. Bl. 105; s. c. 2 Burr. 661. Of this judgment, Lord Mansfield, in Millar *v.* Taylor, 4 Burr. 2404, said: "We had no idea of any prerogative in the crown over the press; or of any power to restrain it by exclusive privileges, or of any power to control the subject-matter on which a man might write or the manner in which he might treat it. We rested upon property from the king's right of original publication. Acts of Parliament are the works of the legislature; and the publication of them has always belonged to the king as the executive part and as the head and sovereign."

Others have contended that the right claimed by the king was founded on prerogative, and not property. See *ante*, p. 63.

For a long time, it was considered unlawful to publish reports of judicial matters without a license. In the preface to Douglas's Reports, vol. i. p. ix, the reporter says: "Soon after the Restoration, an act of Parliament having prohibited the printing of law-books without the license of the Lord Chancellor, the two Chief Justices and the Chief Baron, it became the practice to prefix such a license to all reports published after that period in which it was usual for the rest of the judges to concur, and to add to the *imprimatur* a testimonial of the great judgment and learning of the author. The act was renewed from time to time, but finally expired in the reign of King William. But the same form of license and testimonial continued in use till not many years ago; when, as one had become unnecessary, and the other was only a general commendation of the writer, and no voucher for the merit of the work, the judges, I believe, came to a resolution not to grant them any longer; and accordingly the more recent reports have appeared without them."

Sir James Burrow apologized for publishing his reports without license and the usual *imprimatur*, and said: "I know it is a contempt of this court to publish their proceedings; it is against a standing order of the House of Lords to publish proceedings there upon appeals or writs of error. They ought to be published under authoritative care and inspection; but since the Year Books, no judicial proceedings have been so published, either by the House of Lords, or by any court in Westminster Hall, except State trials." 1 Burr. preface, p. vii.

More recently, the courts have exercised the right of restraining the publication of their proceedings, on the ground that it is an interference with the administration of justice. The King *v.* Clement, 4 Barn. & Ald. 218. See also Tichborne *v.* Mostyn, Law Rep. 7 Eq. 55, note. So, also, the House of Lords has claimed the exclusive right of publishing the proceedings of trials had before it. Gurney *v.* Longman, 13 Ves. 403.

Statutes and Public Documents.

Statutes are within the same principle that governs judicial decisions.[1] They are the property of the government, which employs and pays those who make them. The government, if it chooses, may have them copyrighted; and only the government, or some person deriving title from it, has this right. But any person may acquire copyright in notes and citations appended to a statute.[2] So, copyright was held to vest in certain forms which had been prepared by following the directions given by the statute.[3]

The same general rule applies to public documents, official correspondence of the government, reports made by government officers, &c. Copyright may be secured for such productions, if the proper steps are taken by the rightful owner.[4] The property in public documents usually belongs to the government by virtue of the fact that it employs and pays the persons who write them. But, when the ownership is claimed by the writer, there may be considerations of public policy to prevent him from publishing without the consent of the government.

Statutes and public documents are usually published by the government without being copyrighted. Hence they become common property; and, as far as copyright is concerned, may be reprinted by any person.

Publications Used for Advertising.

Whether a composition of this kind is a proper subject of copyright will depend on its character, and not the purpose for which it is used. An advertisement which has no other use or value than to make known the place and kind of business of the advertiser is not within the scope of the copyright law. But information, and the results of learning, valuable to others than the advertiser, may be, and often are, contained in an advertising publication. That valid copyright will vest in such a publication does not admit of reasonable doubt. In advertising the works which he wishes to sell, a bookseller may

[1] See Baskett *v.* University of Cambridge, referred to in note 2, p. 163; also, Baskett *v.* Cunningham, 1 W. Bl. 370; s. c. 2 Eden, 137.

[2] Banks *v.* McDivitt, 13 Blatchf. 163.

[3] Alexander *v.* Mackenzie, 9 Sc. Sess. Cas. 2d ser. 748. See *post*, p. 204.

[4] See Folsom *v.* Marsh, 2 Story, 100.

communicate information which will be a substantial contribution to bibliography; another dealer may give interesting facts concerning bronzes, pottery, furniture, or other articles. This information may be designed and published by the author expressly to advertise his wares, and be circulated gratuitously in the form of a circular, catalogue, pamphlet, or otherwise, for the sole purpose of promoting his business interests. Such productions may have a value aside from that for which they are primarily intended, and which would give them a title to copyright if published as literary productions; and there is no good reason why this title should be defeated by the fact that the author has designed and uses them to advertise his business. There is nothing in the letter or the spirit of the law of copyright to prevent him from making this use of his work, and at the same time enjoying the protection of the statute. The question depends not on the intention of the author, or the use made of the production, but on its inherent qualities. Publications used for advertising must be governed by the same principles that apply to other works. When they lack the inherent qualities essential to copyright, they are not entitled to protection; when they have such qualities, they are within the scope of the law. Whether a particular publication belongs to one or the other of these classes, will, of course, depend on its character. The controlling inquiry will be, whether it has any value as a contribution to knowledge, or is a mere advertisement, useless for any other purpose than to make known the business of the advertiser.

The question under consideration was in direct issue in the recent English case of Cobbett *v.* Woodward;[1] but it is difficult to determine, from the reported opinion of Lord Romilly, on what principles the case was decided. The plaintiff, an extensive dealer in upholstery and house furniture, had published and copyrighted an illustrated guide for furnishing houses, and circulated it as an advertisement of his business. The defendant, who was engaged in the same business, copied fifty-five of the illustrations and a large part of the text. In defence, it was contended that the plaintiff's book was a mere advertisement; and was, therefore, not within the copyright act.

[1] Law Rep. 14 Eq. 407.

The court held that the drawings in the complainant's book were not entitled to protection, on the ground, as far as can be gathered from the language of the opinion, that they were mere advertisements. With regard to the text, a distinction was drawn between that part which "bears the trace of original composition," and that which "simply describes the contents of a warehouse, the exertions of the proprietor, or the common mode of using familiar articles." The court held that matter of the latter kind was not entitled to protection; but that the plaintiff was entitled to an injunction restraining the defendant from publishing about sixty words of "original composition," which had been copied.

If this decision rests on the ground that the illustrations had no merit as productions of art, and no value except as a mere advertising medium, and that parts of the text were not entitled to protection because they lacked originality, it is in harmony with the doctrines above presented. But if the court held that the drawings were not proper subjects of copyright, simply because they were used as advertisements, or, in other words, that advertisements are not within the scope of the copyright law, the decision is inconsistent with itself; for the small part of the text protected by the court was designed and used by the complainant as an advertisement. As the same general principles must be applied to both text and illustrations, the only rational construction to be put on the decision is, that there may be copyright in matter, whether pictorial or literary, designed and used as an advertisement, provided it be original, and have a value aside from its function as a mere advertising medium.[1]

[1] It is to be regretted that the principles discussed by the court are not given in the opinion with clearness and precision. The entire work in controversy, the text as well as the illustrations, was designed and used to advertise the complainant's business. The court refused to protect the fifty-five illustrations that had been copied, because they were advertisements; but held that about sixty words of text, which was also designed and used as an advertisement, were entitled to protection. If the illustrations were useless except as mere advertisements, the grounds for the distinction are manifest. There is much in the reported opinion that is confusing; and parts of it are destined to be often cited, as showing that there can be no copyright in any advertisement, whatever may be its character.

After referring to directories, concordances, dictionaries, &c., Lord Romilly said:—

"But the distinction between those

This doctrine was recognized in Hotten *v.* Arthur,[1] where an advertising catalogue was protected, and in Grace *v.* Newman.[2] The plaintiff in the latter case was a "cemetery stone

works and the present is this: those works are compiled and published for the information and use of the public, and are bought by the public without any reference to individual benefit — nothing in the shape of advertisement of articles specified in the work forming a part of the work. But this is a mere advertisement for the sale of particular articles which any one might imitate, and any one might advertise for sale.

"To draw the distinction more clearly: if a man not being a vendor of any of the articles in question were to publish a work for the purpose of informing the public of what was the most convenient species of articles of house furniture, or the most graceful species of decorations for articles of house furniture, what they ought to cost, and where they might be bought, and were to illustrate his work with designs and with drawings of each article he described — such a work as this could not be pirated with impunity, and the attempt to do so would be stopped by the injunction of the Court of Chancery; yet, if it were done with no such object, but solely for the purpose of advertising particular articles for sale, and promoting the private trade of the publisher by the sale of articles which any other person might sell as well as the first advertiser, and if in fact it contained little more than an illustrated inventory of the contents of a warehouse, I know of no law which, while it would not prevent the second advertiser from selling the same articles, would prevent him from using the same advertisement, provided he did not in such advertisement by any device suggest that he was selling the works and designs of the first advertiser. At the same time, I am bound to say that where it is shown that the second advertiser has been making use literally of the drawings of the first advertiser, and copying them precisely, I think that the court, though it could not stop him from taking that course, must feel that a use has been made of the works of the first advertiser which would not be considered fair amongst gentlemen, nor (for the rules are the same as regards the usual intercourse of life) amongst fair traders, and would not give costs to the man who deliberately endeavored to profit by the exertions of his fellow-tradesman. But at the last it always comes round to this, that in fact there is no copyright in an advertisement. If you copy the advertisement of another, you do him no wrong, unless in so doing you lead the public to believe that you sell the articles of the person whose advertisement you copy.

"A different rule applies to the letterpress which is said to be copied. Wherever this letterpress bears the trace of original composition it is entitled to protection, but not where it simply describes the contents of a warehouse, the exertions of the proprietor, or the common mode of using familiar articles." Law Rep. 14 Eq. 413.

According to this theory, a bibliography having the highest value as an addition to the store of knowledge would be entitled to copyright if the author be not a bookseller, but would have no claim to protection if prepared by a dealer in books, for the purpose of promoting his business interests. The absurdity of such a distinction is apparent. The question whether copyright will vest depends on the character, the inherent qualities, of the production, and not on the vocation of the author, or the purpose for which he has designed or uses it.

[1] 1 Hem. & M. 603.

[2] Law Rep. 19 Eq. 623. See also Hogg *v.* Scott, 18 Id. 444; Lawrence *v.* Cupples, 9 U. S. Pat. Off. Gaz. 254.

and marble mason," and had published a book containing, with some letterpress, lithographic sketches of monumental designs taken from tombstones in cemeteries. The publication was intended to serve as an advertisement of the plaintiff's business, and to enable customers to whom it was given to select designs to be executed by the plaintiff. The court did not hesitate to declare it a proper subject of copyright.[1]

In Collender *v.* Griffith, it appeared that the plaintiff, who was a maker of billiard tables, had copyrighted an engraving of a design for a billiard table, and used it to advertise his business. The court held that it was not entitled to copyright, on the ground, chiefly, that it was "not a work of art, print, lithograph, or engraving having any value or use as such. It is a mere copy of what the complainant has patented as a design, and constitutes the mode in which complainant advertises his tables."[2]

Newspapers, Magazines, and other Periodicals.

In the United States, no express statutory provision has been made concerning copyright in publications of this kind. But the question whether they are proper subjects of copyright is easily determined by the application of well-known principles. The purpose and effect of the copyright statutes, as construed by the courts both in England and the United States, are to protect all literary productions worthy of protection. It

[1] Sir Charles Hall, V. C., said: "It was also contended that this work is not entitled to any protection having regard to its character — that it is, in fact, a mere advertisement, and that an advertisement is not, on the authority of Cobbett *v.* Woodward, entitled to protection. The decision in that case turned entirely upon the circumstances which existed in it — it was a catalogue of articles which were being offered for sale. But it does not appear that the case of Hotten *v.* Arthur was mentioned to the Master of the Rolls, and whether, if it had been, his lordship's decision would have been different, it is difficult to say, but certainly it was decided in Hotten *v.* Arthur, that a catalogue may, under certain circumstances, be protected by injunction." Law Rep. 19 Eq. 626.

[2] 11 Blatchf. 212.

The court added: "The defendant having the right to make his own tables as he does make them, has an equal right to advertise them by showing the public their appearance by engraving, lithograph, or photograph." This is true; but he would have no right to copy the complainant's engraving in case it possessed the qualities essential to copyright. He might publish and use as an advertisement a similar engraving; but it must have been prepared by himself.

may be material to inquire whether the composition is of sufficient importance to be entitled to protection, or has the inherent qualities, as to originality, innocence, &c., essential to copyright; but in the comprehensive meaning given to the word book is found no requirement as to the size, form, manner, or frequency of the publication containing the copyrighted matter. The question, therefore, whether any composition is entitled to copyright is properly determined by its character, and not the form or manner in which it is published.

The fitness of magazine articles as subjects of copyright is manifest; and publications of this kind, as well as many weeklies, are usually copyrighted. But it may be said that the contents of a daily newspaper are too ephemeral and often too insignificant to be worthy of statutory protection. This is doubtless true of much that appears in a newspaper; but, on the other hand, among the contents of such publications are frequently found productions of great value and permanent literary merit.

There is, then, nothing in the law of copyright, as made by the legislature or as expounded by the courts, to prevent valid copyright from vesting in a magazine or a newspaper, as a whole, or in any of its contents that may be worthy of protection.[1] The same principles apply to such publications as

[1] Cox *v.* Land & Water Journal Co., Law Rep. 9 Eq. 324.

In Platt *v.* Walter, 17 L. T. N. S. 159, Lord Chelmsford expressed the opinion *obiter* that the contents of a newspaper when published become a proper subject of copyright. He said: "I do not exactly comprehend the meaning of the word copyright in its application to a newspaper. That protection given by common and statute law called copyright is only in respect of some published or unpublished literary production, and therefore there can be no copyright in the prospective series of a newspaper. The copyright may attach upon each successive publication; but that which has no present existence cannot be the subject of this species of property."

Lord Justice Turner was of opinion that copyright in a newspaper "undoubtedly exists." *Ex parte* Foss, 2 De G. & J. 239.

In Clayton *v.* Stone, 2 Paine, 392, Mr. Justice Thompson expressed the opinion that a newspaper was not within the scope of the copyright law. His judgment appears to rest on the grounds of the ephemeral character of the publication, and the impracticability of complying with the then statutory requisites, one of which was that a copy of the record of entry should be published for four weeks in one or more newspapers. A more liberal doctrine, however, now prevails. The statutory requirement just mentioned has been long obsolete. Within the half century that has elapsed since that judgment was rendered, the character of American newspapers has been wholly

govern in the case of books. Of course, there must be a compliance with the statutory requisites; and, in the United States, it will be necessary to obtain a separate copyright for each issue of the publication. In the case of a daily newspaper, this will be found inconvenient and perhaps impracticable. In practice, it is not done. But, if it were done in any case, there is no valid reason why the contents of that issue should not be protected. In like manner, copyright may be obtained for any article published in a newspaper, by a compliance in the case of such article with the statutory provisions.

If any uncopyrighted composition be published in an uncopyrighted newspaper or periodical, it becomes common property, and may be republished by any one.[1]

In England, Special Provision for Magazines and Periodicals. —In England, newspapers are not expressly mentioned in the statute; but there is a provision relating to copyright in magazines, reviews, and other periodicals. Section 18 of 5 & 6 Vict. c. 45, enacts that when the owner of "any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever," shall have employed and paid any persons to write the same, or any part thereof, or any articles therein, on the condition that the copyright shall belong to the owner, "the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor." But the author may publish his production in a separate form, and will be entitled to the copyright therein, provided he has reserved to himself that right, "by any contract, express or implied." In the case of "essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works

changed. Much that now appears in them has a permanent literary or scientific value, and as such is entitled to protection.

[1] This question was raised but not decided in the United States Court in 1839, on an application for an injunction in Miller *v.* McElroy, 1 Am. Law Reg. 198. The injunction was refused, and the question reserved till the final hearing. No further report of the case appears; but the theory that the publication of an uncopyrighted article in an uncopyrighted newspaper or magazine is not an abandonment of the author's exclusive rights therein, is contrary to a fundamental principle of the law of copyright.

of a like nature," it is provided that the exclusive right of publication in a separate form shall, after twenty-eight years, revert to the author, for the remainder of the term of forty-two years; and that the owner shall not, during the twenty-eight years, publish the composition, "separately or singly," without the consent of the author. The purpose and effect of this provision are clearly not to create copyright in the class of works mentioned. To maintain that doctrine is to assert that there was no copyright in cyclopædias, magazines, and other periodicals, prior to the statute of Victoria; whereas, before that statute was passed, copyright in such publications was repeatedly recognized by the courts.[1] The comprehensive meaning given to the word book, by both Parliament and the courts, clearly embraces all literary compositions, whether published as books or in cyclopædias, magazines, or other periodicals. The same clause, therefore, which vests copyright in books, vests it also in cyclopædias, magazines, and periodicals. An additional provision for this purpose would be superfluous.

But section 18 has a distinct and useful object. By section 3, copyright is granted only to the author or his assigns. But a cyclopædia or magazine is composed of many articles, which the owner or editor has employed others to write, and of which he is neither the author, nor usually the formal assignee. Moreover, magazine articles are often republished in separate form; and it is important to remove all doubt as to who is the lawful owner of the copyright, and whether the author of the article, or the owner of the magazine in which it has appeared, is entitled to the benefit of republication. These objects are met by section 18. First, it enables any person to acquire, without formal assignment, copyright in a composition which he has employed another to write.[2] Second, in the case of an article published in a magazine or like periodical, it defines the respective rights of the author and the publisher. In this case, the right of the latter is often

[1] Mawman *v.* Tegg, 2 Russ. 385; Hogg *v.* Kirby, 8 Ves. 215; Wyatt *v.* Barnard, 33 Ves. & B. 77; Bell *v.* Whitehead, 3 Jur. 68; Sweet *v.* Maugham, 11 Sim. 51.

[2] Brown *v.* Cooke, 11 Jur. 77; Richardson *v.* Gilbert, 1 Sim. N. S. 336; Sweet *v.* Benning, 16 C. B. 459.

little more than a license to use the article for a specified purpose.[1]

Section 19 of the statute provides that the owner of the copyright in any cyclopædia, review, magazine, or periodical shall be entitled to all the benefits of registration, by registering in the manner prescribed the first volume or number of the publication.

Newspapers in England. — The question whether copyright will vest in a newspaper was a direct issue in the recent English case of Cox *v.* The Land and Water Journal Company, in which it was held that the owner of such a publication has copyright therein, and the articles which it contains, and may maintain an action or suit for piracy, although neither the newspaper nor any of the articles have been registered.[2] To the extent that a newspaper, as a whole, or any of its contents, may be the proper subject of copyright, the doctrine of this decision is sound; but, as far as it holds that matter published in a newspaper is protected by copyright when there has been no compliance with the statute, the judgment is supported by no authority, and is contrary to established principles of the law of copyright.[3] Vice-Chancellor Malins held that a news-

[1] Bishop of Hereford *v.* Griffin, 16 Sim. 190; Mayhew *v.* Maxwell, 1 Johns. & H. 312; Smith *v.* Johnson, 4 Giff. 632; Strahan *v.* Graham, 16 L. T. N. S. 87, on ap. 17 Id. 457.

In Smith *v.* Johnson, Vice-Chancellor Stuart said: "The proviso in the act of Parliament which prohibits a publication 'separately or singly,' is a proviso intended for the benefit and protection of authors. This court in previous cases has, and I think wisely, construed the language of the act so as to afford that protection which was clearly intended by the legislature, and that protection being intended, it is the duty of this court to give the relief now asked.

"In the case cited before the Vice-Chancellor of England (the Bishop of Hereford *v.* Griffin), it was said in argument that the meaning of the proviso taken with the whole clause is not to vest a copyright in the proprietors or publishers of a periodical work, but simply to give them a license to use the matter for a particular purpose. That view was adopted by the Vice-Chancellor of England; that was the view subsequently adopted by Vice-Chancellor Wood [in Mayhew *v.* Maxwell,] and that is the view which, upon the construction of the language of the act, fortified by those authorities, I feel myself bound to take."

[2] Law Rep. 9 Eq. 324.

[3] Vice-Chancellor Malins cited Mayhew *v.* Maxwell, 1 Johns. & H. 312, and Strahan *v.* Graham, 16 L. T. N. S. 87, on ap. 17 Id. 457, as sustaining the position that a newspaper is protected by copyright, though not registered. These authorities lend no support whatever to this theory. In each case, the issue was whether the owner of a magazine had a right, without the consent of the author, to republish in

paper is not entitled to copyright under section 3 of the statute, which vests copyright in "any book," because a newspaper is not expressly mentioned there, and cannot be brought within the definition of a book given in section 2. He held, however, that a newspaper is within the scope of section 18, though not mentioned there. He admitted that the registration of a book or periodical is essential to copyright, but maintained that section 19, which relates to the registration of magazines, does not apply to newspapers, because they are not specifically designated.

The grounds on which this decision is based are palpably erroneous and inconsistent. To exclude newspapers from the third and nineteenth sections because they are not named there, may be plausible; but, at the same time, to include them under the eighteenth section, when its language is not more favorable to that construction, is, to say the least, inconsistent. With one exception, the classes of publications named in sections 18 and 19 are the same.[1] If newspapers

separate form an article which had been accepted for publication in the magazine. The question was governed by section 18, which, as we have seen, expressly prohibits the owner of a magazine from republishing an article in separate form, without the express consent of the author. In such case, the author sues not for infringement of copyright, in the ordinary meaning of that expression, but for violation of a special contract, — for an unauthorized use of the article, and a use expressly forbidden by the statute. Clearly the author's right of action under such circumstances is wholly independent of the ordinary statutory copyright, and is therefore in no wise affected by the question of registration. His remedy is special. His right to prevent republication under the circumstances named is analogous to the right of an author to prevent the unauthorized publication of his manuscript.

This doctrine was clearly expressed in Mayhew *v.* Maxwell, 1 Johns. & H. 315, by Vice-Chancellor Wood, who said: "The plaintiff is not taking proceedings to restrain an infringement of his copyright, but claims to be entitled under the proviso of the 18th section to a right distinct from copyright, viz., that of preventing during twenty-eight years the separate publication of his article by the proprietor to whom the copyright belongs. He may or may not be disposed at the end of twenty-eight years, when his own copyright is to commence, to enter the work at Stationers' Hall. In the mean time he retains the right to protect his future interests by preventing a separate publication without his consent. I am of opinion therefore that this is not a proceeding in respect of any infringement of copyright, and that the provisions of the 24th section do not apply."

In Strahan *v.* Graham, 16 L. T. N. S. 87, on ap. 17 Id. 457, the decision rests on the same principle. The facts were similar, except that the controversy related to the republication of copies of photographs.

[1] The language of section 18 is, "any encyclopædia, review, magazine, periodical work, or work published in a

are included in one, they are included in both; if excluded from one, they cannot be brought within the provisions of the other. There can be no copyright in a newspaper, or any other printed matter, except under the statute; and there can be no copyright under the statute without compliance with its conditions.

The sound construction of the statute under consideration is that a newspaper is clearly within the meaning of a book, as that word is defined in section 2, and as it has been construed by the English courts. There can be no reasonable doubt that it is a "periodical work" within the scope of section 18.[1] But it is not less governed by sections 19 and 24, and must therefore be registered.

As the requirements of the statute as to registration of magagines and other periodicals may be complied with by registration of the first number alone, the same rule would doubtless be held to apply to newspapers. This would render the securing of copyright in journals in England extremely convenient and practicable. But in the United States, where there is no special statutory provision in favor of newspapers or other periodicals, copyright for such publications can be secured only by observing the statutory requisites in the case of each issue.

Maps, Charts, and Plans.

In England, the copyright in these productions was formerly controlled by the statutes relating to engravings;[2] but it is now governed by 5 & 6 Vict. c. 45.[3] In the American statute,

series of books or parts, *or any book whatsoever*." Excepting those italicized, the same words are used in section 19.

[1] Lord Chelmsford expressed a doubt whether section 18 extends to newspapers. Platt *v.* Walter, 17 L. T. N. S. 159.

[2] See 7 Geo. III. c. 38, s. 1; 17 Geo. III. c. 57, s. 1.

[3] Stannard *v.* Lee, Law Rep. 6 Ch. 346; overruling the decision of Vice-Chancellor Bacon, 23 L. T. N. S. 306, that maps were within the provisions of the statutes relating to engravings. The Vice-Chancellor adhered to his view of the law in Stannard *v.* Harrison, 24 L. T. N. S. 570, which was decided after the Lords Justices had given their judgment in Stannard *v.* Lee. In the latter case, Lord Justice James said: "In this case, if the argument of Mr. Cotton were to prevail, it would lead at once to one of these two results: either there would be two kinds of maps,—maps published separately and maps forming part of a book, with respect to which there would be two distinct laws of copyright,—or else as to all maps there would be two distinct laws of copy-

maps and charts are included, with other enumerated subjects of copyright; plans are not mentioned.[1]

Dramatic and Musical Compositions.

These are capable of two distinct uses: 1, publication in print; 2, public representation or performance. With respect to the right of publication, they are treated as books, and the copyright is governed by the same principles that apply to literary productions. Protection is extended not only to original productions, but also to dramatizations, translations, and adaptations. The right of publicly representing or performing a dramatic or musical composition is treated under the head of playright.[2]

Musical compositions were not mentioned in the early English statutes; but the word book in those statutes was judicially construed to embrace any piece of music.[3] It is now expressly

right, one giving a conditional right of property with an unconditional right of action or suit, the other giving an unconditional right of property with a conditional right of action or suit. Either of these states of the law would be strangely inconvenient.

"The 5 & 6 Vict. c. 45, s. 2, says that a 'book' shall 'mean and include every map, chart, or plan separately published;' and in the 24th section it proceeds to say that no proprietor of copyright in any 'book,' that is, of a 'map, chart, or plan separately published,' according to the definition given of a book, shall maintain an action or suit in respect of any infringement of such copyright, unless he shall have previously registered such 'map, chart, or plan' in the way prescribed by the act. No very heavy *onus* on the proprietor — no very difficult step to take before he commences his suit. The words are plain and simple, and there is no reason for saying that the intention of the legislature was different from that which is expressed by the words. The object of the enactment is very clear. Formerly maps had been considered artistic works; now they were to be brought into their proper place as literary works. And rightly so, in my opinion, for maps are intended to give information in the same way as a book does. A chart, for instance, gives similar information to sailing rules; maps give instruction as to the statistics and history of the country portrayed; they point out the amount of population, the places where battles were fought, the dates when provinces were annexed, as in maps of India, and give other geographical and historical details. It was quite reasonable, therefore, to take them out of the law of artistic works, and to give them greater protection by bringing them under the law of copyright of literary works. There is no inconvenience in giving the natural meaning to the words of the statute, and there would be great inconvenience in the contrary construction. I think, therefore, the plea was well pleaded, and that the plaintiffs are not entitled to maintain their suit until they have registered their map." Law Rep. 6 Ch. 348.

[1] U. S. Rev. St. s. 4952.

[2] Chaps. XIII.—XVI.

[3] Bach *v.* Longman, Cowp. 623;

declared by 5 & 6 Vict. c. 45, s. 2, that the word book shall be construed to include every "sheet of music." Musical compositions are included in the subjects of copyright enumerated in the existing American statute,[1] as they were in that of 1831.

Not only an original composition, but any substantially new arrangement or adaptation of an old piece of music, is a proper subject of copyright.[2] In a recent English case, it was unanimously held by the judges of the Queen's Bench, that an arrangement for the piano of an opera is a work substantially new and distinct from the original; and as such is entitled to protection, provided the arranger had a right so to use the original.[3] So also the arrangement for the piano of quadrilles,

Clementi *v.* Golding, 2 Camp. 25; Storace *v.* Longman, 2 Camp., note *a*; Platt *v.* Button, 19 Ves. 447; White *v.* Geroch, 2 Barn. & Ald. 298; D'Almaine *v.* Boosey, 1 Y. & C. Exch. 288; Chappell *v.* Purday, 4 Id. 485; Chappell *v.* Purday, 14 Mees. & W. 303; Jefferys *v.* Boosey, 4 H. L. C. 815. See *ante*, p. 140.

[1] U. S. Rev. St. s. 4952.

[2] Reed *v.* Carusi, Tan. Dec. 72.

[3] Wood *v.* Boosey, Law Rep. 2 Q. B. 340, on ap. 3 Id. 223. See also Boosey *v.* Fairlie, 7 Ch. D. 301, 309. In the former case, Kelly, C. B., said: —

"But what is the pianoforte arrangement? It is an arrangement of the whole of the music of this opera for the pianoforte, a part of which is the ordinary pianoforte accompaniment, the bass and the treble played with both hands, and which is independent of the melody. There may be, as it appears, the line of music for one voice, or two or three voices, as the case may be; and there are separate and distinct lines for the accompaniment for the pianoforte; and, no doubt, here and there throughout this accompaniment, and by going line by line through the score of the original opera, there may be found the same notes; but there are other parts of the accompaniment which are merely the pianoforte accompaniment, the notes forming which are nowhere to be found in the score at all.

"The accompaniment for the pianoforte is a work of greater or less skill. In some cases, perhaps in many cases — it may be in this for aught I know — the operation of adaptation is little more than mechanical, and what any one acquainted with the science of music, any composer of experience, might have been able to do without difficulty; but it may be, and often is, as in the case of the six operas of Mozart by Mazzinghi, a work — I would hardly use the term of great genius, but a work — of great merit and skill of that eminent poet and pianist, Mazzinghi. If such a work be published as the adaptation to the pianoforte by a composer other than the composer of the original opera, no doubt it is a piracy of the opera, and the composer may maintain an action against the adapter or the publisher of the adaptation; but whenever the copyright in the original opera has expired, if after that, and for the first time, another composer composes another adaptation of that opera to the pianoforte, it is a new substantive work, in respect of which he is just as much entitled to the benefit of the copyright in this country as the original composer of the opera; and if any one had, by an adaptation pirated that arrangement, he would be liable to an action

waltzes, &c., selected from an opera, is entitled to protection.[1] So copyright has been held to vest in a song consisting of new words and a new accompaniment written to an old air.[2]

Engravings, Prints, and Cuts.

Great Britain. — The 8 Geo. II. c. 13, provides that "every person who shall invent and design, engrave, etch, or work in mezzotinto or chiaro-oscuro, or from his own works and inventions shall cause to be designed and engraved, etched, or worked in mezzotinto or chiaro-oscuro, any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same" for fourteen years from first publication. This statute gives copyright only when the subject or design of the engraving is original with the engraver. It does not protect engravings made from paintings, sculpture, and other works of art of which the engraver is not the author. This defect was remedied by the 7 Geo. III. c. 38, which extends protection to "any print taken from any picture, drawing, model, or sculpture, either ancient or modern . . . in like manner as if such print had been graved or drawn from the original design of such graver, etcher, or draftsman." It also enlarged the duration of copyright from fourteen to twenty-eight years. Penalties and forfeitures for piracy are imposed by these acts. An action for damages is given by 17 Geo. III. c. 57. The provisions of the acts above cited were extended to Ireland by the 6 & 7 Will. IV. c. 59; and by the 15 & 16 Vict. c. 12, s. 14, they are made to include "prints taken by lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely."

for that piracy. I consider that an infallible test to show the difference between the one work and the other; between the original opera and the arrangement of it for the pianoforte. It is perfectly clear, therefore, that in point of fact — for it is rather a matter of fact than any thing else — the adaptation to the pianoforte, or the arrangement for the pianoforte, of an opera already published, is itself a new and separate work, and is not one and the same with the original opera." Law Rep. 3 Q. B. 229.

[1] Atwill *v.* Ferrett, 2 Blatchf. 39; see also Jollie *v.* Jaques, 1 Id. 618, where the decision concerning an injunction was suspended on the ground of doubt whether the arrangement was any thing more than a copy of the original.

[2] Leader *v.* Purday, 7 C. B. 4.

Engravings, illustrations, &c., published in a book, are treated as part of the book, and are protected by the copyright in the book.[1]

United States. — In this country, engravings and prints have been protected by statute since 1802. By the existing law, copyright is extended to the inventor, designer, or owner of any engraving, cut, or print.[2] No distinction is prescribed between works of this kind and books, except in relation to penalties and forfeitures in cases of piracy. By the act of June 18, 1874, it is provided that the words engraving, cut, and print "shall be applied only to pictorial illustrations, or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office."[3]

In a recent case, playing cards were protected as prints.[4] In another case, a diagram with directions for cutting garments was held to be a book; but the court expressed the opinion that it might be a print or chart within the meaning of the law.[5] A mere label is not entitled to protection under the copyright law;[6] nor is the engraved design of a billiard table, having no other value than that of a mere advertisement.[7]

Paintings, Photographs, Chromos, Sculpture, &c.

Great Britain. — Before 1862, there was no statutory copyright in paintings, drawings, and photographs; and, though an engraving of a painting was protected by statute, the copyright in the former was not violated by copying from the latter.[8] The exclusive right of copying paintings, or any other work of art, was, however, recognized by the common law.[9]

[1] Bogue *v.* Houlston, 5 De G. & Sm. 267; Bradbury *v.* Hotten, Law Rep. 8 Exch. 1; Grace *v.* Newman, Law Rep. 19 Eq. 623. See also Wilkins *v.* Aikin, 17 Ves. 422; Barfield *v.* Nicholson, 2 Sim. & St. 1; Cobbett *v.* Woodward, Law Rep. 14 Eq. 407.

[2] U. S. Rev. St. s. 4952.

[3] 18 U. S. St. at L. 78. See Marsh *v.* Warren, 9 Chic. Leg. News, 395; s. c. 4 Am. L. T. N. s. 126.

[4] Richardson *v.* Miller, 3 L. & Eq. Reporter, 614.

[5] Drury *v.* Ewing, 1 Bond, 540, 548.

[6] Scoville *v.* Toland, 6 West. Law Jour. 84; Coffeen *v.* Brunton, 4 McLean, 516.

[7] Collender *v.* Griffiths, 11 Blatchf. 212. See *ante*, p. 168.

[8] De Berenger *v.* Wheble, 2 Stark. 548.

[9] Turner *v.* Robinson, 10 Ir. Ch.

The 25 & 26 Vict. c. 68, passed in 1862, now gives to the author of every original painting, drawing, or photograph, and his assigns, "the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death." [1]

A photograph of an engraving is an original production within the meaning of this statute.[2]

The provisions of the International Copyright Act, 7 & 8 Vict. c. 12, are extended to paintings, drawings, and photographs, by section 12 of 25 & 26 Vict. c. 68.

The first statute for the protection of sculpture was 38 Geo. III. c. 71, passed in 1798; but this was so ineffective that, in the language of Lord Ellenborough, it "seems to have been framed with a view to defeat its own object." [3] It was amended by 54 Geo. III. c. 56, passed in 1814, and was repealed by 24 & 25 Vict. c. 101.

The 54 Geo. III. c. 56, secures the "sole right and property" therein to "every person or persons who shall make or cause to be made any new and original sculpture, or model, or copy, or cast of the human figure or human figures, or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals, or of any part or parts of any animal combined with the human figure or otherwise, or of any subject being matter of invention in sculpture, or of any alto or basso-relievo representing any of the matters or things hereinbefore mentioned, or any cast from nature of the human figure, or of any part or parts of the human figure, or of any cast from nature of any animal, or of any part or parts of any animal, or of any such subject containing or representing any of the matters and things hereinbefore mentioned, whether separated or combined."

121, 510; Prince Albert *v.* Strange, 2 De G. & Sm. 652, on ap. 1 Mac. & G. 25.

[1] s. 1.

[2] Graves's Case, Law Rep. 4 Q. B. 715.

[3] Gahagan *v.* Cooper, 3 Camp. 111. "These artists," said Lord Ellenborough, "*must again apply to Parliament for protection*; and they had better not *model* the new act themselves as they seem to have done the former."

The term of protection is fourteen years,[1] with provision for an additional term of the same length.[2]

United States. — A photograph was held not to be a print, cut, or engraving, under section 1 of the act of 1831;[3] and there was no statutory protection for photographs until 1865, when a law was passed for that purpose.[4] Photographs and negatives thereof are now included with books and other articles for which copyright is provided by section 4952 of the Revised Statutes.

Copyright in paintings, drawings, chromos, statues, statuary, and models or designs intended to be perfected as works of the fine arts, is secured by the same statute which provides protection for books and other works. The articles above enumerated were first brought within the provisions of the copyright law by the act of 1870. They are subject to the same general rules and principles which govern the copyright in other works.[5]

Designs. — In England, copyright is granted by statute for ornamental designs applied to articles of manufacture, &c., such as paper hangings, carpets, calicoes, silks, laces, pottery, glass, &c.;[6] and also designs having reference to some purpose of utility for "the shape or configuration" of articles of manufacture.[7] The copyright in productions of this kind will not be treated in this work.

[1] s. 1.

[2] s. 2. As to registration and penalties, see 13 & 14 Vict. c. 104, ss. 6, 7.

[3] Wood *v.* Abbott, 5 Blatchf. 325; see also Rossiter *v.* Hall, Ibid. 362.

[4] 13 U. S. St. at L. 540.

[5] But see *post*, p. 231, as to the rights of foreign artists.

[6] 5 & 6 Vict. c. 100.

[7] 6 & 7 Vict. c. 65. The following statutes also relate to copyright in designs: 13 & 14 Vict. c. 104; 21 & 22 Vict. c. 70; 24 & 25 Vict. c. 73; 38 & 39 Vict. c. 93.

CHAPTER III.

QUALITIES ESSENTIAL TO COPYRIGHT.

NEITHER the English nor the American statutes have prescribed any conditions or requirements as to the character of a literary production entitled to copyright. The only statutory condition relating to the nature or quality of the composition is that implied in the avowed purpose of the legislature, which is the encouragement of learning and the increase of useful knowledge. What qualities are essential to bring a literary work within the general scope and spirit of the law is a question which has been left to judicial determination. It is clearly immaterial in what language, native or foreign, a composition may be printed, or in what style or form of publication it appears. The chief inquiries which have fallen within the cognizance of the courts in determining the qualities essential to copyright are: 1, whether the production is innocent, or is injurious to the public peace or morals; 2, whether it is original, or a mere copy; 3, whether, in amount and character, it is a material contribution to useful knowledge, or is too insignificant and valueless to be worthy of protection as a literary composition.

SEDITIOUS AND LIBELLOUS PUBLICATIONS.

In determining whether a work is entitled to copyright, the courts take cognizance of the question whether it tends to disturb the public peace, corrupt morals, or libel individuals. A published work, to be entitled to protection, must in the eyes of the law be innocent. In refusing protection to publications having an injurious moral or political tendency, the court does not act as the guardian of public morals, or as a censor of the press. On the contrary, in declining to interfere with the piratical publication and sale of an obnoxious book, it removes an obstacle to its wider circulation. For this evil

there are other remedies. In cases relating to literary property, only the civil interests of the parties and their rights of property are considered. The publication of a seditious, blasphemous, immoral, or libellous production is a violation of law, and therefore such a work is not entitled to protection as property. The court simply refuses to grant remedies to which the author is not entitled by reason of the objectionable nature of his property. On the same principle, there can be no copyright in a publication whose effect is to encourage the commission of crime;[1] or one whose sale, by reason of fraudulent representations as to its character or authorship, is a case of *crimen falsi*, or an attempt to obtain money under false pretences.[2] It is maintained elsewhere, that the rule that productions not innocent are entitled to no protection as property rightly applies only to published works.[3]

A published work whose seditious or libellous tendency is justly dangerous to the public peace, or exposes the government to peril or serious embarrassment, is clearly not entitled to the protection of the copyright laws. This doctrine was recognized by Lord Ellenborough, in 1803, in an action for the piracy of a song called Abraham Newland. The defence claimed that, while the song professed to be a panegyric on money, it was "a gross and nefarious libel upon the solemn administration of British justice." Lord Ellenborough said: "If the composition appeared, on the face of it, to be a libel so gross as to affect the public morals, I should advise the jury to give no damages. I know the Court of Chancery on such an occasion would grant no injunction. But I think the present case is not to be considered one of that kind."[4] In Wolcott *v.* Walker, wherein the plaintiff sought

[1] Martinetti *v.* Maguire, 1 Deady, 223. See *post*, p. 186, note 2.

[2] Wright *v.* Tallis, 1 C. B. 893. See also Stannard *v.* Harrison, 24 L. T. N. S. 570.

[3] See *ante*, pp. 112–114.

[4] Hime *v.* Dale, 2 Camp. 27, note *b*. The most "nefarious" part of the song was the following stanza: —

"The world is inclined,
To think Justice blind;
Yet what of all that?
She will blink like a bat
At the sight of friend Abraham Newland!
Oh, Abraham Newland! Magical Abraham Newland!
Though Justice, 'tis known,
Can see through a millstone,
She can't see through Abraham Newland!"

"The argument used by Mr. Garrow," said Lawrence, J., "on this fugitive piece as being a libel would as forcibly apply to The Beggar's Opera where the language and allusions are sufficiently derogatory to the administration of public justice."

to restrain the defendant from publishing an edition of his works, in violation of an agreement which had been made by them, Lord Eldon refused to continue the temporary injunction which had been granted, until he should satisfy himself that the writings in controversy were not libellous. "It is not the business of this court," he said, "even upon the submission in the answer, to decree either an injunction, or an account of the profits of works of such a nature that the author can maintain no action at law for the invasion of that which he calls his property, but which the policy of the law will not permit him to consider his property."[1]

See also Du Bost *v.* Beresford, 2 Camp. 511, where, in an action for the malicious destruction of a libellous picture on exhibition, Lord Ellenborough said that the plaintiff was both civilly and criminally liable for having exhibited it; and held that the jury in assessing the damages "must not consider this as a work of art, but must award the plaintiff merely the value of the canvas and paint which formed its component parts." In Clay *v.* Yates, 1 Hurl. & N. 73, it was held that a printer was not bound to continue the printing of a book after he discovered that it contained libellous matter, and was entitled to recover for what had been printed before such discovery was made. See also Gale *v.* Leckie, 2 Stark. 107.

[1] 7 Ves. 1. No question concerning the character of the publication in controversy appears to have been raised at the bar, and the Chancellor admitted that he was "in total ignorance of the nature of this work." Lord Eldon's course in this case has been severely criticised by Lord Campbell:—

"But the decisions of Lord Eldon which I most object to, are those by which he erected himself into a censor of the press, and gave himself the power to protect or to extinguish all literary property at his pleasure. From the time when copyright was vested in authors by the statute of Queen Anne, till Lord Eldon received the Great Seal, equity judges had guarded it from piracy by injunction; and without this remedy the right would be a mockery, as actions at law to recover damages from hawkers and pedlers, who may sell pirated editions of any work in city or country, would only add to the author's loss. The authorship and the piracy being established, the injunction had always gone as a matter of course, without any question being made respecting the nature of the publication; for under Lord Cowper, Lord Macclesfield, Lord King, Lord Hardwicke, Lord Camden, Lord Thurlow, and Lord Loughborough, it never had been imagined that the defendant could be permitted to allege, as a justification of his piracy, that he had been committing a crime by publishing something for which he was liable to be punished, as injurious to private character, or dangerous to religion, morality, or the good government of the State. Accordingly injunctions had been granted against the piracy of the Dunciad, of Swift's Miscellanies, of the Beggar's Opera, of the Life of George Anne Bellamy, and of other works containing passages which if strictly examined might be considered very censurable — no one suggesting that these should be culled as a repast for the Lord Chancellor, or that he should be required to waste his valuable time in trying to find them out, — and all who thought upon the subject being convinced, that if the work pirated were

To defeat copyright on the ground that the work is seditious or libellous on the public, it is not enough to show that the

in any degree exceptionable, a benefit was conferred upon the community by restraining the circulation of it, instead of proclaiming to all the world that it might be published with impunity, in any form, and at any price.

"But within a year after Lord Eldon's appointment as Chancellor, Dr. Wolcott, better known as Peter Pindar, having a dispute with his booksellers respecting the construction of an agreement for publishing two editions of his works, and these editions being published, — as he contended, contrary to the agreement, — filed a bill, and prayed an injunction which was granted in the first instance, till answer. The defendants by their answer admitted that they had published in one of these editions some of the plaintiff's works *contrary* to the agreement, and as to that edition therefore they submitted. With respect to the other edition they insisted that they were justified by the agreement. The pleading at the bar being finished, the conduct of the Lord Chancellor appears to me, I confess, to be most extraordinary and unaccountable. No charge is made by answer or affidavit, or *viva voce* statement, that the work in question contained any thing exceptionable, and the judge had no judicial knowledge of its contents, nor was he (as far as I can discover) judicially called upon to form any opinion upon its merits, for it was at any rate to be presumed to be innocent. But he, privately knowing that Timothy Wolcott was Peter Pindar, and that Peter Pindar had written some ribald verses respecting his 'royal master,' — upon the authority of a *nisi prius dictum* of Lord Chief Justice Eyre at the trial of Dr. Priestley against the hundred for the value of his furniture and books burnt in the Birmingham riots, — 'that if any of the books were seditious, the plaintiff was not entitled to recover for them,' — of his own mere motion refused to decree an injunction or an account of profits, even with respect to that edition as to which there was a submission in the answer, saying, — 'It is the duty of the court to know whether an action at law would lie; for if not, the court ought not to give an account of unhallowed profits of libellous publications. At present, I am in total ignorance of the nature of this work, and whether the plaintiff can have a property in it or not.' After showing how with respect to the disputed edition there must be an action, he continued: 'But even as to the other edition, before I uphold any injunction, I will see these publications and determine upon the nature of them; whether there is question enough to send to law as to the property in those copies; for if not, I will not act upon the submission in the answer. If upon inspection the work appears innocent, I will act upon that submission; if criminal, I will not act at all; and if doubtful, I will send that question to law.' As to the disputed edition, the injunction was very properly dissolved; but as to the other edition, contrary in my opinion to all propriety, an order was made to dissolve the injunction, unless in a week the books should be brought into court for the perusal of the Lord Chancellor.

"Such is the foundation of the Eldonian doctrine, that the judge before granting an injunction against literary piracy is himself *ex mero motu* to read through the whole of the work, that he may see whether it contains any thing which in his opinion may possibly be construed into a libel — a doctrine which must apply equally to an encyclopædia of fifty folios as to a collection of fugitive poems in one duodecimo. I know not whether there may be a reference to the master to report on the character of the work, but one master may be wholly insufficient for the undertaking; and at any rate in analogy to the proceeding upon a question of title he must be allowed to avail himself of the opinions of divines, philosophers, and politicians,

facts set forth or the opinions expressed are merely objectionable or obnoxious, that public measures or men in their public capacity are censured, satirized, or ridiculed. The publication must be such as justly to cause or to threaten a breach of the peace, or to interfere with the functions of the government, or in some way to work positive harm to the Commonwealth. Then is shown an injury to society which comes within the cognizance of the law. In the United States, the largest freedom of speech and of the press consistent with the public welfare is allowed and guaranteed. Until that privilege is justly forfeited by its abuse, no one is held amenable to the laws for the punishment of sedition and libel on the public. The same enlightened liberality should govern in determining rights of literary property.

There is no reported case in which has been expressly considered the question of copyright in a publication which is a libel on an individual, but not directly on the public. But, in law, a libellous attack on a citizen is looked upon as an offence against society, and one which, in the absence of legal remedies for redress, would lead to a breach of the peace. On this theory, and on the ground that, to publish a libel is a violation of the law, the courts may refuse protection to a publication in which an individual, though not the public expressly, is grossly libelled.

Immoral Productions.

The protection of the law will not be extended to a publication which is obscene, or has a positive immoral tendency. In Stockdale *v.* Onwhyn, the plaintiff claimed damages for the unauthorized publication of the Memoirs of Harriette

and exceptions may be taken to his report to be argued before the court. More astounding it is that in this case the Lord Chancellor, professing 'total ignorance of the nature of the work,' should, without any impeachment of it, have imposed upon himself the necessity of reading the whole of it before granting the injunction. The bill and answer showed it to have been printed and published at least six years — during the greater part of which he had himself filled the office of Attorney-General, so that if it were libellous it would have been his duty to prosecute it. For my own part I cannot help suspecting that he was well acquainted with its contents, — that notwithstanding his propensity to prosecute libels, he had been afraid to bring the author before a jury, and that he now thought it a more convenient course to unite in his own person the functions of prosecutor and of judge." 10 Lives of the Chancellors (5th English ed.), 254.

Wilson, which professed to be a history of the amours of a courtesan, and contained "in some parts matter highly indecent, and in others matter of a slanderous nature upon persons named in the work." It was held that the publication of such a book was an offence against the law, and therefore the plaintiff could have no property in it.[1] The same doctrine was applied in a recent American case, wherein the court decided that the dramatic spectacle called the Black Crook was not entitled to protection, on the ground that it "only attracts attention as it panders to a prurient curiosity or an obscene imagination by very questionable exhibitions and attitudes of the female person."[2] Where it was contended that cards for playing were not entitled to protection, because they are often used for unlawful purposes, Mr. Justice Shepley said: "Courts of justice will not lend their aid to protect the authors of immoral

[1] 5 Barn. & Cr. 173. "I am certain," said Chief Justice Abbott, "no lawyer can say that the sale of each copy of this work is not an offence against the law. How then can we hold that by the first publication of such a work, a right of action can be given against any person who afterwards publishes it? It is said that there is no decision of a court of law against the plaintiff's claim. But upon the plainest principles of the common law, founded as it is, where there are no authorities, upon common sense and justice, this action cannot be maintained. It would be a disgrace to the common law could a doubt be entertained upon the subject; but I think that no doubt can be entertained, and I want no authority for pronouncing such a judicial opinion."

In Poplett *v.* Stockdale, Ryan & M. 337, it was held that the printer was not entitled to recover money due from the publisher for printing this book. In a case before Vice-Chancellor Leach, in 1823, an injunction which had been obtained to restrain the publication of a pirated edition of a part of Don Juan was dissolved; but the defendant was ordered to keep an account. Jac. 474, note.

In Fores *v.* Johnes, 4 Esp. 97, it was held that the defendant who had given an order to the plaintiff for "all the caricature prints that had ever been published" was not bound to receive those which were immoral or obscene.

[2] Martinetti *v.* Maguire, 1 Deady, 216. "Congress," said Deady, J., "is not empowered by the Constitution to pass laws for the protection or benefit of authors and inventors, except as a means of promoting the progress of 'science and useful arts.' For this reason an invention expressly designed to facilitate the commission of crime, as murder, burglary, forgery or counterfeiting, however novel or ingenious, could not be patented. So with a dramatic composition which is grossly indecent, and calculated to corrupt the morals of the people. The exhibition of such a drama neither promotes the progress of science or useful arts, but the contrary. The Constitution does not authorize the protection of such productions, and it is not to be presumed that Congress intended to go beyond its power in this respect to secure their authors and inventors the exclusive right to the use of them." Ibid. 223. See also Keene *v.* Kimball, 16 Gray (82 Mass.), 548; Shook *v.* Daly, 49 How. Pr. 366.

works. But, where there is nothing immoral or improper in the prints themselves, the fact that they may be used by persons to violate the laws against gambling does not of itself deprive them of the protection of the law. To do this, it must appear either that there is something immoral, pernicious, or indecent in the things *per se*, or that they are incapable of any use except in connection with some illegal or immoral act. It is not contended that the playing cards of the complainant are subject to either of these imputations."[1] Whether the work in controversy is positively indecent, or has an objectionable, immoral tendency, will be in some cases a question on which well-meaning persons may honestly differ. But, when the fact is found that the publication in this respect is obnoxious to society, it is not a proper subject of copyright.

Blasphemous Publications.

Great Britain. — Blasphemous writings cannot be the subject of copyright, because blasphemy is a crime against society, punishable by law. But what is blasphemy, and what liberty an author may exercise in treating religious subjects, without forfeiting the right to protection for his literary property, are questions not decisively or satisfactorily answered by the decisions. The doctrine that no work injurious to religion is entitled to protection was advanced by Lord Eldon, and rests on two equity decisions pronounced by him in 1822. When application was made to restrain the publication of a pirated edition of Byron's Cain, the Chancellor doubted whether the poem was not "intended to vilify and bring into discredit that portion of Scripture history to which it relates," and refused the injunction until it should be shown that an action at law could be maintained.[2] On similar grounds, the

[1] Richardson *v.* Miller, 3 L. & Eq. Reporter, 614.

[2] *Murray v. Benbow*, 6 Petersd. Abr. 558. "Now this publication," said Lord Eldon, "if it is one intended to vilify and bring into discredit that portion of Scripture history to which it relates, is a publication, with reference to which, if the principles on which that case at Warwick (Dr. Priestley's case) was decided, be just principles of law, the party could not recover any damages in respect of a piracy of it. *This court has no criminal jurisdiction*; it cannot look on any thing as an offence; but in those cases it only administers justice for the protection of the civil rights of those who possess them, in consequence of being able to maintain an action. You have alluded to Milton's immortal work; it did happen in the course of last long vacation,

same judge refused to continue an injunction against the piratical publication of Sir William Lawrence's Lectures on Physiology, Zoölogy, and the Natural History of Man. These lectures had been delivered by that eminent surgeon at the College of Surgeons, in London, and by him they were afterward published. On a motion to dissolve the *ex parte* injunction which had been granted against the publication of a pirated edition, the defendant pleaded "that the nature and

amongst the *solicitæ jucunda oblivia vitæ*, I read that work from beginning to end; it is therefore quite fresh in my memory, and it appears to me that the great object of its author was to promote the cause of Christianity; there are, undoubtedly, a great many passages in it, of which, if that were not its object, it would be very improper by law to vindicate the publication; but, taking it altogether, it is clear that the object and effect were not to bring into disrepute. but to promote, the reverence of our religion. Now, the real question is, looking at the work before me, its preface, the poem, its manner of treating the subject, particularly with reference to the fall and the atonement; whether its intent be innocent as that of the other with which you have compared it; or whether it be to traduce and bring into discredit that part of sacred history. This question I have no right to try, because it has been settled, after great difference of opinion among the learned, that it is for a jury to determine that point; and where, therefore, a reasonable doubt is entertained as to the character of the work, (and it is impossible for me to say I have not a doubt, I hope it is a reasonable one), another course must be taken for determining what is its true nature and character."

In criticising Lord Eldon's decision in this case, Lord Campbell said: —

"In this 'mystery,' which Lord Jeffrey says, 'abounds in beautiful passages, and shows more *power* than any of the author's dramatic compositions,' there are sentiments very much to be condemned; but so there are in the speeches of Paradise Lost, and it must have been a strange occupation for a judge who for many years had meddled with nothing more imaginative than an act of Parliament, to determine in what sense the speculations of Adam, Eve, Cain, and Lucifer are to be understood, and whether the tendency of the whole poem be favorable or injurious to religion." 10 Lives of the Chancellors (5th English ed.), 257.

The scrupulous doubts of Lord Eldon concerning the religious tendency of Byron's work seem not to have been shared by Sir Walter Scott, who, in accepting the dedication of Cain, wrote, in 1821, to the publisher, Mr. John Murray: "I accept with feelings of great obligation the flattering proposal of Lord Byron to prefix my name to the very grand and tremendous drama of Cain. I may be partial to it, and you will allow I have cause; but I do not know that his muse has ever taken so lofty a flight amid her former soarings. He has certainly matched Milton on his own ground. Some part of the language is bold, and may shock one class of readers, whose tone will be adopted by others out of affectation or envy. But then they must condemn the Paradise Lost, if they have a mind to be consistent. The fiend-like reasoning and bold blasphemy of the fiend and of his pupil lead exactly to the point which was to be expected, the commission of the first murder and the ruin and despair of the perpetrator." 6 Lockhart's Life of Sir Walter Scott (10 vols., Edinburgh), 424.

general tendency of the work in question were such that it could not be the subject of copyright," and referred to passages in it which were claimed to be "hostile to natural and revealed religion, and impugned the doctrines of the immateriality and immortality of the soul." For the plaintiff, it was claimed that the passages did not bear this construction. In passing judgment, Lord Eldon said: "Looking at the general tenor of the work, and at many particulars of it, recollecting that the immortality of the soul is one of the doctrines of the Scriptures, considering that the law does not give protection to those who contradict the Scriptures, and entertaining a doubt, I think a rational doubt, whether this book does not violate that law, I cannot continue the injunction."[1]

If the doctrine propounded by Lord Eldon, more than half a century ago, shall be followed by the English courts of to-day, protection will be refused to all publications in which are denied the fundamental principles of the Bible: as the existence of the Deity, the Divinity of Christ, the inspiration of the Scriptures, the immortality of the soul, and even less important truths. The question, however, has not since been adjudicated in any reported copyright case. Whether the court, when again called upon to declare the law, will adopt the narrow theories of Lord Eldon, or will proclaim a better and more

[1] Lawrence *v.* Smith, Jac. 471.

"I take it for granted," said the Lord Chancellor, "that when the motion for the injunction was made, it was opened as quite of course; nothing probably was said as to the general nature of the work, or of any part of it; for we must look not only at the general tenor, but at the different parts; and the question is to be decided, not merely by seeing what is said of materialism, of the immortality of the soul, and of the Scriptures, but by looking at the different parts and inquiring whether there be any which deny or which appear to deny the truth of Scripture, or which raise a fair question for a court of law to determine whether they do or do not deny it. . . . But if I feel a rational doubt whether an action would lie, it will not be necessary to go into the grounds of that doubt; it might perhaps prejudice the trial if I did."

The doctrine here applied by Lord Eldon was foreshadowed in 1720 by Lord Chancellor Macclesfield, who in granting an injunction to restrain the publication of a piratical English translation of Burnett's *Archæologia Philosophica*, on the ground that while the original "contained strange notions intended by the author to be concealed from the vulgar in the Latin language, in which language it could not do much hurt," the dissemination of its doctrines in English would be harmful to religion, said that he "looked upon it that this court had a superintendency over all books, and might in a summary way restrain the printing or publishing any that contained reflections on religion or morality." Burnett *v.* Chetwood, 2 Meriv. 441.

liberal doctrine, and, if so, what advance toward a wise tolerance will be made, is a matter of conjecture. There is no good reason why even in England, where religion is still jealously guarded by intolerant acts, which have too long remained in force, the protection of the law should be denied to publications in which the accepted truths of Christianity are doubted, or denied, with moderation and sincerity, and without injury to public morals.

But it is not probable that the English courts will yet go so far as to protect a work in which is expressly denied, however temperately or conscientiously, the fundamental principles of religion. The laws of England relating to blasphemy and other offences against religion are stringent. A statute of the seventeenth century still subjects to punishment "any person or persons having been educated in or at any time having made profession of the Christian religion within this realm" who "shal assert or maintain there are more gods than one or shal deny the Christian religion to be true or the Holy Scriptures of the Old and New Testament to be of divine authority."[1]

Although this statute, as far at least as the enforcement of its penalties is concerned, is practically obsolete, its spirit is to be found in the still prevalent common-law doctrines which have been affirmed by the courts. In the cases that have arisen, the wrong-doer has been held to have made wanton and impious attacks on religion or Christianity, and against these acts the law has been construed with vigor. Whether the same or a different rule is applicable in cases of temperate expression of honest religious disbelief has not been directly adjudicated or considered by the courts. Nor can it be determined with certainty what freedom, consistent with the decisions heretofore rendered, a conscientious disbeliever may lawfully exercise in soberly promulgating views hostile to the accepted teachings of the Bible. In theory, malice and a wanton manner are essential to blasphemy. But there is little in the reported cases to show that impious motives and manner will not be presumed as a matter of course, where views

[1] 9 Will. III. c. 35, passed in 1698, given as 9 & 10 Will. III. c. 32, in Ruffhead's Statutes at Large. 2 Revised Statutes, 72. This act is

antagonistic to religion are promulgated. In other words, if the stringent doctrines of the early decisions shall be still followed, it will probably be a rare case in which the rigor of the law against a disbeliever will be overcome by the sincerity with which his convictions are held, or the moderation with which they are expressed. But there is little doubt that in penal actions for blasphemy more liberal views will now govern the courts, and that the presence or the absence of express malice and a wanton manner will be a controlling inquiry in determining the law.[1]

[1] The leading English decisions relating to blasphemy may be found in Starkie's Law of Slander and Libel (4th ed., by Folkard; Wood's Am. ed.), and The Law relating to Works of Literature and Art, by Shortt (London, 1871).

Mr. Starkie's liberal statement of the law, however desirable and sound in theory it may be, is hardly sustained by the decisions. He says: —

"There are no questions of more intense and awful interest than those which concern the relations between the Creator and the beings of his creation; and although, as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions, yet it cannot be doubted that any man has a right, not merely to judge for himself on such subjects, but also legally speaking to publish his opinions for the benefit of others. When learned and acute men enter upon these discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing mischief, must in general tend to the advancement of truth, and the establishment of religion on the firmest and most stable foundations. The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless; but, be this as it may, the law interferes not with his blunders so long as they are honest ones, justly considering, that society are more than compensated for the partial and limited mischiefs which may arise from the mistaken endeavors of honest ignorance, by the splendid advantages which result to religion and to truth from the exertions of free and unfettered minds. It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals, — a state of apathy and indifference to the interests of society, — is the broad boundary between right and wrong. If it can be collected from the circumstances of the publication, from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons or subjects, that the design of the author was to occasion that mischief to which the matter which he publishes immediately tends, to destroy or even to weaken men's sense of religious or moral obligations, to insult those who believe by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and form of worship

But the same liberality, however desirable, can hardly be expected in the judicial treatment of civil questions. As recently as 1867, it was held by a court of law in a civil case to be unlawful to deliver lectures on such subjects as "The Character and Teachings of Christ; the former defective, the latter misleading:" and "The Bible shown to be no more inspired than any other book; with a refutation of modern theories thereon." The plaintiff had contracted for the use of a public hall in Liverpool in which to deliver lectures, and afterward advertised the subjects, when the defendant refused to permit his hall to be used for such purposes, and an action for breach of contract followed. For the plaintiff, it was contended that "the test of blasphemy lies rather in the manner than the matter of what is said; and the current opinion of modern times has been, that, to support a prosecution for blasphemy, there must be a scurrilous and indecent attack upon commonly received opinions, or a maintenance of views flagrantly opposed to ordinary morality." It does not appear that the judges expressed any opinion on the vital question here raised, except that Sir George Bramwell remarked that, whatever might be the law in penal actions for blasphemy, a more stringent rule should be applied in civil cases. The court found that the contract was for an unlawful purpose, and held that it could not be enforced.[1]

into disgrace and contempt, the offence against society is complete." Folkard's Starkie, p. 599; Wood's ed. p. 771.

Mr. Shortt justly notes that the law is here stated "with a degree of liberality which, however desirable it may be in itself, the decided cases seem hardly to warrant." "It is a matter of some doubt," he says, "whether a criminal prosecution could, with the tolerant views now prevailing, be successfully maintained for the *bona fide* publication of opinions sincerely and conscientiously entertained, and temperately expressed, though hostile to the doctrines of Christianity. The actual decisions on the subject do not warrant a more confident statement; and the language of the statute 9 & 10 Will. III. c. 32, which is still in force, hardly warrants even this." Law of Literature and Art, pp. 305, 307.

The question under consideration was put directly to Lord Chief Justice Abbott in The King *v.* Waddington, 1 Barn. & Cr. 26, but was not answered. The defendant was on trial for having said that "Jesus Christ was an impostor, and a murderer in principle." One of the jurors asked whether a work which denied the divinity of the Saviour was libellous. But the Chief Justice evasively replied: "A work speaking of Jesus Christ in the language used in the publication in question was a libel."

[1] Cowan *v.* Milbourn, Law Rep. 2 Exch. 230.

"It would be a violation of duty," said Kelly, C. B., "to allow the ques-

To apply this illiberal doctrine in determining the validity of copyright in a book is to affirm the Eldonian theory. To adopt that unsound theory now, is to annihilate the literary property in not a few of the works which are to make the Victorian age of intellectual achievements as glorious as the Elizabethan.[1]

United States. — In this country there is no reported case in which the question of copyright in irreligious books has been considered. But the large freedom of inquiry and discussion allowed in religious matters is shown by the construction of the law relating to blasphemy. This law punishes scurrilous and impious attacks on the Christian religion, but does not prohibit the dissemination of any opinions or beliefs, however extreme, provided they are conscientiously entertained, and promulgated with propriety. The rule has been expressly declared, that impious purposes and a wanton manner are essential to complete the offence; and that, in the absence of these, not even a denial of the existence of the Deity will amount to blasphemy.[2] In the language of Chief-Justice Shaw,

tion raised to remain in any doubt. That question is, whether one who has contracted to let rooms for a purpose stated in general terms, and who afterwards discovers that they are to be used for the delivery of lectures in support of a proposition which states, with respect to our Saviour and His teaching, that the first is defective and the second misleading, is nevertheless bound to permit his rooms to be used for that purpose in pursuance of that general contract. There is abundant authority for saying that Christianity is part and parcel of the law of the land; and that, therefore, to support and maintain publicly the proposition I have above mentioned is a violation of the first principles of the law, and cannot be done without blasphemy. I therefore do not hesitate to say that the defendant was not only entitled, but was called on and bound by the law, to refuse his sanction to this use of his rooms. It is contended that this was not the real motive which actuated the defendant, and that the evidence showed another and different motive, and that this reason was put forward only as an excuse. But I am of opinion that, whatever may have been the motive operating on his own mind, it was open to him by law, at the last moment before the rooms had been taken possession of, to refuse their use, and to justify that refusal on the ground that the plaintiff had in fact this purpose in view."

[1] "When Dr. Johnson and I were left by ourselves," says Boswell, "I read to him my notes of the opinions of our judges upon the questions of literary property. He did not like them; and said, 'They make me think of your judges not with that respect which I should wish to do.' To the argument of one of them, that there can be no property in blasphemy or nonsense, he answered, 'Then your rotten sheep are mine! By that rule, when a man's house falls into decay, he must lose it.'" 4 Life of Johnson (Croker's ed., 10 vols., London), 45.

[2] People *v.* Ruggles, 8 Johns. Rep.

the law "does not prohibit the fullest inquiry and the freest discussion, for all honest and fair purposes, one of which is the discovery of truth. It admits the freest inquiry when the real purpose is the discovery of truth, to whatever result such inquiries may lead. It does not prevent the simple and sincere avowal of a disbelief in the existence and attributes of a supreme intelligent Being, upon suitable and proper occasions."[1] "The free, equal, and undisturbed enjoyment of religious opinion," said Chief Justice Kent, "whatever it may be, and free and decent discussions on any religious subject, are granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community, is an abuse of that right."[2] Mr. Justice Cooley has given expression to the following sound views on this subject: "But it does not follow because blasphemy is punishable as a crime, that therefore one is not at liberty to dispute and argue against the truth of the Christian religion, or of any accepted dogma. Its 'divine origin and truth' are not so far admitted in the law as to preclude their being controverted. To forbid discussion on this subject, except by the various sects of believers, would be to abridge the liberty of speech and of the press in a point which, with many, would be regarded as most important of all. Blasphemy implies something more than a denial of any of the truths of religion, even of the highest and most vital. A bad motive must exist; there must be a wilful and malicious attempt to lessen men's reverence for the Deity, or for the accepted religion. But, outside of such wilful and malicious attempt, there is a broad field for candid investigation and discussion, which is as much open to the Jew and the Mahometan as to the professors of the Christian faith."[3]

The question now arises, Will or should the same liberal

(N. Y., 2d ed.) 225; Updegraph *v.* Commonwealth, 11 Serg. & R. (Pa.) 394; State *v.* Chandler, 2 Harring. (Del.) 553; Commonwealth *v.* Kneeland, 20 Pick. (37 Mass.) 206.

[1] Commonwealth *v.* Kneeland, *supra*, 220. In the same case, Mr. Justice Morton said: "To complete this offence in my judgment, there must be not only a denial of God, but it must be done in a manner and in language justly offensive to others and attended by a corrupt and malicious intent; in other words it must be blasphemously done." Ibid. 239.

[2] People *v.* Ruggles, 8 Johns. Rep. (N. Y. 2d ed.) 228.

[3] Const. Lim. 474.

doctrines be applied in determining questions of literary property? The law for the punishment of blasphemy is penal, and should therefore, it may be urged, be construed with less stringency than in civil cases. It may also be argued, that, because the law refuses to punish the authors of certain works injurious to religion, it does not follow that it will protect their property in such works; that not to treat the publication of the objectionable writing as an offence is one thing, but to apply active remedies for its protection is another and a different matter. Whatever plausibility or force there may be in this argument, the distinction is not a valid one to defeat the copyright in a publication which is not blasphemous. Copyright confers *prima facie* title to property in a book. That property is entitled to protection, and the courts are bound to give the usual remedies, until a defect in the title, or a fault in the property, is shown. If the work appears on its face, or is proved to be blasphemous, libellous, or seditious, its publication is unlawful, because blasphemy, libel, and sedition are offences against the law, and the author is thereby deprived of his remedies. If it be immoral, the right of protection is forfeited, because immorality is regarded in every civilized community as an offence against society and harmful to the public welfare.

But the temperate promulgation of sincere beliefs, hostile to the Christian religion, is not in this country a violation of any law, and cannot justly be regarded as injurious to morality or the public welfare. To defeat the right of property on the ground of the obnoxious character of the book, it must appear that some positive law is violated, or that the publication is dangerous to the peace of the community, or harmful to public morals. There are those who believe that the dissemination of doctrines hostile to religion is an act of immorality, and dangerous to the welfare of society. So, also, not a few regard the exercise of a large freedom in political discussion as damaging to the government and baneful to the commonwealth. But in this country the expression of political opinions, however hostile to the government, comes within the cognizance of the law only when the public peace and order are thereby disturbed or threatened, or the government exposed to peril. A like rule is proper in the case of religious inquiry. Religion and morality,

irreligion and immorality, are not synonymous words. Disbelief in the Bible or the religious doctrines which it teaches does not in itself amount to immorality; and the proper expression of that disbelief does not justly interfere with the public order or undermine public morals. Until this tendency can be shown in a literary composition, its religious character is not a proper subject of judicial inquiry. Unless the object be to ascertain whether the promulgation of views hostile to religion amounts to blasphemy, immorality, or a breach of the public peace, the law can rightly take no more cognizance of differences of opinion in religion than in politics or philosophy or political economy, or any other department of thought.[1]

In the absence, therefore, of any judicial or statutory restrictions on this subject, there appears to be no good reason why valid copyright will not rest in a publication in which are denied any or all of the doctrines of the Bible; provided the motives and the manner of the author be such as not to warrant the finding of a case of blasphemy, immorality, or breach of the peace.

False Pretences as to Authorship.

The principle that a work subversive of good order or morality is not a proper subject of copyright has been ex-

[1] "If a court of equity," says Mr. Justice Story, "under color of its general authority, is to enter upon all the moral, theological, metaphysical and political inquiries, which in past times have given rise to so many controversies, and in the future may well be supposed to provoke many heated discussions, and if it is to decide dogmatically upon the character and bearing of such discussions, and the rights of authors, growing out of them; it is obvious that an absolute power is conferred over the subject of literary property, which may sap the very foundations on which it rests, and retard, if not entirely suppress, the means of arriving at physical as well as metaphysical truths. Thus, for example, a judge who should happen to believe, that the immateriality of the soul, as well as its immortality, was a doctrine clearly revealed in the Scriptures (a point upon which very learned and pious minds have been greatly divided), would deem any work ante-Christian, which should profess to deny that point, and would refuse an injunction to protect it. So, a judge who should be a Trinitarian might most conscientiously decide against granting an injunction in favor of an author, enforcing Unitarian views; when another judge of opposite opinions might not hesitate to grant it." 2 Eq. Jur. § 988.

tended in England to protect the public against publications issued under false and fraudulent representations, intended injuriously to deceive the buyer. In an action for piracy of a book entitled Evening Devotions, from the German of C. C. Sturm, it was shown that the work was not a translation from Sturm, but that it had been wilfully and falsely represented to be so, with a view of gaining profits by the unwarranted use of the name of that well-known writer. The falsehood expressed in the title was reiterated at length in the preface. The court characterized this proceeding on the part of the plaintiff as an attempt to obtain money under false pretences, and held that there could be no valid copyright in a work whose "sale produces such consequences." Chief Justice Tindal, who pronounced the decision, drew a distinction between this case and the common one of publications issued under an assumed name, with innocent intent by the author and without harm to the buyer. In the latter case, there is no serious design on the part of the author to deceive the buyer, or to acquire unlawful profits by false representation; and it is a matter of indifference to the public whether the representation be real or fictitious. The copyright is not affected by such innocent representations. But, when the public is induced to buy a book in the false belief that it is the work of a well-known writer, who in fact has had no part in its production, the transaction is a fraud which will defeat the copyright.[1]

[1] Wright *v.* Tallis, 1 C. B. 893. The Chief Justice said: "The first observation, therefore, that arises, is, that the present case is perfectly distinguishable from those which have been referred to at the bar, of books of amusement or instruction having been published as translations, whilst they have been, in fact, original works; or having been published under an assumed, instead of a true name. Such was the instance given of The Castle of Otranto [by Walpole], professing to be translated from the Italian; and such the case of innumerable works published under assumed names — voyages, travels, biography, works of fiction or romance, and even works of science and instruction; for, in all these instances the misrepresentation is innocent and harmless. There is not found in any one of those cases, any serious design on the part of the author to deceive the purchaser, or to make gain and profit from him by the false representation. The purchaser, for any thing that appears to the contrary, would have purchased at the same price, if he had known that the name of the author was an assumed, and not a genuine name; or had known that the work was original, and not translated. And, indeed, in most of the cases that can be put, the statement is

Equity has restrained the publication of a book falsely represented to be the production of a well-known author.[1]

ORIGINALITY.

The rule has been laid down and universally recognized, that originality is an essential attribute of copyright in a literary composition. The words original and originality, as used in the law of copyright, have a most comprehensive meaning. Very few, if any, intellectual productions are original in the strict sense that the author is the creator of all that is expressed in his composition. Knowingly or unknowingly, one writer borrows from another; and in the most original works of modern genius are found thoughts and sentiments as old as language itself.[2] The object of the law of copyright is to pro-

not calculated in its nature to deceive any one, but is seen, upon the very first glance, to be plainly and manifestly fictitious. In those cases, therefore, it was perfectly indifferent to the public, whether the representation was true or not; and, in all probability, the book would have obtained an equal sale, whether it was a translation or an original, whether the name of the author was assumed or genuine.

"But, in the case before us, no one of these observations will apply. The facts stated in the plea import a serious design on the part of the plaintiff to impose on the credulity of each purchaser, by fixing upon the name of an author who once had a real existence, and who possessed a large share of weight and estimation in the opinion of the public. The object of the plaintiff is, not merely to conceal the name of the genuine author, and to publish opinions to the world under an innocent disguise; but to deceive the public, by inducing them to believe, that the work is the original work of the author whom he names, when he himself knows it not to be so, to obtain from the purchaser a greater price than he would otherwise obtain. The transaction, therefore, ranges itself under the head of *crimen falsi*. The publisher seeks to obtain money under false pretences; and as, not only the original act of publishing the work, but the sale of copies to each individual purchaser, falls within the reach of the same objection, we think the plaintiff cannot be considered as having a valid and subsisting copyright in the work, the sale of which produces such consequences, or that he is capable of maintaining an action in respect of its infringement.

"The cases in which a copyright has been held not to subsist where the work is subversive of good order, morality, or religion, do not, indeed, bear directly on the case before us; but they have this analogy with the present inquiry, that they prove that the rule which denies the existence of copyright in those cases is a rule established for the benefit and protection of the public. And we think the best protection that the law can afford to the public against such a fraud as that laid open by this plea, is, to make the practice of it unprofitable to its author." Ibid. 906.

[1] Byron *v.* Johnston, 2 Meriv. 29; Seeley *v.* Fisher, 11 Sim. 581; Harte *v.* DeWitt, 1 Cent. Law Jour. 360. See also Archbold *v.* Sweet, 5 Car. & P. 219, treated in Chap. VII.

[2] "In truth, in literature, in science and in art," said Mr. Justice Story,

mote learning and useful knowledge by protecting the fruits of intellectual activity. Almost every product of independent literary labor is a proper subject of copyright; and, to be entitled to protection, the author has simply to show something material and valuable produced by himself, and not copied from the protected matter of another.[1]

Work need not be wholly Original. — In many cases the author has created the substance as well as the form of the

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

"Virgil borrowed much from Homer; Bacon drew from earlier as well as contemporary minds; Coke exhausted all the known learning of his profession; and even Shakespeare and Milton, so justly and proudly our boast, as the brightest originals, would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days. What is La Place's great work, but the combination of the processes and discoveries of the great mathematicians before his day, with his own extraordinary genius? What are all modern law-books, but new combinations and arrangements of old materials, in which the skill and judgment of the author in the selection and exposition and accurate use of those materials, constitute the basis of his reputation, as well as of his copyright? Blackstone's Commentaries and Kent's Commentaries are but splendid examples of the merit and value of such achievements." Emerson *v.* Davies, 3 Story, 779.

[1] "The defendant is not liable to this action, unless the jury find that Russell was the author of the musical composition, The Old Arm Chair, for which he obtained a copyright in 1840; and it is for the jury to decide, upon the whole evidence, whether he was or was not the author. If the said musical composition was borrowed altogether from a former one, or was made up of different parts, copied from older musical compositions, without any material change, and put together into one tune, with only slight and unimportant alterations or additions, then Russell was not the author within the meaning of the law; but the circumstance of its corresponding with older musical compositions, and belonging to the same style of music, does not constitute it a plagiarism, provided the air in question was, in the main design, and in its material and important parts, the effort of his own mind." Taney, C. J. Reed *v.* Carusi, Tan. Dec. 72.

So a play may be original, although its characters and incidents are similar to those of a previously published novel. Boucicault *v.* Fox, 5 Blatchf. 87.

composition for which he claims copyright; and, though the sentiments and thoughts may not all be original, neither the whole nor a material integral part of the composition can be said to have previously existed. Popularly speaking, the work is wholly new and original. But the law does not require that a person, to be entitled to copyright, shall be the sole creator of the work for which protection is claimed. Labor bestowed by one person on the production of another, if no rights are thereby invaded, will often constitute a valid claim for copyright. The maker of an abridgment, translation, dramatization, digest, index, or concordance of a work of which he is not the author, may obtain a copyright for the product of his own labor and skill. So, also, any one, by making material changes, additions, corrections, improvements, notes, comments, &c., in the unprotected work of another, may create a valid claim for copyright in a new and revised edition. A person acquires a title to copyright by arranging music which he has not composed.[1] A photograph, chromo, or engraving is often but a copy of a work of art in whose production the photographer or engraver had no part.[2] In all such cases, the test of originality is applied to that which represents the labor or skill of the

[1] Atwill *v.* Ferrett, 2 Blatchf. 39; Wood *v.* Boosey, Law Rep. 2 Q. B. 340, on ap. 3 Id. 223. See also Boosey *v.* Fairlie, 7 Ch. D. 301, 309.

In Wood *v.* Boosey, Bramwell, B., said: "It has been said that there is nothing inventive on the part of the person who makes the arrangement. In one sense, there is not, that is to say, he neither invents the tune nor the harmony; but there is invention in another sense, or rather there is composition in the adaptation to the particular instrument. Of that, the adapter is the author, and it is perfectly certain that the man who wanted to arrange this opera for a piano-forte would find it a great deal easier to copy what Brissler had done than to take the score and do it over again." Law Rep. 3 Q. B. 232.

[2] In a recent English case it was contended that a photograph of an engraving was not an original production within the meaning of 25 & 26 Vict. c. 68, s. 1, which secures copyright in "every original painting, drawing, and photograph." In overruling this objection, Mr. Justice Blackburn said:—

"The distinction between an original painting and its copy is well understood, but it is difficult to say what can be meant by an original photograph. All photographs are copies of some object, such as a painting or a statue. And it seems to me that a photograph taken from a picture is an original photograph, in so far that to copy it is an infringement of this statute. As I have already pointed out, by section 2, although it is unlawful to copy a photograph or the negative, it is permitted to copy the subject-matter of the photograph by taking another photograph." Graves's Case, Law Rep. 4 Q. B. 723.

person claiming copyright. In the case of an abridgment, the question is whether the maker has fairly condensed the matter of the original, and reproduced it as a work of his own authorship, or whether he has merely shortened it by omitting parts. So, a dramatization must have a value due to the work of the dramatist, and not found in the novel or poem dramatized.

Collections of Well-known Facts. — A title to authorship is acquired by collecting well-known facts and information, or describing common objects. "As to copyright," said Lord Eldon, "I do not see why, if a person collects an account of natural curiosities and such articles, and employs the labor of his mind by giving a description of them, that is not as much a literary work as many others that are protected by injunction and by action. It is equally competent to any other person, perceiving the success of such a work, to set about a similar work, *bona fide* his own. But it must be in substance a new and original work, and must be handed out to the world as such."[1]

In Jarrold *v.* Houlston,[2] the work in controversy was Dr. Brewer's Guide to Science, the purpose of which was to explain, on scientific principles, and by means of questions and answers, some of the ordinary phenomena of nature. In preparing the work, the author had collected inquiries which he had heard made by many persons, and had solicited questions from others. These inquiries, with answers furnished partly from his own information and partly obtained from published works, constituted the matter of his book. For the defence it was contended that a work so composed did not meet the requirements of the law as to originality. But this argument was without force; and the court, without hesitation, upheld the copyright in the book. "That an author," said Vice-Chancellor Wood, "has a copyright in a work of this description is beyond all doubt. If any one by pains and labor collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions, and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of his former

[1] Hogg *v.* Kirby, 8 Ves. 221.

[2] 3 Kay & J. 708.

general reading, or out of works consulted by him for the express purpose, the reduction of questions so collected, with such answers, under certain heads and in a scientific form, is amply sufficient to constitute an original work, of which the copyright will be protected." [1]

So he who simply describes specimens of fruit before him,[2] or reproduces and describes monumental designs from tombstones in a cemetery,[3] performs an act of authorship which brings him within the protection of the law. The maker of a map or chart merely represents boundaries, places, and distances which he finds fixed by nature or man. A directory is but a list of the names and residences of citizens. A catalogue is often a mere arrangement of the titles of books or other things. In such case, the law does not inquire whether the facts and information given are new or old. The question is, whether there is any material product of authorship on the part of the person claiming copyright; whether the publication is the result of independent labor, other than that of mere copying.

Compilations. — A compilation of old materials gathered from published works and other common sources is an original production within the meaning of the law. Here the test of originality is applied, not to the materials, but to their arrangement and combination. A mere copy or reprint, not differing materially from the original matter, is not entitled to protection.[4] But labor, skill, or learning, exercised in selecting, arranging, and combining old materials in a new and useful form, creates a title to authorship. "The question is not," said Mr. Justice Story, "whether the materials which are used are entirely new, and have never been used before; or even that they have never been used before for the same purpose. The true question is, whether the same plan, arrangement and combination of materials have been used before for the same purpose or for any other purpose. If they have not, then the plaintiff is entitled to a copyright, although he may

[1] 3 Kay & J. 713.

[2] Hogg *v.* Scott, Law Rep. 18 Eq. 444.

[3] Grace *v.* Newman, Law Rep. 19 Eq. 623.

[4] Hedderwick *v.* Griffin, 3 Sc. Sess. Cas. 2d ser. 383; Jollie *v.* Jaques, 1 Blatchf. 618; Boucicault *v.* Fox, 5 Id. 87, 101.

have gathered hints for his plan and arrangement, or parts of his plan and arrangement, from existing and known sources. He may have borrowed much of his materials from others; but if they are combined in a different manner from what was in use before, and *a fortiori*, if his plan and arrangement are real improvements upon the existing modes, he is entitled to a copyright in the book embodying such improvement. It is true he does not thereby acquire the right to appropriate to himself the materials which were common to all persons before, so as to exclude those persons from a future use of such materials; but then they have no right to use such materials with his improvements superadded, whether they consist in plan, arrangement or illustrations or combinations; for these are strictly his own."[1]

[1] Emerson *v.* Davies, 3 Story, 778. See Compilations, *ante*, p. 152.

In Gray *v.* Russell, 1 Story, 16, Mr. Justice Story said: "The argument proceeds mainly upon this ground, that there is nothing substantially new in Mr. Gould's notes to his edition of Adam's Latin Grammar; and that all his notes in substance, and many of them in form, may be found in other works antecedently printed. That is not the true question before the court. The true question is, whether these notes are to be found collected and embodied in any former single work. It is admitted, that they are not so to be found. The most that is contended for, is, that Mr. Gould has selected his notes from very various authors, who have written at different periods; and that any other person might, by a diligent examination of the same works, have made a similar selection. It is not pretended, that Mr. Cleveland undertook or accomplished such a task by such a selection from the original authors. Indeed, it is too plain for doubt, that he has borrowed the whole of his notes directly from Mr. Gould's work; and so literal has been his transcription, that he has incorporated the very errors thereof.

"Now, certainly, the preparation and collection of these notes from these various sources, must have been a work of no small labor, and intellectual exertion. The plan, the arrangement, and the combination of these notes in the form in which they are collectively exhibited in Gould's Grammar, belong exclusively to this gentleman. He is, then, justly to be deemed the author of them in their actual form and combination, and entitled to a copyright accordingly. If no work could be considered by our law as entitled to the privilege of copyright, which is composed of materials drawn from many different sources, but for the first time brought together in the same plan and arrangement and combination, simply because those materials might be found scattered up and down in a great variety of volumes, perhaps in hundreds, or even thousands of volumes, and might, therefore, have been brought together in the same way and by the same researches of another mind, equally skilful and equally diligent, — then, indeed, it would be difficult to say, that there could be any copyright in most of the scientific and professional treatises of the present day. What would become of the elaborate commentaries of modern scholars upon the classics, which, for the most part, consist of selections from the works and criticisms of vari-

To what extent the functions of the compiler must go beyond those of a mere copyist is to be determined by the circumstances of each case. But there must be substantial results due to the operation of his mind; the compilation must have a material value not found in the parts taken separately. The principle is the same whether the common materials are taken by the compiler from published or unpublished sources. If he is not the owner of the manuscripts, if they are common property, his exclusive rights will be determined by the compilation which he has made. Where a collection of statistics had been made from unpublished official records, and it appeared that the compiler had exercised industry and judgment in selection and arrangement, it was held that the requirements of the law as to originality had been fulfilled.[1] But the compiler could have acquired no title to authorship by merely copying the figures as he found them.

In Alexander *v.* Mackenzie, the validity of the complainant's copyright in a collection of legal forms or "styles" was questioned, on the ground that, in preparing them, he had simply followed the directions prescribed by the statute; and that, under the circumstances, the forms prepared by two or more persons must be substantially the same. The court held that, if the statute had contained the forms themselves, and the complain-

ous former authors, arranged in a new form, and combined together by new illustrations, intermixed with them? What would become of the modern treatises upon astronomy, mathematics, natural philosophy, and chemistry? What would become of the treatises in our own profession, the materials of which, if the works be of any real value, must essentially depend upon faithful abstracts from the reports, and from juridical treatises, with illustrations of their bearing. Blackstone's Commentaries is but a compilation of the Laws of England, drawn from authentic sources, open to the whole profession; and yet it was never dreamed, that it was not a work, which, in the highest sense, might be deemed an original work; since never before were the same materials so admirably combined, and exquisitely wrought out, with a judgment, skill, and taste absolutely unrivalled. Take the case of the work on insurance, written by one of the learned counsel [Phillips] in this cause, and to which the whole profession are so much indebted; it is but a compilation with occasional comments upon all the leading doctrines of that branch of the law, drawn from reported cases, or from former authors, but combined together in a new form, and in a new plan and arrangement; yet I presume, none of us ever doubted, that he was fully entitled to a copyright in the work, as being truly, in a just sense, his own."

[1] Scott *v.* Stanford, Law Rep. 3 Eq. 718; Maclean *v.* Moody, 20 Sc. Sess. Cas. 2d ser. 1154.

ant had simply copied them, his copyright would have failed through want of originality. But, as the statute gave simply directions, it was an act of authorship to prepare the forms pursuant to such directions.[1]

So a good title to copyright is acquired by representing on a map boundaries of townships which are fixed by statute.[2]

Works alike may be Original. — It is not essential that any production, to be original or new within the meaning of the law of copyright, shall be different from another. Whether the composition for which copyright is claimed is the same as or different from, whether it is like or unlike, an existing one, are matters of which the law takes no cognizance, except to determine whether the production is the result of independent labor or of copying. There cannot be exclusive property in a general subject, or in the method of treating it;[3] nor in the mere plan of a work;[4] nor in common materials, or the manner or purpose for which they are used.[5] The rights of any

[1] 9 Sc. Sess. Cas. 2d ser. 748. "It is said," remarked Lord Fullerton, "that owing to the particular nature of the styles they cannot be the subject of copyright, because they are drawn up precisely after the form prescribed in the statute, and because any styles relating to the same subjects as those given by the complainer must, if the directions of the statutes and phraseology of conveyances were used, be expressed in the same manner exactly as those compared by the complainer. Now it may be quite true, that if the statute had supplied certain forms, by which the operations intended to be thereby regulated were to be done, if the statute had contained, as such statutes sometimes do, an appendix exhibiting certain schedules of forms which it was only necessary for any one to copy in order to avail himself of the provisions of the act, then I hold that the reprinting of such forms in a separate publication would not give him a copyright in those forms. But the case here is different, for the statute only gives very general directions and descriptions of the styles that are to be used. The schedules are very general in their terms, and it is no doubt of great practical importance to suit these general directions to each case falling under the statute as it may arise. The preparing and adjusting of such writings require much care and exertion of mind. As to invention that is a different thing. It does not require the exercise of original or creative genius, but it requires industry and knowledge." Ibid. 754.

[2] Farmer *v.* Calvert Lithographing, Engraving, & Map-Publishing Co., 5 Am. L. T, R. 168.

[3] Matthewson *v.* Stockdale, 12 Ves. 270; Longman *v.* Winchester, 16 Id. 269; Lewis *v.* Fullarton, 2 Beav. 6; Blunt *v.* Patten, 2 Paine, 393, 397; Banks *v.* McDivitt, 13 Blatchf. 163.

[4] Mack *v.* Petter, Law Rep. 14 Eq. 431; Lawrence *v.* Cupples, 9 U. S. Pat. Off. Gaz. 254.

[5] Barfield *v.* Nicholson, 2 Sim. & St. 1; Murray *v.* Bogue, 1 Drew. 353; Spiers *v.* Brown, 6 W. R. 352; Pike *v.* Nicholas, Law Rep. 5 Ch. 251; Cox *v.* Land & Water Journal Co., Law Rep. 9 Eq. 324; Farmer *v.* Calvert Lithographing, Engraving, & Map-Publishing Co., *supra*. Section 2 of 25 &

person are restricted to his own individual production. There is nothing in the letter or the spirit of the law of copyright to prevent or to discourage any number of persons from honestly laboring in the same field. Two or more authors may write on the same subject, treat it similarly, and use the same common materials in like manner and for one purpose. Their productions may contain the same thoughts, sentiments, ideas; they may be identical. Such resemblance or identity is material only as showing whether there has been unlawful copying.[1] In many cases, the natural or necessary resemblance between two productions, which are the result of independent labor, will amount to substantial identity. Thus, the differences will be often slight, and sometimes immaterial, between two descriptions of a common object; two compilations of like materials; two maps, charts, or road-books of a common region; two directories of one city; two photographs of the same scene; two engravings of the same painting. But, notwithstanding their likeness to one another, any number of productions of the same kind may be original within the meaning of the law; and no conditions as to originality are imposed on the makers, except that each shall be the producer of that for which he claims protection.[2]

20 Vict. c. 68, which secures copyright in paintings, drawings, and photographs, declares that "nothing herein contained shall prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding there may be copyright in some representation of such scene or object."

[1] **Br.** Roworth *v.* Wilkes, 1 Camp. 94; De Berenger *v.* Wheble, 2 Stark. 548; Barfield *v.* Nicholson, 2 Sim. & St. 1; Nichols *v.* Loder, 2 Coop. (*temp.* Cottenham) 217. **Am.** Blunt *v.* Patten, 2 Paine, 393, 397; Reed *v.* Carusi, Tan. Dec. 72; Benn *v.* LeClercq, 18 Int. Rev. Rec. 94. In Wood *v.* Boosey, as reported 18 L. T. N. S. 108, Kelly, C. B., said: "After the original opera there may be an arrangement of it for the piano-forte by one author or composer, and there may be another arrangement of it for the piano by another author and composer. If the copyright in the original opera be expired, a copyright might exist in the composers of both of those arrangements; each would be a new substantive work entitled to the benefit of any existing law of copyright, and one might or might not be a piracy of the other."

[2] "A copyright cannot subsist in a chart, as a general subject, although it may in the individual work, and others may be restrained from copying such work. But the natural objects from which the charts are made are open to the examination of all, and any one has a right to survey and make a chart. And if such surveys and charts are all correct, all will be alike, but no one would complain of his rights having been infringed, and each one may be considered an original chart. A right in such a subject is violated only when

Tables of figures have been held to be a proper subject of copyright. The copyright is not in the mode or rules of computation, but in the results. Of course, the same calculations, when correctly made, must produce the same results; and the test of originality is simply whether the person claiming protection has himself performed the operations, or has copied the results.[1] Where it was shown that, of thirteen tables in which copyright was claimed, at least seven had been published in different works long before the plaintiff's publication appeared, Vice-Chancellor Leach said: "I am not of opinion that the plaintiff ceases to be entitled to protection, though the tables in respect of which his complaint is made, may have been pre-existing. He has a right to protection, if they were original calculations of his own; and such he swears them to have been. . . . The plaintiff's title to the tables is that he calculated them; the defendant, by calculating them on his part, acquires the same right."[2]

There can be no monopoly in the plan of a directory, and the same sources of information are common to all persons. All that is required of each compiler is, that he shall prepare his own publication without copying from that of his rival.[3] So in the case of compilations consisting of matter taken from other publications. Any number of persons may use the same common materials, in like manner and for a similar purpose.[4] Each compilation must be original, in the sense that it is a work materially different from its component parts taken sepa-

another copies from the chart of him who has secured the copyright and thereby availing himself of his labor and skill. And in all such cases it is a proper question for a jury, whether the one is a copy of the other or not. If the two are in all respects alike, the *prima facie* presumption probably would be, that one was a copy of the other, yet both might be originals; and if there was some small variance, it would be a proper subject of inquiry whether the alteration was not merely colorable and that the one was in substance a mere transcript of the other." Thompson, J., Blunt *v.* Patten, 2 Paine, 400.

[1] Baily *v.* Taylor, 3 L. J. (Ch.) 66, 1 Russ. & My. 73; M'Neill *v.* Williams, 11 Jur. 344.

[2] Baily *v.* Taylor, 3 L. J. (Ch.) 66.

[3] Kelly *v.* Morris, Law Rep. 1 Eq. 697; Morris *v.* Ashbee, 7 Id. 34; Morris *v.* Wright, Law Rep. 5 Ch. 279.

[4] "No compiler of such a book has a monopoly of the subject of which the book treats. Any other person is permitted to enter that department of literature and make a similar book. But the subsequent investigator must investigate for himself from the original sources which are open to all." Shipman, J., Banks *v.* McDivitt, 13 Blatchf. 166.

rately; that it is not a mere reprint of what the compiler is in no sense the author. It must also be original in the sense that the compiler has obtained the materials from the common sources, and has arranged and combined them by his own labor and skill. But the originality of a compilation is not affected by the fact that the same materials have been used before for the same purpose and in the same order; in other words, that the work is not different from one previously published.[1]

The principle is the same in the case of original compositions. It is not probable that two authors, working independently of each other, will produce two poems, novels, essays, &c., which will be precisely alike. But, if such a case should arise, each author would be entitled to copyright in his own production.[2]

Test of Originality. — In all cases, whatever may be the kind or the character of the work for which protection is claimed, the true test of originality is whether the production is the result of independent labor or of copying. A close resemblance between two publications may afford strong evidence of copying; and in some cases, especially when the similarity is not explained, it may amount to conclusive proof of piracy. But, when it is established that a work is the result of honest authorship, its likeness to another publication is immaterial.

Literary Merit and Quality.

Literary Merit. — When a production meets the requirements of the law as to innocence and originality, the only inquiry relating to its character is, whether it is a material contribution to useful knowledge. This raises the question, whether literary merit, in the common meaning of that expression, is essential

[1] **Br.** Barfield *v.* Nicholson, 2 Sim. & St. 1; Murray *v.* Bogue, 1 Drew. 353; Spiers *v.* Brown, 6 W. R. 352; Pike *v.* Nicholas, Law Rep. 5 Ch. 251. **Am.** Gray *v.* Russell, 1 Story, 11; Webb *v.* Powers, 2 Woodb. & M. 497; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402; Lawrence *v.* Cupples, 9 U. S. Pat. Off. Gaz. 254; Banks *v.* McDivitt, 13 Blatchf. 163.

[2] "The order of each man's words," said Mr. Justice Erle, "is as singular as his countenance, and although if two authors composed originally with the same order of words each would have a property therein, still the probability of such an occurrence is less than that there should be two countenances that could not be discriminated." Jefferys *v.* Boosey, 4 H. L. C. 869.

to copyright in a composition. On this point the statute contains no express provision. The only guide from this source is that afforded by the avowed purpose of the legislature. The statute of Anne, entitled An Act for the Encouragement of Learning, was declared in the preamble to be "for the encouragement of learned men to compose and write useful books." The object of the 5 & 6 Vict. c. 45, as expressed in the preamble, is "to afford greater encouragement to the production of literary works of lasting benefit to mankind." The first American statute[1] was entitled An Act for the Encouragement of Learning, and was passed pursuant to that provision of the Constitution which empowers Congress "to promote the progress of science" by securing to authors the exclusive right to their writings.[2]

To the object of copyright legislation, as thus indicated, the courts have given a most liberal interpretation. They have declared that the law cannot be restricted to the protection of "literary works of lasting benefit to mankind," according to a strict interpretation of the preamble of 5 & 6 Vict. c. 45; but that its true scope and spirit are to encourage the production of "useful books," as avowed by the statute of Anne, which is the foundation of all English and American copyright legislation. Many productions without literary or scientific merit are valuable additions to useful knowledge; and such works, not less than those of learning, in the strict meaning of that expression, are within the scope of the copyright law as judicially construed. A directory, a calendar or catalogue of names, a compilation of statistics, a table of figures, a collection of legal forms, an abstract of titles to lands, a list of hounds, are productions which may be regarded as void of literary or scientific qualities. Yet they are contributions to the general fund of knowledge, and are sources of information useful to the public. Hence, they have been judicially recognized as proper subjects of copyright.[3]

In an early case in the United States Circuit Court, Mr.

[1] Act of 1790; 1 U. S. St. at L. 124.

[2] Art. 1, s. 8, cl. 8.

[3] See *ante*, p. 153. In the Scotch case of Maclean *v.* Moody, 20 Sc. Sess. Cas. 2d ser. 1163, Lord Deas said: "The act does not confine the privilege to works of literary merit."

Justice Thompson held that a daily price current, or review of the market, was not within the purview of the copyright statute.[1] But a more liberal doctrine now prevails. The importance and value of the information often contained in prices current, trade circulars, market reports, &c., are well recognized in the commercial world; and such publications are clearly within the principle on which copyright has been declared to vest in directories, calendars, statistical reports, &c.[2] In Drury *v.* Ewing, it was held that a chart or diagram, with directions for cutting garments, was entitled to protection as a book. "It is clearly no objection to the validity of her copyright," said Mr. Justice Leavitt, "that her production does not claim a standing as a work of great literary merit. The statute does not make this a necessary element of a legal copyright, and it is well known that there are works of great practical utility, having no pretension to literary merit, which are yet within, not only the words, but the scope and design of the statute."[3]

The material inquiry, then, is not whether a production has literary or scientific merit, but whether it may be regarded as a material addition to useful knowledge, a source of general information. If it be of substantial importance, and have a material value in this respect, the law does not inquire into the degree of its usefulness or of its merits. Whether one production is more or less useful, meritorious, or popular than another, is of no concern to the court, which exercises no functions of criticism.[4]

[1] Clayton *v.* Stone, 2 Paine, 382, 392. "The act in question," said Mr. Justice Thompson, "was passed in execution of the power here given [by the Constitution], and the object therefore was the promotion of science; and it would certainly be a pretty extraordinary view of the sciences to consider a daily or weekly publication of the state of the market as falling within any class of them. They are of a more fixed, permanent, and durable character. The term science, cannot, with any propriety, be applied to a work of so fluctuating and fugitive a form as that of a newspaper or price current the subject-matter of which is daily changing, and is of mere temporary use. . . . The title of the act of Congress is for the encouragement of learning, and was not intended for the encouragement of mere industry, unconnected with learning and the sciences."

[2] See Kiernan *v.* Manhattan Quotation Telegraph Co., 50 How. Pr. (N. Y.) 194.

[3] 1 Bond, 540, 548. See also Folsom *v.* Marsh, 2 Story, 109; Lawrence *v.* Cupples, 9 U. S. Pat. Off. Gaz. 254; Richardson *v.* Miller, 3 L. & Eq. Reporter, 614.

[4] For a consideration of the question of literary value in unpublished works, see *ante*, p. 111.

While the requirements of the law as to the importance or value of a production are so slight that valid copyright will attach to almost any publication, and to many that appear to be of little or no consequence, not every collection of printed words or sentences is entitled to protection. To be worthy of copyright, a thing must have some value as a composition sufficiently material to lift it above utter insignificance and worthlessness. A title of a book,[1] a mere label,[2] an advertisement[3] which serves no higher purpose than to make known the place and kind of business of the advertiser, are not proper subjects of copyright.

In a recent English case, copyright was claimed in a scoring-sheet or "tablet" used in the game of cricket. The tablet consisted of two lines ruled at the foot of the sheet, with spaces in which were marked the totals or number of the runs obtained in the game at the fall of each wicket. At the head of the tablet were the words "Runs at the fall of each wicket." It appeared that this was not original, having long been in common use. Vice-Chancellor Malins held that, even if original, it was not a proper object of copyright. He was of opinion that "to say that the particular mode of ruling a book constituted an object for copyright is absurd. A solicitor's bill is made out in that way, by casting up the totals; and what more is this? It is below all protection, being a mere arithmetical

[1] See cases cited *ante*, p. 145, note 1.

[2] Scoville *v.* Toland, 6 West. Law Jour. 84; Coffeen *v.* Brunton, 4 McLean, 516. In the former case, Mr. Justice McLean, said: "The label which the complainant claims to be a book refers to a certain medicinal preparation and was designed to be an accompaniment of it. Like other labels, it was intended for no other use than to be pasted on the vials or bottles which contained the medicine. As a composition distinct from the medicine it can be of no value. It asserts a fact that Dr. Rodgers' Compound Syrup of Liverwort and Tar is a certain cure for many diseases; but it does not inform us how the compound is made. In no respect does this label differ from the almost numberless labels attached to bottles and vials containing medicines and directions how they shall be taken. Now these are only valuable when connected with the medicine. As labels they are useful, but as mere compositions, distinct from the medicine, they are never used or designed to be used. This is not the case with other compositions which are intended to instruct and amuse the reader, though limited to a single sheet or page. Of this character would be lunar tables, sonatas, music, and other mental labors concentrated on a single page."

[3] Collender *v.* Griffith, 11 Blatchf. 211. See the consideration of the question of copyright in advertisements, *ante*, p. 164.

operation, which must have been done over and over again." [1]

Quantity. — How short a composition may be, and still be a subject of copyright when published alone, has not been definitely determined by the legislature or the courts. We have seen that productions written on a single page have been protected as books. In a recent English case, a passage of about sixty words was held to be entitled to protection by injunction.[2] The question is to be determined rather by the worth and importance of the production than by its length. It would seem that, however small the piece may be, if it has merit and value enough to be published alone, and to be an object of piracy, it should also be of sufficient importance to be entitled to protection. A gem of literature may be contained in a couplet of poetry or in a sentence of prose. Mr. Lincoln's words at Gettysburg rank with the highest productions of oratory; yet they may be read in less than two minutes.

The same general test is to be applied in determining the validity of copyright in a compilation of old materials, or a new edition of a work previously published. The controlling question is whether the results due to the labor or skill of the compiler, or the author of the new edition, are of material consequence and value. Has the compilation a substantial worth not found in the materials uncombined? Is the new edition materially different from the old? In Black *v.* Murray,[3] copyright was claimed in a new edition of one of Scott's ballads which differed in but one word from the original edition in which the copyright had expired. Lord Deas earnestly contended that the change wrought in the author's meaning by this substitution of a single word, and the force and beauty thereby given to the poem, were so great as to afford a basis for a new copyright in the revised edition. The other judges did not attach so much importance to the force of the revision, but regarded the new edition as a substantial reprint of the old.

[1] Page *v.* Wisden, 20 L. T. N. S. 435.

[2] Cobbett *v.* Woodward, Law Rep. 14 Eq. 407. See the question of quantity and value considered in Chaps. VIII., XI.

[3] 9 Sc. Sess. Cas. 3d ser. 341. For a fuller consideration of this case, see *ante*, p. 149. See also Hedderwick *v.* Griffin, 3 Sc. Sess. Cas. 2d ser. 383.

The judgment of the court, therefore, was that there was not sufficient basis for a renewed term of protection. But the principle was evidently recognized, that the claim for copyright in such cases is to be tested by the change wrought in the meaning of a composition, rather than by the extent of the verbal alterations.

CHAPTER IV.

IN WHOM COPYRIGHT WILL VEST.

ONE of the first questions which arise in connection with this subject is, whether the copyright legislation of Great Britain, or that of the United States, is for the benefit of native authors alone, or of all authors without distinction as to nationality. The general copyright statutes of England grant protection to "authors," without declaring whether native or foreign authors are meant. By the International Copyright Acts, special provision is made for extending copyright to foreigners; but such protection is given only to those authors whose country extends reciprocal privileges to English authors. A noticeable feature of these acts is that they extend protection to works first published abroad, while first publication in the United Kingdom is essential to secure copyright under the general statutes.

INTERNATIONAL COPYRIGHT. — GREAT BRITAIN.

The first International Copyright Act was passed in 1838.[1] This was repealed in 1844 by the 7 & 8 Vict. c. 12, which, with the 15 & 16 Vict. c. 12, and the 38 & 39 Vict. c. 12, now governs the law of international copyright.

Foreign Works in Original Language. — By these acts, the Queen is empowered to direct by an Order in Council that authors, inventors, designers, engravers, and makers of books, prints, articles of sculpture and other works of art, to be defined in such order, which shall be first published in any foreign country to be named in the order, shall have copyright therein during a specified period; not exceeding, however, the duration of English copyright. In a similar manner, provision

[1] 1 & 2 Vict. c. 59.

is made for conferring upon the authors and composers of dramatic and musical compositions, first publicly represented or performed in foreign countries, the sole liberty of representing or performing them in any part of the British dominions, for a period not exceeding that during which protection is afforded to similar works first published in England. The provisions of the general copyright statutes are to apply to cases provided for by the International Copyright Acts; subject, however, to such special exceptions as may be made in the Order in Council. To acquire copyright, the foreign author must comply with certain prescribed regulations as to registry, and the delivery of copies for deposit in the British Museum. Orders in Council may specify different times for registration, and different periods during which protection will extend for different foreign countries, and for different classes of works.

Translations. — The above provisions seem to have been intended for the protection of foreign works in their original language. There are special regulations concerning translations. The 7 & 8 Vict. c. 12, expressly declares that its provisions shall not apply to translations.[1] But the 15 & 16 Vict. c. 12,[2] empowers her Majesty to direct, by Order in Council, that the author of a book or a dramatic composition first published or publicly represented in a foreign country may, by complying with the provisions of the act, prevent the publication or representation in the British dominions of an unauthorized translation for a specified period, not exceeding five years from the date of publication or public representation of the authorized translation; and in the case of a book published in parts, not extending as to each part beyond five years from the time when the authorized translation of such part is first published.

Adaptations of Dramatic Compositions. — Section 6 of the same act declares that nothing therein "shall be so construed as to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country." But this provision was repealed in 1875 by the 38 & 39 Vict. c. 12, which provides that the Queen, by Order in Council, may "direct that the sixth section of the

[1] s. 18. [2] s. 2.

said act shall not apply to the dramatic pieces to which protection is so extended; and thereupon the said recited act shall take effect with respect to such dramatic pieces and to the translations thereof as if the said sixth section of the said act were hereby repealed."

Newspapers and Periodicals. — The provision of the statute relating to books published in parts has been judicially construed to refer to publications which are to be completed in a definite number of parts, and not to those to be continued indefinitely. Newspapers and periodicals do not therefore come within the scope of this clause;[1] but for such publications special provision is made. Section 7 of 15 & 16 Vict. c. 12, provides that "any article of political discussion which has been published in any newspaper or periodical in a foreign country may, if the source from which the same is taken be acknowledged, be republished or translated in any newspaper or periodical in this country; and any article relating to any other subject which has been so published as aforesaid may, if the source from which the same is taken be acknowledged, be republished or translated in like manner, unless the author has signified his intention of preserving the copyright therein, and the right of translating the same, in some conspicuous part of the newspaper or periodical in which the same was first published." In case of such reservation, articles other than those of "political discussion" will be entitled to the same protection that is extended to books, but subject to the conditions and requirements relating to registration, &c., prescribed in the case of books.[2] The formalities prescribed in the case of the translation of a book or dramatic composition do not apply to translations of articles originally published in newspapers and periodicals, unless such articles are published in separate form.[3]

The Order in Council dated Jan. 10, 1852, for extending protection to French authors, provides that works first published in France shall be registered at Stationers' Hall, London, and copies delivered "within three months after the first publication thereof in any part of the French dominions, or, if such

[1] Cassell *v.* Stiff, 2 Kay & J. 279.

[2] Cassell *v.* Stiff, *supra*.

[3] 15 & 16 Vict. c. 12, s. 8, cl. 7.

work be published in parts, then within three months after the publication of the last part thereof." It has been held that a newspaper or periodical is not such a work published in parts as is contemplated by this provision; and that it must be registered within three months after the beginning of its publication, or within three months after the date of the Order in Council, if its publication was begun before the issue of that order.[1]

Statutory Requirements in Case of Translations. — In order to entitle a foreign author or his assignee to protection for the translation of any book or dramatic composition, there must be a compliance with the following requirements prescribed by 15 & 16 Vict. c. 12, s. 8: —

1. The original work from which the translation is to be made must be registered and a copy thereof deposited in the United Kingdom in the manner required for original works by the said International Copyright Act, within three calendar months of its first publication in the foreign country:

2. The author must notify on the title-page of the original work, or, if it is published in parts, on the title-page of the first part, or, if there is no title-page, on some conspicuous part of the work, that it is his intention to reserve the right of translating it:

3. The translation sanctioned by the author, or a part thereof, must be published either in the country mentioned in the order in council by virtue of which it is to be protected, or in the British dominions, not later than one year after the registration and deposit in the United Kingdom of the original work; and the whole of such translation must be published within three years of such registration and deposit:

4. Such translation must be registered and a copy thereof

[1] *Cassell v. Stiff*, 2 Kay & J. 279. Referring to the language of the Order relating to works published in parts, Vice-Chancellor Wood said: "The only interpretation of that clause is that it refers to a publication which is to be completed in a specified number of parts, and not one which is to be continued for an indefinite period. There would be no sense in the other construction. The effect of it would be that at any period the publisher of *such a work might register it, and* carry back his copyright to the earliest period in 1852 when French authors first had a copyright in this country. That cannot be the intention; it must mean to apply to a work to be completed in a definite number of parts, and such a work, though not registered at its commencement, may be registered within three months after the publication of the last part." Ibid. 286.

deposited in the United Kingdom within a time to be mentioned in that behalf in the order by which it is protected, and in the manner provided by the said International Copyright Act for the registration and deposit of original works :

5. In the case of books published in parts, each part of the original work must be registered and deposited in this country in the manner required by the said International Copyright [Act] within three months after the first publication thereof in the foreign country :

6. In the case of dramatic pieces the translation sanctioned by the author must be published within three calendar months of the registration of the original work :

7. The above requisitions shall apply to articles originally published in newspapers or periodicals, if the same be afterwards published in a separate form, but shall not apply to such articles as originally published.

It has been held that the act contemplates and requires a translation of the whole work, and that a translation of a part is not enough to entitle the author to protection. Moreover, the version must be a *bona fide* translation. In the case of a drama, a mere imitation or adaptation to the English stage, although sanctioned by the author as a translation, is insufficient for the completion of a valid title. Where it was sought to restrain the representation of an unauthorized adaptation to the English stage of a French comedy originally represented in Paris, the court held that the plaintiff's title was defeated by the fact that the version approved by the authors of the comedy as a translation, and duly registered as such, was a mere adaptation, without the elements of such a translation as is required by the statute. What Parliament intended, said Vice-Chancellor James, was "that the English people should have the opportunity of knowing the French work as accurately as it is possible to know a French work by the medium of a version in English." [1]

[1] Wood *v.* Chart, Law Rep. 10 Eq. 193, 205. "It is provided," said the Vice-Chancellor, "that in the case of dramatic pieces the translation sanctioned by the author must be published within three calendar months of the registration of the original work. Now I do not think it is possible to say that means that any thing which the author shall sanction as a translation shall be published within three calendar months. It means that a real

Importing Piratical Copies Prohibited. — In order to secure more effectually the protection granted, the statute prohibits the unauthorized importation into any part of the British dominions of copies of any work of literature or art in which copyright exists by virtue of the International Copyright Acts, which have been printed, reprinted, or made in any foreign country other than that in which such work was originally published; and the same prohibition applies to unauthorized translations of books or dramatic compositions protected by the acts.[1]

translation, being a translation which has been authorized or sanctioned by the author, must be published within three calendar months of the registration of the original work. It appears to me that the plaintiff in this case has gone out of his course to dig a pitfall for himself, for what he says he has done is — the original thing being called *Frou-Frou* — he has published in England a comedy called Like to Like, a comedy in five acts, being an English version of MM. Meilhac and Halévy's *Frou-Frou*, written by H. Sutherland Edwards. Then he has introduced English characters; he has transferred the scene to England; he has made the alterations necessary for making it an English comedy, and he has left out a great number of speeches and passages — especially in the first act — which would seem to me to imply, that at first he was really making an imitation or adaptation, and afterwards was minded more completely to make a translation. The first two acts seem to me particularly to be what is referred to in the act itself as an imitation or adaptation. Whether it is a fair imitation or adaptation is another question; but if one wanted to have an example of what is an imitation or adaptation to the English stage, one would have said that this is exactly the thing which is meant. It is an imitation and adaptation to the English stage; that is, you have transferred the characters to England, you make them English characters, you introduce English manners, and you leave out things which you say would not be suitable for representation on the English stage. Now that is not, in my view of the case, what the act requires, for some sufficient purpose as I have said before, when it requires that a translation should be made accessible to the English people. What is required is, that the English people should have the opportunity of knowing the French work as accurately as it is possible to know a French work by the medium of a version in English." Ibid. 204.

When this decision was rendered, the statute expressly provided that "fair imitations or adaptations to the English stage" of any foreign play might be made without the consent of the author of the original. 15 & 16 Vict. c. 12, s. 6. This clause has been repealed since Wood *v.* Chart was decided. 38 & 39 Vict. c. 12. But it does not appear that the court in that case was influenced by the provision just referred to. Referring to the necessity of publishing such a translation as was contemplated by this statute, Vice-Chancellor James said: "If the author had complied with the condition required by the act of Parliament, or any other person claiming under the author had complied with that condition, I should at once have restrained the acting of such a piece as this by any one else, as not being a fair imitation or adaptation, but as being a piratical translation of the original work." Law Rep. 10 Eq. 206.

[1] 15 & 16 Vict. c. 12, s. 9.

Works first Published Abroad not entitled to Copyright, except under International Acts. — Section 19 of 7 & 8 Vict. c. 12, declares that the author of a book, dramatic composition, or other work mentioned in the act, which shall be first published out of the British dominions, shall have no copyright therein, nor the exclusive right of representation, "otherwise than such (if any) as he may become entitled to under this act." It has been held that this section applies to native as well as to foreign authors, and to works first published in any foreign country, whether the provisions of the International Copyright Acts have or have not been extended to that country; and, accordingly, that no author, whether a British subject or an alien, is entitled to any other protection for a work first published abroad than that which he may claim under the International Copyright Acts.[1]

Rights of Foreign Authors in Great Britain.

The International Copyright Acts do not affect the rights of an alien under the general copyright statutes, and leave untouched the question whether, under the latter, a foreigner is entitled to any protection for a work first published in England. This question has undergone the most elaborate discussion in the courts, and is one on which the ablest judges have expressed opinions diametrically opposed. The conflict of opinion is the result of the different meanings given to the word author in the statute 8 Anne, c. 19,[2] and 5 & 6 Vict. c. 45;[3] the question being whether Parliament legislated for all authors, native and foreign, or for British subjects alone. Of course, it has never been claimed that a foreigner is entitled to any privileges, except on the conditions which are to be observed by an Englishman.

The doctrine that an alien is capable of acquiring British copyright was not opposed by any direct authority until 1849. Before that year, the protection of the law had been uniformly

[1] Boucicault *v.* Delafield, 1 Hem. & M. 597; Boucicault *v.* Chatterton, 5 Ch. D. 267. See these authorities considered more fully under Publication in Chap. V. For countries with which international copyright conventions have been made, see *ante*, p. 86.

[2] s. 1. [3] s. 3.

extended to the works of foreign authors;[1] and, in 1848, the Court of Common Pleas, after an elaborate discussion of the subject, unanimously held, in Cocks *v.* Purdy, that an alien friend, though resident abroad at the time of publication, was entitled to copyright in a work first published in England.[2] The law was construed to the same effect by the Court of Queen's Bench, in Boosey *v.* Davidson, decided in 1849.[3]

The soundness of this doctrine was first judicially questioned in 1845, when Chief Baron Pollock, delivering the judgment of the Court of Exchequer in Chappell *v.* Purday, remarked that "upon the construction of the statutes alone a foreign author, or the assignee of a foreign author, whether a British subject or not, had no copyright in England, and no right of action on the ground of any piracy of his work in the British territories."[4] But the result of the decisions at that time was stated to be that a foreigner became entitled to the benefit of the statutes by first publishing in England; and, in view of such authorities, the court went no farther than to express a doubt whether English copyright would vest in a foreigner resident abroad.[5] But the determination of this question, if not the discussion, was unnecessary; as the copyright in controversy was clearly defeated by a prior publication of the work abroad. In 1849, the same court, contrary to all the authorities on the subject, held, in Boosey *v.* Purday, that a foreigner, domiciled abroad, by sending his work to Great Britain for first publication, acquired no copyright, and could not confer a valid

[1] Bach *v.* Longman, Cowp. 623; Guichard *v.* Mori, 9 L. J. (Ch.) 227; D'Almaine *v.* Boosey, 1 Y. & C. Exch. 288; Bentley *v.* Foster, 10 Sim. 329; Chappell *v.* Purday, 4 Y. & C. Exch. 485. In the case last cited, the copyright was defeated by a prior publication of the work abroad; but Lord Abinger said, that "a foreigner who is the author of a work unpublished in France may communicate his right to a British subject." Ibid. 495.

[2] 5 C. B. 860.

[3] 13 Q. B. 257. See also Ollendorff *v.* Black, 4 De G. & Sm. 209; Buxton *v.* James, 5 Id. 80.

[4] 14 Mees. & W. 318.

[5] Ibid. 321. In Delondre *v.* Shaw, 2 Sim. 237, decided in 1828, Vice-Chancellor Shadwell said: "The court does not protect the copyright of a foreigner." But this case had no connection with the law of copyright, and the above was a mere remark carelessly made. Moreover, in Bentley *v.* Foster, 10 Sim. 329, decided in 1839, the same judge did not hesitate to declare that a foreign author who gave "the British public the advantage of his industry and knowledge," by first publishing his work in England, was entitled to the protection of the copyright statutes.

title upon a British subject.[1] "Our opinion," said Baron Pollock, "is that the legislature must be considered *prima facie* to mean to legislate for its own subjects, or those who owe obedience to its laws; and, consequently, that the acts apply *prima facie* to British subjects only in some sense of that term which would include subjects by birth or residence being authors; and the context or subject-matter of the statutes does not call upon us to put a different construction upon them. The object of the legislature clearly is not to encourage the importation of foreign books and their first publication in England as a benefit to this country; but to promote the cultivation of the intellect of its own subjects."[2]

This judgment was followed, in Boosey *v.* Jefferys, by the Court of Exchequer, whose decision was overruled by the Exchequer Chamber in 1851, when it was again declared that all authors, native or foreign, resident in England or abroad, were entitled to the protection of the law, on condition of first publishing their works in England.[3] "We see no sufficient reason," said Lord Chief Justice Campbell, "for thinking that it was the intention of the legislature to exclude foreigners from the benefit of the acts passed for the protection of literary property. The British Parliament has no power, and cannot by any general words be supposed to intend, to legislate for aliens beyond British territory; but, for any thing within British territory, it has the power to legislate for aliens as well as natural-born subjects; and, as we conceive, by general words must be presumed to do so. The monopoly which the statutes confer is to be enjoyed here, and the conditions which they require for the enjoyment of it are to be performed here. What is there to rebut the presumption that aliens are included? The act 8 Anne, c. 19, which the others follow, is entitled 'An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies.' Assuming that the legislature looked only to the enlightenment of the kingdom of Great Britain, without any general regard for the republic of letters, may it not be highly for the encour-

[1] 4 Exch. Rep. 145.
[2] Ibid. 156.
[3] 6 Exch. Rep. 580. The law as expounded in this case was followed in Buxton *v.* James, 5 De G. & Sm. 80.

agement of learning in this country, that foreigners should be induced to send their works composed abroad, either in English or in a foreign language, to be first published in London? If Rapin or De Lolme had written their valuable works to illustrate our history and constitution, without even visiting our shores, could it be intended that they should be debarred from publishing on their own account in England, or selling their copyright to an English bookseller? . . . For these reasons, we think that if an alien residing in his own country were to compose a literary work there, and, continuing to reside there, without having before published his work anywhere, should cause it to be first published in England in his own name and on his own account, he would be an author within the meaning of our statutes for the encouragement of learning; and that he might maintain an action in our courts against any one who, in this country, should pirate his work." [1]

Foreigner Resident Abroad not Entitled to Copyright. — An appeal from this decision was taken to the House of Lords, where, in 1854, the authorities and principles involved were discussed with a thoroughness that makes Jefferys *v.* Boosey [2] the leading copyright case of this century, as Millar *v.* Taylor and Donaldson *v.* Becket were of the last. The leading question submitted to the judges in attendance was, whether valid copyright was vested in the opera, *La Sonnambula*, which had been composed by Bellini, a foreigner, resident in Italy, and first published in England by his assignee, Boosey. The discussion turned on the meaning of the word author in the statute of of Anne. Six [3] of the eleven judges maintained that this was

[1] 6 Exch. Rep. 593, 596.

[2] 4 H. L. C. 815.

[3] Erle, Williams, Coleridge, Maule, Wightman, Crompton.

"The general rule," said Mr. Justice Maule, "is that words in an act of Parliament, and indeed in every other instrument, must be construed in their ordinary sense, unless there is something to show plainly that they cannot have been used, and so, in fact, were not used in that sense. Here the words to be construed are 'author, assignee and assigns.' These words plainly comprehend aliens as well as others; and there is nothing, as it seems to me, in any part of the acts to show that they are to be restricted. Indeed, those who reject this construction do not rely on any thing to be found in the terms of the acts; nor is it pretended that, by construing the words in their proper sense, any contradiction, incongruity, or absurdity will arise. But it is said that the intention of the acts is restricted to the encouragement of British industry and talent, and that this construction of the words would give an effect to the act beyond that restricted intention. I

used in a general sense, embracing all authors, native and foreign; that there was nothing in the statute to restrict its meaning to British subjects, and that such restriction would be against established principles of statutory construction, and contrary to the spirit of the act; that the purpose of the legislature was to promote learning and literature in Great Britain,

cannot bring myself to think that any such restriction was intended; it certainly is not expressed. But, even taking the intention of the acts to be as assumed, it would not, I think, be sufficient to take from the general words of the legislature their natural and large construction; for British industry and talent will be encouraged by conferring a copyright on a foreigner first publishing in England; industry, by giving it occupation; and talent, by furnishing it with valuable information and means for cultivation.

"It is also said that the legislature was dealing with British interests and legislating for British people. This is true; but to give a copyright to a foreign author publishing in this country is dealing with British interests and legislating for British people. Some parts of the acts, it is said, though expressed generally, must be construed with a restriction to this country. And this is true with respect to the extent of the sole liberty of printing conferred by the acts in general terms. But these words are, with respect to their operation, necessarily confined to the dominions within which the legislature had the power of conferring such liberty; and the words prohibiting importation show that the framers of the acts had this construction distinctly in view. But this consideration has no operation with respect to the persons on whom the sole liberty is conferred. The words 'author, assignee, and assigns' naturally comprehend aliens; and the legislature is not denied to have had the right and power of conferring the sole liberty on them if it thought fit. In my opinion, therefore, the acts confer a copyright on a foreign author, or his assignee, first publishing in England. To hold otherwise, would, I think, be contrary to the plain meaning of the acts, and would be a most inconvenient restriction of the rule, which, in personal matters, places an alien in the same situation as a natural-born subject." 4 H. L. C. 895.

"As to the intention of the legislature," said Mr. Justice Erle, "to exclude alien authors from the rights of authors in England, because it is intended to encourage learning, and to induce learned men to write useful books, the recited intention leads me to an opposite construction; for learning is encouraged by supplying the best information at the cheapest rate, and according to this view the learner should have free access to the advances in literature and science to be found in the useful books of learned men of foreign nations, and I gather from the statute that this was its scope. It is not to be supposed that the legislature looked upon all foreign literature as bad, because of some pernicious writings, or on all British productions as good, on account of some works of excellence; nor is it to be supposed that the legislature planned either to release British authors from a competition with aliens, or to restrict readers to a commodity of British productions of inferior quality, at a higher price; or that it intended to give to British authors of mediocrity a small premium, at the expense of depriving British printers and booksellers of the profit of printing and selling works of excellence by aliens. If any such plan existed, the enactment contains no words for executing it. It provides for authors, which, in common acceptation, denotes authors of all countries; author expressing a relation to a work exclusive of country." Ibid. 878.

and that this object was advanced by encouraging foreign authors to send their works to England for first publication. Five judges[1] argued that, though foreigners were not expressly excluded from the privileges of the statute, a British legislature, dealing with British interests, must be presumed to have legislated for British subjects and for the encouragement of native authors alone. Lord St. Leonards and Lord Brougham, who advised their peers, followed the minority of the judges. The House of Lords adopted the same views; and, in pronouncing the most important copyright decision since Lord Mansfield's time, held that English copyright would not vest in the work of a foreign author *resident abroad*.[2]

[1] Cranworth, Jervis, Pollock, Parke, Anderson. Lord Chancellor Cranworth said:—

"The substantial question is, whether, under the term author, we are to understand the legislature as referring to British authors only, or to have contemplated all authors of every nation. My opinion is, that the statute must be construed as referring to British authors only. *Prima facie* the legislature of this country must be taken to make laws for its own subjects exclusively, and where, as in the statute now under consideration, an exclusive privilege is given to a particular class at the expense of the rest of her Majesty's subjects, the object of giving that privilege must be taken to have been a national object, and the privileged class to be confined to a portion of that community, for the general advantage of which the enactment is made. When I say that the legislature must *prima facie* be taken to legislate only for its own subjects, I must be taken to include under the word subjects all persons who are within the Queen's dominions, and who thus owe to her a temporary allegiance. I do not doubt but that a foreigner resident here, and composing and publishing a book here, is an author within the meaning of the statute; he is within its words and spirit. I go further; I think that if a foreigner, having composed, but not having published, a work abroad, were to come to this country, and, the week or day after his arrival, were to print and publish it here, he would be within the protection of the statute. This would be so if he had composed the work after his arrival in this country, and I do not think any question can be raised as to when and where he composed it. So long as a literary work remains unpublished at all, it has no existence, except in the mind of its author, or in the papers in which he, for his own convenience, may have embodied it. Copyright, defined to mean the exclusive right of multiplying copies, *commences at the instant of publication*; and if the author is at that time in England, and while here he first prints and publishes his work, he is, I apprehend, an author, within the meaning of the statute; even though he should have come here solely with a view to the publication. . . . If publication, which is (so to say) the overt act establishing authorship, takes place here, the author is then a British author, wherever he may, in fact, have composed his work. But if at the time when copyright commences by publication, the foreign author is not in this country, he is not, in my opinion, a person whose interests the statute meant to protect." 4 H. L. C. 954, 955.

[2] Followed in Novello *v.* James, 5 De G. M. & G. 876.

The Law Criticised. — This, therefore, must be regarded as the law of England, until it shall be changed by a tribunal of equal authority to that by which it was declared. But the judgment is indefensible. It was in opposition to the opinions of a majority of the judges, and was against the current of authorities. It was not less contrary to sound principles and established rules of construction. The word author is used in the statute in a general sense, and there is nothing to show that the legislature intended that its meaning should be restricted to native authors. The primary object of the act was the advancement of learning in Great Britain, which Parliament aimed to effect by encouraging the first publication there of literary works; thus securing to the British public the advantages arising therefrom. The protection extended to authors is but a means to this end, which is equally promoted whether the works published are those of native or foreign authors, and whether the author be at Calais or at Dover. "The act," said Lord Westbury, "is auxiliary to the advancement of learning in this country. The real condition of obtaining its advantages is the first publication by the author of his work in the United Kingdom. Nothing renders necessary his bodily presence here at the time; and I find it impossible to discover any reason why it should be required, or what it can add to the merit of the first publication. It was asked, in Jefferys *v.* Boosey, why should the act (meaning the statute of Anne) be supposed to have been passed for the benefit of foreign authors? But if the like question be repeated with reference to the present act, the answer is, in the language of the preamble, that the act is intended 'to afford greater encouragement to the production of literary works of lasting benefit to the world,' a purpose which has no limitation of person or place. But the act secures a special benefit to British subjects by promoting the advancement of learning in this country, which the act contemplates as the result of encouraging all authors to resort to the United Kingdom for the first publication of their works. The benefit of the foreign author is incidental only to the benefit of the British public. Certainly the obligation lies on those who would give the term author a

restricted signification to find in the statute the reasons for so doing." [1]

The judges who maintained that an alien residing abroad was not within the purview of the statute conceded that valid copyright would vest in the work of a foreign author, provided he were in England at the time of publication. It was pertinently asked, by those who rightly thought this to be a fanciful distinction, what the English people, or the cause of learning in Great Britain, would gain by its observance, and why the law gave copyright to a foreigner staying for a day at Dover, but denied it to him if he stopped at Calais and sent his manuscript to London. As long as the lower courts are governed by the authority of Jefferys *v.* Boosey, a foreign author, resident abroad, who publishes in Great Britain, has no protection there against piracy; but, should the direct issue come again before the highest judicial tribunal of Great Britain, there is good reason for believing that the judgment of 1854 will be reversed, and the protection of English law extended to every author, wherever or in whatever language he may write, who gives the British nation the benefit of the first publication of his work. Indeed, in 1868, when Routledge *v.* Low was before the House of Lords, although the direct issue did not arise, Lord Chancellor Cairns and Lord Westbury expressed the opinion that Jefferys *v.* Boosey, which was decided under the act of Anne, is not a binding authority in the construction of the present statute; and that the latter extends protection to every author, native or foreign, who first publishes in the United Kingdom, wherever he may then be resident.[2]

[1] Routledge *v.* Low, Law Rep. 3 H. L. 118.

[2] "It is *impossible*," said the Lord Chancellor, "not to see that the *ratio decidendi* in that case [Jefferys *v.* Boosey] proceeded mainly, if not exclusively, on the wording of the preamble of the statute of Anne, and on a consideration of the general character and scope of the legislation of Great Britain at that period. The present statute has repealed that act and professes to aim at affording greater encouragement to the production of literary works of lasting benefit to the world. And accepting the decision of this House as to the construction of *the statute of Anne, it is*, I think, *impossible* not to see that the present statute would be incompatible with a policy so narrow as that expressed in the statute of Anne." Law Rep. 3 H. L. 111.

"The case of Jefferys *v.* Boosey," said Lord Westbury, "is a decision which is attached to and depends on the particular statute of which it was the exponent; and as that statute has been repealed, and is now replaced by another act, with different enactments

"In my opinion," said the Lord Chancellor, "the protection is given to every author who publishes in the United Kingdom, wheresoever that author may be resident, or of whatever state he may be the subject. The intention of the act is to obtain a benefit for the people of this country, by the publication to them of works of learning, of utility, of amusement. This benefit is obtained, in the opinion of the legislature, by offering a certain amount of protection to the author, thereby inducing him to publish his work here. This is, or may be, a benefit to the author of the work; but it is a benefit given, not for the sake of the author of the work, but for the sake of those to whom the work is communicated. The aim of the legislature is to increase the common stock of the literature of the country; and if that stock can be increased by the publication for the first time here of a new and valuable work composed by an alien, who never has been in the country, I see nothing in the wording of the act which prevents, nothing in the policy of the act which should prevent, and every thing in the professed object of the act, and in its wider and general provisions, which should entitle, such a person to the protection of the act, in return and compensation for the addition he has made to the literature of the country. My Lords, I am glad to be able to entertain no doubt that a construction of the act so consistent with a wise and liberal policy is the proper construction to be placed upon it." [1]

expressed in different language, the case of Jefferys *v.* Boosey is not a binding authority in the exposition of this latter statute." Ibid. 117.

But Lord Cranworth did not "as at present advised, see any difference between the two statutes, so far as relates to the subject of the residence of foreign authors." Ibid. 114. And Lord Chelmsford was of the same opinion. Ibid. 116.

[1] Law Rep. 3 H. L. 110. Lord Westbury said: "The question then arises, who are included in the term authors. The word is used in the statute without limitation or restriction. It must, therefore, include every person who shall be an author, unless from the rest of the statute sufficient grounds can be found for giving the term a limited signification. It is proposed to construe the act as if it had declared in terms that the protection it affords shall extend to such authors only as are natural-born subjects, or foreigners who may be within the allegiance of the Queen on the day of publication. But there is no such enactment in express terms, and no part of the act has been pointed out as requiring that such a construction should be adopted. The act appears to have been dictated by a wise and liberal spirit; and in the same spirit it should be interpreted, adhering of course to the settled rules of legal construction. The preamble is, in my opinion, quite inconsistent with the conclusion that

Foreigner within British Dominions may Secure Copyright. — It was conceded in Jefferys *v.* Boosey, and expressly held by the House of Lords in Routledge *v.* Low,[1] that an alien author may acquire copyright by first publishing in the United Kingdom, provided he be within the British dominions at the time of publication. It matters not where he has composed his work, nor whether he goes into the realm with the sole purpose of being there at the time of publication, and leaves when publication has taken place.[2] No definite period has been named during which he shall remain on British soil. His presence does not seem to be required before or after publication, but merely "at the time of publication." As publication takes place on one day, it may be assumed that the requirements of the law will be met if the author be within the realm during the same period.[3] It is not necessary that he shall be at the place of publication or in England. Thousands of miles may separate him and his publishers. On the day his book is published in the United Kingdom, he may be anywhere within the British dominions, at any point in Canada between the two oceans, in India, in the most distant English colony, at any spot over which waves the British flag. But the author must be there in person. He cannot appear by proxy, — cannot send his assignee, his publisher, or his agent. Why the majesty of the law demands the bodily presence of the author, why copyright will vest if the author tarry for ten hours on one side of the St. Lawrence, or on one side of an imaginary line, but not if he

the protection given by the statute was intended to be confined to the works of British authors. On the contrary, it seems to contain an invitation to men of learning in every country to make the United Kingdom the place of first publication of their works; and an extended term of copyright throughout the whole of the British dominions is the reward of their so doing." Ibid. 118.

[1] Law Rep. 3 H. L. 100. See also Low *v.* Ward, Law Rep. 6 Eq. 415; Boucicault *v.* Delafield, 1 Hem. & M. 597.

[2] See remarks of Lord Cranworth, *ante*, p. 225, note 1. In Routledge *v.* Low, the fact was clearly before the court that Miss Carpenter, an American author, whose work was published in London, had gone to Montreal, Canada, in accordance with an arrangement with her English publishers; and was merely staying there temporarily for the express purpose of acquiring copyright.

[3] "It seems, indeed, to be admitted, that if a foreign author comes to England for however short a time, and first publishes his work here, he is entitled to the benefit of the statute." Wightman, J., Jefferys *v.* Boosey, 4 H. L. C. 887.

is on the other, is a mystery as unfathomable as the distinction is fanciful.

British Subject Resident Abroad Entitled to Copyright. — It appears to be conceded, although the question has not been judicially determined, that a British subject, while resident abroad, may acquire copyright by first publishing in his own country. "It seems not to be denied," said Lord St. Leonards, "that an English author may reside abroad, and yet may have his rights as an English author, upon publication here. Why? Because he owes a natural allegiance, which he cannot shake off." [1]

Law Summarized. — The law concerning the nativity and residence of the author may now be given succinctly. English copyright will not vest in the work of an alien who is not within the British dominions at the time of publication. A foreign author may acquire copyright in England on three conditions: 1, Publication must be in the United Kingdom; 2, there must have been no previous publication; 3, the author must be at the time of publication within the British dominions.[2] A native author must comply with the first two of these requisites; but it is immaterial whether he is within or without the British dominions at the time of publication.

Works of Art. — Sculpture, models, and casts are governed by a special statute;[3] and so are prints and engravings.[4] But these statutes, like those relating to literary compositions, make no distinction between native and foreign authors.[5] The act

[1] Jefferys *v.* Boosey, 4 H. L. C. 985. "If Mr. Gibbon," said Lord Chief Justice Campbell, "after writing the later volumes of his Decline and Fall, at Lausanne, had continued to reside there, can it be doubted that, while domiciled there, he might have caused them to be published in London, acquiring the same rights as an author as if he had returned to this country; or that he might have sold the copyright to another residing in Lausanne, who might have published as the purchaser in London, or assigned the right to a London bookseller?" Boosey *v.* Jefferys, 6 Exch. Rep. 596. And Lord Chancellor Cranworth intimated that if Gibbon had "established himself at Lausanne, without any *animus revertendi*," he would not have lost his rights as a British subject. Jefferys *v.* Boosey, 4 H. L. C. 822.

[2] For the extent of the United Kingdom and of the British dominions, see *post*, p. 298.

[3] 54 Geo. III. c. 56.

[4] 8 Geo. II. c. 13; 7 Geo. III. c. 38; 17 Geo. III. c. 57.

[5] In Page *v.* Townsend, decided in 1862, Shadwell, V. C., held, concerning prints and engravings, that "the object of the legislature was to protect those works which were designed, engraved, etched or worked in Great Brit-

relating to paintings, drawings, and photographs, grants copyright to an "author, being a British subject or resident within the dominions of the crown." [1] This seems to exclude a foreign author who resides abroad, but not one who may be resident within the British dominions.

Rights of Foreigners in the United States.

No Copyright in Work of Foreign Author. — In this country, the question whether a foreigner is entitled to copyright is free from much of the doubt and difficulty which have surrounded it in England. From the first statute, enacted in 1790, to that passed in 1870, Congress has granted copyright to such author only as may be "a citizen of the United States or resident therein," and has expressly declared that no protection shall be extended to the works of a foreigner. The statutes in force before 1870 completely excluded foreign authors from all privileges. There is no reason for believing that Congress, in passing the act now in force, deliberately intended to make any change in the law in this respect. But this statute cannot be construed to prevent a resident owner from securing valid copyright for certain works of art produced by foreign authors.

Statutory Prohibition not Extended to certain Works of Art. — Section 4952 of the Revised Statutes provides that "any citizen of the United States or resident therein, who shall be 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 be entitled to secure copyright therein. There is nothing in this section to prevent a citizen or a resident of the United States from acquiring copyright in a work

ain, and not those which were designed, engraved, etched or worked abroad and only published in Great Britain." 5 Sim. 404. In this case the prints had been struck off abroad, and only published in England. The decision is not an authority against the doctrine that the foreigner might have acquired copyright if his productions had been *printed* and published in England.

[1] 25 & 26 Vict. c. 68, s. 1.

which he has bought from a foreign author; for a "proprietor" is empowered to secure copyright, and in such case no condition or requirement is prescribed as to the nativity or residence of the author. The part of the statute which excludes from protection the works of foreign authors is section 4971; which declares that "nothing in this chapter shall be construed to prohibit the printing, publishing, importation, or sale of any book, map, chart, dramatic or musical composition, print, cut, engraving, or photograph, written, composed, or made by any person not a citizen of the United States nor resident therein." It is clear that no protection can be secured for any work here named which is the production of a person who is not a citizen or a resident of the United States.[1] But there is no mention in this section of paintings, drawings, chromos, statues, statuary, models, or designs; and there is nothing in the statute to prevent a resident owner of any such production from securing a valid copyright therein, though it be the work of a foreigner.

Translations, Abridgments, Dramatizations. — There is no reasonable doubt that valid copyright will vest in a translation, abridgment, or dramatization made by a citizen or resident from the work of a foreign author. The law recognizes such productions as proper subjects of copyright; and, as the copyright does not extend to the original, it matters not that this is the work of a foreign author. But, in such case, the law protects each author only in his own production. The original, being common property, may be used by any person, without infringing the copyright in a protected abridgment, translation, or dramatization.[2]

Joint Native and Foreign Authors. — In the case of a work of which a citizen and a foreigner are joint authors, there is nothing to prevent a valid copyright from vesting in that part of which the former is the author, provided this can be separated from that written by the foreign author. If the parts cannot be separated, it would seem that copyright will not vest in any of it.

[1] Carey *v.* Collier, 56 Niles Reg. 262; Keene *v.* Wheatley, 9 Am. Law Reg. 33; Boucicault *v.* Wood, 2 Biss. 34.

[2] Shook *v.* Rankin, 6 Biss. 477; Shook *v.* Rankin, 3 Cent. Law Jour. 210; Benn *v.* LeClercq, 18 Int. Rev. Rec. 94.

Meaning of Resident. — The judicial construction given to the word resident, as used in the copyright statute, is that it refers to a person who is residing in the United States with the intention of making this country his place of permanent abode. A formal declaration of such intention is not necessary, nor is any definite period of time indicated as requisite to constitute such residence. Nor is it essential that such person shall be a householder. He may be a lodger or boarder. The question is determined by the state of mind, the intention, of the person at the time he has his abode here; and by his acts, as far as they show what that intention was. If while here he intends to stay and make this his home, he becomes during the continuance of that intention a resident within the meaning of the law, though afterward he may change his mind, and return to his native land. How long such intention shall continue, the courts have not said; but, if it exist *bona fide* at the time of recording the title, valid copyright vests, and will not be defeated by any subsequent acts or change of mind on the part of the claimant. On the other hand, if a foreign author comes to this country intending to stay temporarily, although he actually remains many years, he is a mere sojourner, and does not acquire a residence within the meaning of the act.[1] To determine thus the intention in the mind of a person may be attended with difficulty, and even with fraud. It is a question of fact, on whose determination the law will depend.[2]

In Boucicault *v.* Wood,[3] it appeared that the plaintiff, who was a native of Great Britain, had been in the United States from 1853 to 1861, when he returned to the former country. During this period, he had copyrighted certain plays which he had written. The defence was that the plaintiff, being a foreigner, was not entitled to copyright in this country.

[1] Boucicault *v.* Wood, 2 Biss. 34.

[2] In Carey *v.* Collier, 56 Niles Reg. 262, decided by the United States Circuit Court in 1839, it was held that Capt. Marryatt, who had filed a declaration of his intention to become a citizen of the United States, did not thereby become a resident, for the reason that the evidence showed that he was still a subject of Great Britain in whose navy he was an officer, and that he intended to return to that country to reside. Mr. Justice Betts said that "it was evident that a man who was a mere transient visitant, whose family, business intentions and relations were all abroad, could not be considered a resident; and the filing a declaration of his intention to become a citizen could not make him one."

[3] *Supra*.

The jury was directed to find whether Boucicault, when he entered his copyright, intended to make this country his home. It was found that such intention then existed in his mind, and accordingly the copyright was held to be valid. The law on this point was expounded by Mr. Justice Drummond as follows: "No person is entitled to the benefit of these acts unless he be, at the time of filing the title, a citizen of the United States, or a resident therein. Residence ordinarily means domicile, or the continuance of a man in a place, having his home there. It is not necessary that he should be the occupant of his own house; he may be a boarder or a lodger in the house of another. The main question is the intention with which he is staying in a particular place. In order to constitute residence, it is necessary that a man should go to a place, and take up his abode there with the intention of remaining, making it his home. If he does that, then he is a resident of that place. This question of residence is not to be determined by the length of time that the person may remain in a particular place. For example, a man may go into a place and take up his abode there with the intention of remaining, and if so, he becomes a resident there, although he may afterwards change his mind, and within a short time remove. So if a person goes to a place with the intention of remaining for a limited time, although in point of fact he may remain for a year or more, still this does not constitute him a resident. So it is his intention accompanied with his acts, and not the lapse of time, which determines the question of residence. The plaintiff came to this country in 1853, and remained, pursuing his profession as an actor and author until 1861; and if at the time of filing the title he had his abode in this country with the intention of remaining permanently, he was a resident within the meaning of the law, even though he afterwards changed his mind and returned to England. If, however, he was a sojourner, a transient person, or at the time of this filing had the intention to return to England, he is not entitled to the protection of these laws." [1]

Immaterial where Work is Produced or Citizen Author Resides. —No conditions are prescribed as to where the work shall be

[1] 2 Biss. 38; s. c. 7 Am. Law Reg. N. s. 539, 545.

produced. And it is obviously immaterial whether it has been written in or out of the country, provided the author comes within the requirements of the law as to citizenship or residence. Nor, if the author be a citizen of the United States, can it be material whether he is or is not resident in the country when his book is published and the copyright entered. Whether the book must be printed in the United States is a question which is elsewhere considered.[1]

Foreign Assignee of Native Author. — The question may arise whether a foreign assignee of a native author is entitled to the privileges of the statute. On this point there is no judicial light. The act confers copyright upon an author or owner of a book who is a citizen of the United States or resident therein, and upon the assignee of such author or owner. It does not prescribe that the assignee shall be a citizen or a resident. Nor does its general spirit or object demand that such restriction shall be made. The purpose of the legislature is to foster native literature by encouraging native authors. This object is secured by protecting the works of such authors; and is in no degree defeated by permitting them to transfer their productions, either before or after publication, to foreign buyers. Indeed, the value of the property to the author is increased by such enlarged facilities for disposing of it. It will hardly be contended that, when a native author has published his work and secured statutory copyright, such copyright will become void by being transferred to a foreigner. The principle is the same when the author assigns his work before publication, and the assignee seeks to secure the copyright in his own name. In neither case is the object of the statute promoted by excluding a foreign assignee from its privileges. It is foreign authorship, not ownership, which the law refuses to protect.[2]

[1] See *post*, p. 296.

[2] To this construction there is an apparent, but not a real, objection. The statute, as has been seen, declares that the "proprietor" of a book who is a citizen of the United States, or resident therein, shall be entitled to copyright. Now, it is clear that an assignee is a proprietor, and, therefore, it might be urged, must also be a citizen or resident. But the act does not say that a proprietor who is not a citizen or resident shall not have copyright. On the contrary, its privileges are expressly extended to an assignee without restriction as to citizenship or residence; and this view, as shown in the text, is in entire harmony with the spirit and purpose of the law. It is true that this construction practically annuls

Author and Assignee.

The various statutes of England and the United States have declared that the author of a literary work, or his assignee, shall have copyright therein for a named term from the time of first publication. It is also provided by the existing statutes that the copyright in a book published after the death of its author may be secured in England by the owner of the manuscript,[1] and in the United States by the executors and administrators of the author.[2] It now becomes necessary to consider who may be an author within the meaning of the law, and what persons may be assignees entitled to copyright.

Who is Author. — A literary production is primarily the property of the author who has created it; and, until he has parted with it, he alone is entitled to the privileges given by the statute. When a person has conceived the design of a work, and has employed others to execute it, the creation of the work may be so far due to his mind as to make him the author.[3] But he is not an author who "merely suggests the subject, and has no share in the design or execution of the work."[4] When the same work is the basis of two or more different copyrights, he is the author, within the meaning of the statute, who has produced that for which the copyright is granted. Thus, the author of a translation, dramatization, or abridgment, is the person who has translated, dramatized, or abridged a work of which he may or may not be the author.[5] So, he who arranges music for any instrument is the author of such arrangement, though he may not be the composer of the music.[6] In like manner, a person who has made and arranged selections from other works is the author of the compilation.

the restrictive force which the words, "citizen of the United States or resident therein," might otherwise have on a "proprietor." But there is no reason to believe that Congress intended to make such limitation; and, whether it did or not, the section cannot rightly be construed to have that effect.

The word proprietor was not used in this connection in any statute before the existing one passed in 1870. For what purpose it was inserted in this is not apparent.

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

[2] U. S. Rev. St. s. 4952. See Folsom *v.* Marsh, 2 Story, 100.

[3] Hatton *v.* Kean, 7 C. B. N. S. 268.

[4] Shepherd *v.* Conquest, 17 C. B. 427, 445.

[5] See *ante*, p. 158.

[6] Wood *v.* Boosey, Law Rep. 2 Q. B. 340, on ap. 3 Id. 223; Boosey *v.* Fairlie, 7 Ch. D. 301, 309.

But in these cases authorship alone does not create a title to copyright. The maker of such productions must have a right so to use the originals.

Joint Authors. — Copyright will vest in two or more joint authors of a work, who will thereby become owners in common of the undivided property.[1] "There may be a difficulty in some cases," said Mr. Justice Smith, "in determining who are joint authors. But I take it that, if two persons agree to write a piece, there being an original joint design, and the co-operation of the two in carrying out that joint design, there can be no difficulty in saying that they are joint authors of the work, though one may do a larger share of it than the other."[2] A person who had merely made certain alterations in a play without the co-operation of the author was held not to be a joint author. "I fail to discover any evidence," said Keating, J., "that there was any co-operation of the two in the design of this piece, or in its execution, or in any improvements either in the plot or the general structure. All the plaintiff claims to have done is to vary some of the dialogue so as to make it more suitable for his company or for his audience. If the plaintiff and the author had agreed together to rearrange the plot, and so to produce a more attractive piece out of the original materials, possibly that might have made them joint authors of the whole. So, if two persons undertake jointly to write a play, agreeing in the general outline and design, and sharing the labor of working it out, each would be contributing to the whole production, and they might be said to be joint authors of it. But, to constitute joint authorship, there must be a common design. Nothing of the sort appears here. The plaintiff made mere additions to a complete piece, which did not in themselves amount to a dramatic piece, but were intended only to make the play more attractive to the audience."[3]

[1] Maclean *v.* Moody, 20 Sc. Sess. Cas. 2d ser. 1154; Levi *v.* Rutley, *infra;* Marzials *v.* Gibbons, Law Rep. 9 Ch. 518. As to owners in common of a copyright, see Carter *v.* Bailey, 64 Me. 458.

[2] Levi *v.* Rutley, Law Rep. 6 C. P. 523, 530.

[3] Ibid. 529. "It is not pretended here," said Smith, J., "that there was any original joint design. Wilks was employed by the plaintiff to write the play. Wilks invented the plot and wrote the whole dialogue complete. The plaintiff and some members of his company thought the play might be improved. Accordingly, the

Who is Assignee. — An author who has not parted with the property in his production is empowered by the statute to secure copyright in his own name; and at any time afterward to transfer it to an assignee, who thereby becomes vested with the same right. But the meaning of assignee, as used in the act, is not restricted to an assignee of the privilege created by the statute. It embraces also a person to whom an author has transferred his unpublished work, before statutory copyright has attached to it. In other words, statutory copyright will vest *ab initio* in an assignee, as well as in the author himself. Both the English [1] and the American statutes [2] expressly recognize the right of the "proprietor" of an unpublished work to enter the copyright in his own name; and the law has been repeatedly construed to this effect by the courts.[3]

plaintiff either himself wrote or procured some one else to write for him a new scene, and made several other alterations in the incidents and in the dialogue; and the question is whether that constituted the plaintiff a joint author of the play with Wilks. The plot remains. The additions do not disturb the drama composed by Wilks; they were made for the mere purpose of improving or touching up some of its parts. It would be strange indeed, if not unjust, if the author's rights could be thus merged into a joint authorship with another. There are probably very few instances, — at least in modern times, — of a play being put upon the stage without some alteration by the manager. It is, no doubt, difficult to draw the line; but it never could be suggested that, when an author submits his manuscript to a friend, and the friend makes alterations and improvements, the latter would thereby become a joint author of the work. If, when the piece was brought to the plaintiff, he had said to Wilks, 'This thing requires to be remodelled, and you and I will do it together,' and Wilks had assented, possibly a case of joint authorship might have been set up But the evidence here falls very short of that." Levy *v.* Rutley, Law Rep. 6 C. P. 530. See also Stanley *v.* Ross, Ibid. 531, note; Delf *v.* Delamotte, 3 Jur, N. S. 933.

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

[2] U. S. Rev. St. s. 4952; also, statute of 1831, s. 4; 4 U. S. St. at L. 436.

[3] Cocks *v.* Purday, 5 C. B. 860; Folsom *v.* Marsh, 2 Story, 100; Pulte *v.* Derby, 5 McLean, 328; Little *v.* Gould, 2 Blatchf. 165, 362; Cowen *v.* Banks, 24 How. Pr. 72; Paige *v.* Banks, 7 Blatchf. 152, on ap. 13 Wall. 608; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402. In Jefferys *v.* Boosey, Mr. Justice Crompton said: "The statute of Anne clearly contemplates a first publication by the assignee as sufficient to give him the monopoly — and, in point of fact, I believe that nothing is more common than that the booksellers should take an assignment of the copyright, and publish themselves as proprietors, so as to vest the monopoly in them during the term. The words of the statute, that the author or his assignee shall have the sole liberty, &c., from the day of the first publication, seem to me to show that the assignee may himself publish, so as to acquire the copyright." 4 H. L. C. 863. In D'Almaine *v.* Boosey, where it appeared that the plaintiff had published and copyrighted a musical composition which he had bought in manuscript from a foreign author, the cou.s

Owner of Manuscript may Secure Copyright. — An assignee, therefore, in the meaning of the statute, may be a person who has acquired his title either before or after the copyright has been secured; that is, either before or after the work has been published. Here is presented a distinction of importance. The literary property which an author has in his manuscript exists by the common law. The common-law right is lost when the manuscript is published. Statutory copyright begins with publication. There can be no common-law property in a published, and no statutory copyright in an unpublished, book. When, therefore, the author secures to himself the copyright, and assigns it after publication, what is transferred is the statutory copyright. But, when he disposes of his property in an unpublished work, he does not assign the statutory copyright; because that does not then exist, and hence cannot be assigned.[1] Nor can it be said that in this case it is the inchoate copyright, or merely the right to secure the copyright, which is transferred. What is passed is the common-law

said: "If he is the owner of the work, it makes no difference whether he composed it himself or bought it from a foreigner." 4 Y. & C. Exch. 300. This was true on the assumption that the *status* of a foreign author under the copyright law was the same as that of an Englishman. But the doctrine was afterward affirmed that copyright would not vest in the work of an alien, except on certain conditions.

In Cumberland *v.* Planché, 1 Ad. & El. 580, it was expressly held that an assignee is not necessarily an assignee of the privilege created by the statute. It appeared that the defendant had sold a farce, of which he was the author, to the plaintiff, who published it and secured the copyright. Afterward was passed the 3 & 4 Will. IV. c. 15, which gave for the first time, to the author or his assignee, the exclusive right to represent a dramatic composition. This right had not been created when the transfer was made. But the court held that the plaintiff had become the absolute owner of the play, and was entitled, as such owner, to secure the right of representation conferred by the statute of William. "We cannot therefore," remarked Littledale, J., "say that 'assignee' means the assignee of the privilege created by the act." Ibid. 587.

[1] Colburn *v.* Duncombe, 9 Sim. 151; Sweet *v.* Shaw, 3 Jur. 217; Pulte *v.* Derby, 5 McLean, 328; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402. This view of the law was expressed by Mr. Justice Wightman in Jefferys *v.* Boosey. "The statute [8 Anne, c. 19] gives the author or his assignee copyright, properly so called, from the time of the first publication in England. From the expressions used in it, there is a recognition of proprietors of literary works, independently of the statute, and it enables the author to give to an assignee the same power to obtain a copyright that he possessed himself; but neither he nor his assignee would be entitled to copyright until publication. Whatever right the author may have possessed before publication must have been at common law." 4 H. L. C. 886.

property in the manuscript. Of this the assignee, unless the assignment be of a qualified interest, becomes the absolute owner. He succeeds to all the rights which were vested in the author. He acquires the right not only to publish and to secure the statutory copyright, but also to withhold from publication, or to publish without securing, the copyright; and thus, if he wishes, to abandon his property to the public.[1] In short, he becomes vested with all the rights of property which the common law recognizes in an unpublished composition, and which are more extensive than the right to secure statutory copyright.

A person, then, who is an assignee at common law of the author's rights is recognized by the statute as an assignee entitled to secure copyright. Whether a person who has derived a title at common law is or is not an assignee, and whether such title is or is not valid, is to be determined by the common law, and not by the statute. Now, at common law, neither a written nor a formal assignment is necessary to make a person an assignee. The owner of an unpublished work may sell it,[2] exchange it, or give it away;[3] or it may be transferred by operation of law.[4] The ownership of the property may be lawfully acquired in any of these ways; and there is no reason why a person who thus derives title from the author may not be an assignee in a broad and proper meaning of the word. The essential qualities of an assignee are found in an owner who has derived a lawful title from the author, and such owner is properly within the meaning of assignee as used in the statute. Indeed, this comprehensive meaning is expressly given to the word by the existing English statute, which declares that "the word 'assigns' shall be construed to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or other-

[1] See language of Blatchford, J., Paige *v.* Banks, 7 Blatchf. 156, quoted *post* 329, note 2.

[2] Parton *v.* Prang, 3 Cliff. 537.

[3] Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402.

[4] Little *v.* Gould, 2 Blatchf. 165, 362; Folsom *v.* Marsh, 2 Story, 100. See *ante*, p. 104.

wise."[1] This language is clearly broad enough to make the meaning of "assign" as comprehensive as that of owner, and to enable any person who is the lawful owner of an unpublished work to secure statutory copyright therein.[2] Congress has expressly given the same broad scope to the statute now in force, by enacting that the author or the *proprietor* of a book may obtain copyright.[3] Moreover, if it was necessary under the act of 1831 that a person who was not the author should show a title derived from the author, that requirement cannot be regarded as now existing. There is no reason why a person who is the owner of an unpublished manuscript or work of art which has been found, or otherwise brought to light, may not obtain a copyright therein, although the name of the author be unknown.

Assuming the principles above explained to be correct, statutory copyright, either in England or in the United States, may be secured in the first instance not only by the author, but also by the owner of an unpublished work who has derived his title from the author; and it is immaterial in what way, provided it be lawful by the common law, the owner has acquired the property in such unpublished work. In the United States, this doctrine in its full scope has neither been expressly affirmed nor denied by the courts; but it is supported by the leading decisions in Little *v.* Gould,[4] and Lawrence *v.* Dana,[5] both of which were rendered before all doubt concern-

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

[2] Cocks *v.* Purday, 5 C. B. 860. In Jefferys *v.* Boosey, Mr. Justice Erle expressed the opinion that the bookseller who had obtained ancient manuscripts "brought to light from unburied cities" would be entitled to secure copyright therein. 4 H. L. C. 880. In Maclean *v.* Moody, Lord Deas said: "A person may find a manuscript in his ancestor's repositories, or get a gift of it, and publish it, and he may be entitled to copyright, although he cannot tell who was the author, nor whether the author is living or dead. . . . That the first publisher may have copyright in the work, although he cannot point out the author, appears to me to be implied in section 16 of the statute [5 & 6 Vict. c. 45], which requires the defendant, 'if the nature of his defence be that the plaintiff in such action was not the author or first publisher of the book' to give notice of 'the name of the person whom he alleges to have been the author or first publisher.' I think it is here assumed that there may be cases in which, if the plaintiff be 'the first publisher,' he may be entitled to copyright, although no author has been or can be named upon either side." 20 Sc. Sess. Cas. 2d ser. 1163.

[3] U. S. Rev. St. s. 4952.

[4] 2 Blatchf. 165, 362.

[5] 2 Am. L. T. R. N. S. 402.

ing the law on this point was removed by the use of the word proprietor in the existing statute.[1]

The English courts have conceded that copyright will vest *ab initio* in an assignee; but they have held that statutory copyright can be assigned only by a writing, and have drawn no distinction between transfers made before and those made after publication.[2] According to this doctrine, only an assignee who has derived his title by a written assignment would be entitled to secure copyright. The fallacy of this theory has already been shown to be the false assumption, that the statute recognizes no other assignee than one to whom the statutory copyright has been transferred, and that this right can be assigned before it has any existence. The important fact has been overlooked, that, when an author disposes of an unpublished work, he does not convey any statutory copyright therein, because there is no statutory copyright to convey. The only rights which then exist, and which alone can be transferred, are common-law rights. When a person has acquired these rights from the author by any method recognized by the common law, whether by parol agreement or otherwise, he is the lawful owner of the unpublished work, and an assign within the meaning of the statute entitled to secure the copyright conferred by the statute. I have endeavored elsewhere to show more fully that the theory here criticised is contrary to sound principles and to the definition of assignee given by the statute of Victoria, and that in but one case[3] yet reported it has been applied to the construction of that statute.[4]

The doctrine that copyright will vest, in the first instance, in the owner of a manuscript, is limited by the consideration that the author must be a person entitled to copyright. Thus, when the work of a foreigner is excluded from protection, neither the author nor his assignee can acquire valid copyright for it.

A manuscript or a copyright may be owned by the government or a corporation as well as by an individual, and the

[1] See *post*, p. 319, where it is maintained that the statute of the United States does not require an assignment to be in writing when the transfer is made before publication.

[2] See *post*, pp. 302-304.

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

[4] See *post*, pp. 304 *et seq.*

rights of the government or corporation are governed by the same principles as those of an individual owner.[1]

Rights of Employer and Author Employed.

Assuming that the law is rightly expounded above, to the effect that copyright will vest *ab initio* in the owner of an unpublished production, it follows that any person may secure statutory copyright for a work which he has employed another to write. The produce of labor may become the property of him who has employed and paid the laborer. Literary labor is no exception to this universal rule. When an author is employed on condition that what he produces shall belong to the employer, the absolute property in such production vests in the employer by virtue of such employment and by operation of law. This mode of acquiring property in an unpublished work is as lawful as any other, and such owner is as clearly entitled as any other owner of an unpublished work to secure the privileges granted by the statute. Indeed, if the law were otherwise, there would be no copyright in many works already published, and it would be often impracticable to secure copyright for such works to be hereafter published. Thus, cyclopædias, gazetteers, directories, maps, charts, photographs, &c., are in many instances produced by persons employed on the condition that the results of their labor shall belong to their employers; and they are copyrighted and published as the property of such employers.

Cyclopædias and Periodicals in Great Britain. — In England, the owners of certain publications are expressly empowered to secure copyright in compositions which they have employed others to write. Section 18 of 5 & 6 Vict. c. 45, declares that when "the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever," has employed and paid a person to prepare articles for any such publication on the terms that the copyright shall belong to the proprietor, the copyright shall vest in the proprietor, "who shall enjoy the same rights as if he

[1] Little *v.* Gould, 2 Blatchf. 165, 362; Marzials *v.* Gibbons, Law Rep. 9 Ch. 518. See *ante*, pp. 161–164.

were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this act." It is, however, provided that the author may, by "any contract, express or implied," reserve to himself the right tc publish his production in separate form, and, in case of such reservation, he will be the owner of the copyright in the separate publication.

The owner of any publication embraced within this section of the statute is thus expressly empowered to employ a person to write the whole or a part of it, and to acquire by virtue of the contract of employment either the absolute copyright in what is so written, or simply the right to use it *in* that special publication. Whether he acquires the one or the other of these rights will depend on the nature of the agreement, which need not be in writing nor in express words, but may be verbal and implied.[1] The copyright remains in the author, unless he has consented to part with it;[2] but, in the absence of an express agreement, such consent may be implied from the attending circumstances.[3] If the absolute copyright vests in the owner,

[1] Bishop of Hereford *v.* Griffin, 16 Sim. 190; Sweet *v.* Benning, 16 C. B. 459; Strahan *v.* Graham, 16 L. T. N. S. 87, on ap. 17 Id. 457.

[2] Bishop of Hereford *v.* Griffin, *supra;* Mayhew *v.* Maxwell, 1 Johns. & H. 312; Smith *v.* Johnson, 4 Giff. 632; Strahan *v.* Graham, *supra;* Delf *v.* Delamotte, 3 Jur. N. S. 933.

[3] Sweet *v.* Benning, *supra.* The plaintiffs were publishers of The Jurist, and had employed various lawyers to prepare reports of cases for that periodical. Nothing was said as to the copyright. The Court of Common Pleas held that there must be presumed an implied agreement that the copyright was to be the property of the employers. "It was urged," said Maule, J., "that these reports were not written 'on the terms that the copyright therein should belong to the proprietors' of The Jurist, because there were no express words in the contract under which they were written, conferring upon them the right to the copy. But, though no express words to that effect are stated in this special case, I think, that, where a man employs another to write an article, or to do any thing else for him, unless there is something in the surrounding circumstances, or in the course of dealing between the parties, to require a different construction, in the absence of a special agreement to the contrary, it is to be understood that the writing or other thing is produced upon the terms that the copyright therein shall belong to the employer — subject, of course, to the limitation pointed out in the 18th section of the act." 16 C. B. 484.

In the Bishop of Hereford *v.* Griffin, where it appeared that the plaintiff, at the request of the publishers, had written an article on Thomas Aquinas for the Encyclopædia Metropolitana, and no special agreement had been made as to the copyright, Vice-Chancellor Shadwell held that the publishers had acquired merely the right to publish the article in the cyclopædia. He said: "Then the defendants say that they believe that the ordinary terms of contract were adopted between the plaintiff and the publishers of the encyclopædia, and that no special agreement was entered into with respect to the

he alone is entitled to publish the production in a separate form.[1] If he has acquired merely the right of publication in a specified work, the ownership of the copyright continues in the author, and the owner is a mere licensee, without authority to publish the production in a separate form.[2]

There is, however, a special proviso "in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature," to the effect, 1, that at the end of twenty-eight years the right of publication in a separate form shall revert to the author, for the remainder of the term given by the statute; 2, that the owner shall not at any time publish the composition "separately or singly without the consent, previously obtained of the author thereof, or his assigns." The owner of a review, magazine, or like periodical, as well as the owner of any other publication embraced within the section, as a cyclopædia or a "work published in a series of books or parts," may acquire, by virtue of the contract of employment, the copyright in an article. This copyright will embrace all rights of publication, and is not restricted to the right to use the article in the periodical for which it is written. But, pursuant to the proviso just cited, the copyright in the case of a magazine or like periodical will revert to the author at the end of twenty-eight years; whereas, in the case of any work not included in the proviso, the copyright will continue in the owner during the entire statutory term. This appears to be the only respect in which the law in the case of "reviews, magazines, or other periodicals of a like nature," is different from that governing other publications within the purview of the section.[3]

reservation of any right of publication by the plaintiff. But, it must be observed that, according to the law, the copyright was in the plaintiff except so far as he parted with it; therefore no reservation was necessary to constitute a right in him." 16 Sim. 196.

These two authorities are not necessarily conflicting. The sound doctrine is that the copyright is in the author, unless he has consented to part with it. The court was of opinion that an implied consent to part with the copyright was created by the circumstances attending the agreement in Sweet *v.* Benning, but not in the Bishop of Hereford *v.* Griffin. As these circumstances were not precisely the same in the two cases, the decisions may properly be different, and yet based on the same principles.

[1] Sweet *v.* Benning, 16 C. B. 459.

[2] See authorities cited *ante*, p. 244, note 2. As to what is a separate publication, see Smith *v.* Johnson, 4 Giff. 632; Mayhew *v.* Maxwell, 1 Johns. & H. 312.

[3] That part of the proviso relating

The question may arise, whether in all cases the copyright in articles published in reviews, magazines, and like periodicals, is governed by section 18 of the statute. If so, the copyright, though it has vested in and become the property of the publisher, will revert to the author at the end of twenty-eight years. Whereas, by the general provisions of the statute, no distinction is made between periodicals and books in general; and, when the publisher acquires the copyright in an article first published in a periodical, he becomes the absolute owner of it for the full statutory term. The natural construction of the section under consideration would seem to be, that its provisions were intended to apply only to cases wherein authors have been expressly employed to prepare articles or other matter, and not to ordinary agreements concerning compositions, which the author has not been specially employed to write. In some cases, this distinction may be vague and unsatisfactory. But it would seem that, when an author has lawfully transferred to the publisher of a periodical the copyright in an article which he has not been specially employed to write, the respective rights of the parties are properly governed by the general provisions of the statute, and not by the special provisions of section 18. Indeed, the language of this section has been so strictly construed that actual payment for the article has been held essential to the vesting of the right of publication in the owner of the periodical.[1]

to reviews, magazines, and periodicals, which prohibits the owner from publishing separately without the consent of the author, is, in my judgment, superfluous, unless it is to be construed as requiring for a separate publication a special consent apart from the original contract of employment. But it is not reasonable to suppose that this is its object or effect. By virtue of section 18 of the statute under consideration, if an author writes an article for a magazine or other periodical, under an agreement that the copyright shall belong to the owner, the latter thereby acquires all rights of publication during twenty-eight years, including the right of publishing separately; and he acquires such rights by consent of the author. If, on the other hand, the agreement is that the owner shall have only the right to use the article in a named publication, he is not entitled to publish it in any other form, for the reason that he has not acquired that right, nor received the author's consent for a separate publication. Now, excepting the division of the term of the copyright between the owner and the author, this, as shown in the text, is precisely the law in the case of a cyclopædia, or other work to which the special proviso under consideration does not apply.

[1] Brown *v.* Cooke, 11 Jur. 77; Richardson *v.* Gilbert, 1 Sim. N. S. 336. In most of the cases which have been decided under section 18 of the statute,

It has not been judicially determined what classes of publications are embraced within section 18 of the statute of Victoria. That section was manifestly intended to empower the owners of cyclopædias, periodicals, and works published in parts, to acquire the copyright in the matter which they have employed others to write. But the language used embraces not only such owners, but also the owner of "any book whatsoever." This language would seem to be sufficiently comprehensive to include any literary composition which one person has employed another to write, and there seems to be no good reason why it should have a more restricted meaning.[1]

General Publications in Great Britain. — But without regard to section 18, the statute rightly construed must be taken to vest copyright in any person who has employed another to produce a literary work. As has been shown,[2] an assignee is empowered by the statute to secure copyright, and by the comprehensive definition contained in the statute, such assignee may be a person who, "by operation of law, or otherwise," has acquired the interest of the author in an unpublished work. There can be little ground for doubt that this provision is broad enough to embrace a person who has become the owner of a literary

it appeared that the articles had been written by authors in the employment of the owners. Such was not the case, however, in Strahan *v.* Graham; yet this case was decided under this section. 16 L. T. N. S. 87, on ap. 17 Id. 457.

[1] In Shepherd *v.* Conquest, Jervis, C. J., referring to Sweet *v.* Benning, said *obiter*: "The decision there turned upon the construction of the peculiar provisions of the 18th section of the 5 & 6 Vict. c. 45, relating to periodical works, and it has no bearing upon the present case." 17 C. B. 445. But it was immaterial whether this section of the statute did or did not apply in Shepherd *v.* Conquest. Nor did the Chief Justice say what publications were within that section, or refer to the important words, "any book whatsoever," there used.

In Delf *v.* Delamotte, where it appeared that the plaintiff had written, and the defendant published, a book called The Practice of Photography, Lord Campbell said: "I do not say that under the 5 & 6 Vict. c. 45, s. 18, it is impossible that the property of the copyright might be conveyed to and invested in a person for whom an author had undertaken to write. It was argued that section 18 only applied to copyright in articles furnished for magazines, periodicals, &c. Without saying how that is, it is quite clear that the property can only be so conveyed when, according to the act of Parliament, it is written on such terms, *i. e.*, on the terms that the copyright in the article shall belong to the proprietor, publisher or conductor, and where it has been paid for by such proprietor, publisher or conductor. Now it is clear that this book was not written with a view to the copyright being vested in Mr. Cundall." 3 Jur. N. S. 933.

[2] *Ante*, p. 238.

work by virtue of having employed and paid another to produce it.[1]

But it may be going too far to say that the law to this effect is judicially settled. It is conceded that, when one person has employed and paid another to write a work, with the mutual understanding that it shall be the property of the employer, the latter acquires an equitable title which will enable him in a court of chancery to assert his rights in the published production against either the person employed or others.[2] Whether a complete legal title to the copyright will vest *ab initio* in such employer without the necessity of a written assignment, is a point on which the law has not been expressly declared by the courts of law; but the decisions in the chancery courts, though not in entire harmony, support the doctrine that an employer is capable of securing in his own name a valid copyright at law. And this doctrine has not been contradicted in any case decided since the statute of Victoria was passed. Lord Eldon held that the owner of a periodical had a valid copyright in translations which he had employed another to make;[3] and Vice-Chancellor Leach ruled that the publisher of a dictionary of architecture was the owner of the copyright in the articles written by persons employed by him.[4] In the recent case of Grace *v.* Newman, where it appeared that the plaintiff had hired a person to compile a collection of monumental designs taken from tombstones in cemeteries, and had published them in a book, and registered himself as the owner of the copyright, Vice-Chancellor Hall said: "Next, it was

[1] The proviso in section 18 may, however, operate in the case of articles written under employment for reviews, magazines, and similar periodicals, to limit the term of the copyright in the employer to twenty-eight years.

[2] Wyatt *v.* Barnard, 3 Ves. & B. 77; Barfield *v.* Nicholson, 2 L. J. (Ch.) 90, 102; s. c. 2 Sim. & St. 1; Sweet *v.* Shaw, 3 Jur. 217; Grace *v.* Newman, Law Rep. 19 Eq. 623.

[3] Wyatt *v.* Barnard, *supra.*

[4] Barfield *v.* Nicholson, *supra.*

Referring to the statute of Anne, the Vice-Chancellor said: "I am of opinion, that, under that statute, the person, who forms the plan and who embarks in the speculation of a work, and who employs various persons to compose different parts of it, adapted to their own peculiar acquirements — that he the person who so forms the plan and scheme of the work, and pays different artists of his own selection, who, upon certain conditions, contribute to it, is the author and proprietor of the work, if not within the literal expression, at least within the equitable meaning of the statute of Anne, which being a remedial law is to be construed liberally." 2 L. J. (Ch.) 102.

contended that the plaintiff is not entitled to a decree, because he has not brought himself within the section of the act which refers to authors and their assignees; but I think the words of the section are wide enough to embrace the case of a person employing another person and remunerating that person for the work done. The person remunerated has no claim to the copyright; but it is the property of the person who remunerates him, and in this court the person who remunerates must be taken to be the equitable assignee and the publisher within the meaning of the act." [1]

In harmony with this doctrine is the decision of the court of Common Pleas in Hatton *v.* Kean, where it appeared that the defendant had designed a dramatic representation, consisting of

[1] Law Rep. 19 Eq. 626. To the same effect are Nicol *v.* Stockdale, 3 Swans. 687; Cary *v.* Longman, 1 East, 358; Sweet *v.* Maugham, 11 Sim. 51; Hatton *v.* Kean, 7 C. B. N. S. 268; Wallenstein *v.* Herbert, 16 L. T. N. S. 453; Marzials *v.* Gibbons, Law Rep. 9 Ch. 518, opinion of Lord Deas in Maclean *v.* Moody, 20 Sc. Sess. Cas. 2d ser. 1163. See also Leader *v.* Purday, 7 C. B. 4; Stevens *v.* Wildy, 19 L. J. N. S. (Ch.) 190.

Shepherd *v.* Conquest, 17 C. B. 427, and Levi *v.* Rutley, Law Rep. 6 C. P. 523, are not opposing authorities, for the reason that in neither was there an agreement, express or implied, that the production should become the property of the employer. In the former case, Jervis, C. J., said: "We do not think it necessary in the present case to express any opinion whether, under any circumstances, the copyright in a literary work, or the right of representation, can become vested *ab initio* in any employer, other than a person who has actually composed or adapted a literary work." *Supra*, 444.

To the contrary, see Jefferys *v.* Baldwin, Amb. 164; Storace *v.* Longman, 2 Camp. 27, note; Cary *v.* Kearsley, 4 Esp. 168; Sweet *v.* Shaw, 3 Jur. 217. In the last-named case, the plaintiffs claimed copyright in law reports which had been prepared for them by persons employed for that purpose. Vice-Chancellor Shadwell said: "I think that they have in equity, but I cannot understand how they have got the copyright at law; because I cannot see how at law the agreement that persons shall prepare a work for the plaintiffs gives the plaintiffs a copyright at law, for nothing can pass at law except that which actually exists."

The fallacy of this reasoning is the assumption that what passed from the reporters to the plaintiffs was the statutory copyright. The reporters prepared and delivered the manuscript reports under an agreement that they should be the absolute property of the plaintiffs. The transfer was of common-law rights, and hence embraced property in existence. Its validity was not affected by the fact that no statutory copyright was in existence, because this was not the subject of the transfer.

In Hazlitt *v.* Templeman, 13 L. T. N. S. 593, the court expressed the opinion, but did not decide, that the copyright would have vested in the author, and not in the employer. But as the defendant had registered the copyright in her own name, it was held that such registration was *prima facie* evidence of her title, which was not rebutted by the absence of proof of a written assignment.

a play of Shakespeare, with certain changes made by Kean, and with costumes, properties, scenery, dances, and music prepared by others under his direction. The plaintiff had been employed to compose the music, and afterward claimed that the property in it belonged to him. The court found that the defendant was the author and designer of an entire dramatic representation, and that the plaintiff had been hired to compose the music with the distinct understanding, and on the terms, that it should become a part of the entertainment, and that the defendant should have the sole liberty of performing it. It was therefore held that the music became the property of the defendant.[1] It could not have been successfully maintained that the defendant, though the designer of the entire representation, was the author of the music. Nor does music become a mere accessory or inseparable part of a drama merely because it is specially composed for such drama. It may have an independent existence and a value apart from the literary composition, as in the case of Locke's music to Macbeth, and Mendelssohn's music to the Midsummer Night's Dream. The true ground on which the decision rests is that the composer had been employed with the understanding and on the con-

[1] 7 C. B. N. S. 208.

"It appears to me," said Erle, C. J., "upon the facts thus admitted upon the record, that the defendant was the author and designer of an entire dramatic representation or entertainment, with respect to part of which, a small accessory, viz., the music, he employed the plaintiff upon the terms set out in the plea, — that, in consideration of certain reward paid by the defendant to the plaintiff, the music should become part of such dramatic piece as designed and adapted for representation by the defendant, and that the defendant should have the sole liberty of representing and performing, and causing and permitting to be represented and performed, the said musical composition with the said dramatic piece, and as an accessory thereto, and as part thereof. I am of opinion that the music so composed by the direction and under the superintendence of the defendant, and as part of the general plan of the spectacle, must, as between him and the plaintiff, become the property of the defendant; and that, consequently, the defendant has violated no right of the plaintiff in causing it to be represented in the manner alleged. One cannot but perceive, that, if the plaintiff were right in his contention, the labor and skill and capital bestowed by the defendant upon the preparation of the entertainment might all be thrown away, and the entire object of it frustrated, and the speculation defeated, by any one contributor withdrawing his portion. As between these parties, and under the circumstances, it seems to me very clearly that the musical composition in question became the property of the defendant, and that the plaintiff never was within the language of the statute the owner or proprietor thereof." Ibid. 279, 280.

dition that the music should be the property of his employer.

Wallenstein v. Herbert Criticised. — The doctrine of Hatton *v.* Kean was misunderstood and misapplied by the Queen's Bench in the following case of Wallenstein *v.* Herbert.[1] The governing principle was the same in both cases; but the controlling facts were so vitally different that the decisions could not rightly be alike. It appeared in evidence that Matthews, the manager of St. James's Theatre, in London, had employed Wallenstein to furnish music for that theatre. The latter engaged and paid the musicians, supplied the instruments and compositions, and conducted the orchestra. Besides playing general orchestral music for the theatre, it was his duty to provide incidental music for dramas, when necessary; and such music he might either select or compose. In performance of this duty, he composed incidental music for Lady Audley's Secret, a drama brought out by Matthews, but of which the latter was in no sense the author, and at that time was not even the owner. In composing the music, the plaintiff had received no assistance from the manager, and had himself found the paper on which the music was written and employed a person to copy the various orchestral parts from the original score. These parts the composer kept in his own possession; nor did the theatre have a library of music. When the engagement between Matthews and Wallenstein had ended, the former obtained from the latter a duplicate copy of the music, with permission to use it "on a provincial tour." Afterward, when the defendant, Miss Herbert, had succeeded Matthews in the management of St. James's Theatre, and Wallenstein had ceased to be the musical director, she obtained permission from Matthews to represent Lady Audley's Secret, of which play he was now the owner, and received from him the duplicate copy of the music which Wallenstein had made for him. The original score was still in the possession of the composer, who had given no consent either to Matthews or to Miss Herbert to use the music in London.

The court, without deciding in whom the copyright vested, held that the controlling facts in this case were not different

[1] 15 L. T. N. S. 364, on ap. 16 Id. 453.

from those in Hatton *v.* Kean; that the music became an inseparable part of the drama, and was not an independent composition; that Matthews, by virtue of the contract of employment, had acquired an unlimited right to use the music; and that the defendant, as the licensee of Matthews, was also entitled to use it.

This decision was avowedly based on the authority of Hatton *v.* Kean. But the difference between the governing facts in the two cases is vital. The only ground, as has been seen, on which the decision in Hatton *v.* Kean can be sustained, is that the music was composed under an agreement that it should be the property of the employer; and this is the principle by which the judgment in Wallenstein *v.* Herbert is to be tested. It was not seriously claimed that Matthews was the author of the music; and the judgment of the court cannot be defended on the ground that the music became an inseparable part of the play, and could have no independent existence. Music and literature cannot be so closely blended but that the former may exist and have a value independently of the latter. In Hatton *v.* Kean, the plaintiff was not in the regular and general employment of the defendant, but had been expressly engaged to compose certain music; and there was a special agreement, as the court found, that the property therein should belong to the defendant. In Wallenstein *v.* Herbert, the plaintiff had written the music in the discharge of his ordinary duties, and there was no distinct agreement as to whose property it should be. It is conceded that it might have become the absolute property of the employer by an implied agreement, or a mutual understanding to that effect, created by the terms and conditions of the general employment, and without the necessity of an express or a special agreement. But such implied agreement or mutual understanding is not necessarily created by the mere circumstance of employment; and the facts established by the evidence in this case do not support the conclusion that there was any agreement or understanding between the parties that the music should become the property of the manager. Mr. Justice Shee said that it was "incumbent upon the plaintiff to show that he retained an independent right to the music."[1]

[1] 16 L. T. N. S. 454.

But the property was in the person who created it, until he consented to part with it; and it was for Matthews to show that such consent had been given.

Wallenstein had agreed to play the usual orchestral music for the theatre, and also such music as might be specially required in the production of any drama. He was not bound to compose the latter, but was at liberty to make selections for that purpose. The theatre owned no musical compositions, and, it appears, paid no money for the purchase of any. Those which were not original were bought by Wallenstein, and it appears were kept by him as his own property; and no interest in their ownership was claimed by the theatre. It was the playing of the music and the use of the compositions, not the property in them, for which the manager contracted and paid; and, when Wallenstein had played the required music, he had performed his part of the contract. If Wallenstein had bought selections for, or paid another composer to write, the incidental music for Lady Audley's Secret, it would hardly have been contended that the manager had any rightful claim to the property in such music. Yet the principle is the same whether Wallenstein composed or selected the music. The manager acquired by the contract of employment no more property in the music composed by Wallenstein than in that bought by him; and he had no better title to either than to the instruments with which the music was played. Wallenstein was bound to furnish music for the drama, and Matthews was entitled to the use of it while the former was in his employment. But the property remained in the composer.

Nor did Matthews, as the court held, acquire the unlimited right to use the music. While the engagement lasted, the conductor was bound to supply the necessary music for the theatre, and the manager was entitled to the use of his compositions. But, when the former ceased to be employed, the latter had no more claim to the use of his music than to his services as conductor.

The controlling principle in this case is the same as in Boucicault *v.* Fox,[1] where it appeared that the plaintiff had been

[1] 5 Blatchf. 87. See *post*, p. 257.

employed to write a play under an agreement that it should be performed at a certain theatre as long as it would run. The Circuit Court of the United States soundly construed the law to the effect, that, while the manager of the theatre might be entitled to the use of the play for the time contemplated in the agreement, he had no claim to its use beyond that time, and no interest in the property in the play, for the reason that there was no agreement, express or implied, to that effect.[1]

Works of Art in Great Britain. — By the 7 Geo. III. c. 38, copyright is secured to any person "who shall invent or design, engrave, etch, or work, . . . or from his own work, design, or invention shall cause or procure to be designed, engraved, etched, or worked," prints, engravings, &c.[2] Where a person had designed a map, and furnished the materials for preparing it, but had employed another to make the drawing, the former was held to be the author within the meaning of the statute.[3]

[1] In harmony with this doctrine are Roberts *v.* Myers, 13 Monthly Law Reporter, 396; Shepherd *v.* Conquest, 17 C. B. 427; Levy *v.* Rutley, Law Rep. 6 C. P. 523.

[2] The language of the American statute of 1802 was similar; 2 U. S. St. at L. 171. See Binns *v.* Woodruff, 4 Wash. C. C. 48.

[3] Stannard *v.* Harrison, 24 L. T. N. S. 570. "Then," said Vice-Chancellor Bacon, "as to whether the design or invention is that of the plaintiff or not is a mere matter of character. Mr. Concanen has been examined. He has proved that it is the design of the plaintiff; that the plaintiff brought to him his rough sketch or draft, a drawing of the same size as the stone upon which it was to be engraved, pointing out, as Mr. Concanen had said, 'A rough sketch of the forts and town to give me an idea; he furnished me also with a large French map, and some maps published in the Times and Daily Telegraph; he gave me notice also daily of the earthworks that were made, and produced, besides, a picture published in the Illustrated London News.' That the plaintiff cannot draw himself is a matter wholly unimportant if he has caused other persons to draw for him. He invents the subject of the design beyond all question. He prescribes the proportions and the contents of the design; he furnishes a part of the materials from which the drawing has to be made in the first instance, and afterwards collects daily from the proper sources, and even if it be necessary to say so, from official sources, the decrees, the reports, the bulletins, and accounts contained in the newspapers of the different phases of the war, and especially of the places in which earthworks are thrown up. These he communicates to the man whom he has employed to make a drawing for him. Not having the skill to do it himself, he stands by, and, as Mr. Concanen says, comes to him daily with materials from which the lithograph is to be compiled. Can there be any thing more plainly within the words of the act of Parliament than that Mr. Stannard did himself invent, that he did procure another person to design and draw for him, and do that which he himself could not do?" Ibid. 572. See also Stannard *v.* Lee, 23 L. T. N. S. 306, on ap. Law Rep. 6 Ch. 846.

So copyright is given to any person "who shall make or cause to be made," a work of sculpture.[1]

The 25 & 26 Vict. c. 68, s. 1, provides that, when any painting, drawing, or the negative of any photograph, "shall be made or executed for or on behalf of any other person" than the author, the copyright shall not be acquired by such person, nor shall it be kept by the author, except by an agreement in writing, signed by him who relinquishes the copyright. The effect of this provision must be that, when no such agreement is made, the copyright is not secured to any person.

Employer may Secure Copyright in United States. — In this country, the doctrine that a person may secure copyright for a work which he has employed another to write, though opposed by two decisions,[2] is supported by the weight of judicial authority.[3] In Little *v.* Gould,[4] it appeared that a reporter had been employed and paid a salary by the State of New York to prepare reports of decisions under a law that the copyright therein should be the property of the State. The copyright was entered in the name of the Secretary of State, "in trust for the State of New York;" and its validity was sustained, although no formal assignment had been made by the author. The State became the owner of the manuscript by virtue of having employed and paid the reporter, and, as such owner, was entitled to secure the statutory copyright.[5] And so in Lawrence *v.* Dana, where it appeared that the com-

[1] 54 Geo. III. c. 56, s. 1.

[2] Pierpont *v.* Fowle, 2 Woodb. & M. 23, 46. Atwill *v.* Ferrett, 2 Blatchf. 39. Binns *v.* Woodruff, 4 Wash. C. C. 48, was decided under a special statute. See *ante*, p. 254, note 2.

[3] Little *v.* Gould, 2 Blatchf. 165, 362; Heine *v.* Appleton, 4 Blatchf. 125; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402. See also Keene *v.* Wheatley, 9 Am. Law Reg. 83; Commonwealth *v.* Desilver, 3 Phila. (Pa.) 31; Siebert's Case, 7 Op. Atty.-Gen. 656.

[4] *Supra.*

[5] "I am of opinion," said Nelson, J., "that the interest of the reporter in this third volume of his Reports, as an author, passed to the Secretary of State, in trust for the benefit of the State, and that it was competent for that officer to take out the copyright in pursuance of the provisions of the act of Congress of 1831, securing to the State the exclusive right of proprietorship in the work. The reporter must be deemed to have accepted the terms and conditions of the acts of the legislature of April 11, 1848, and April 9, 1850, the effect of which was to vest the interest in the State, he receiving a compensation for his labors by way of annual salary." 2 Blatch. 365.

Mr. Justice Conkling thought that the relations between the reporter and the State might be regarded as creating "an assignment by operation of law." Ibid. 183.

plainant had gratuitously prepared notes for two editions of Wheaton's Elements of International Law, with the understanding that the property therein, as far as those two editions were concerned, should belong to Mrs. Wheaton, the court held that such property vested in her, as the work was done and delivered, without the necessity of a formal assignment, and that she was a proper person to take out the statutory copyright. Here the complainant, though receiving nothing for his services, was in the position of an author employed, and Mrs. Wheaton in that of an employer. By virtue of such relation, she became the owner of the property in the manuscript notes to the extent of the gift, and was entitled to secure the statutory copyright for the protection of such property.[1]

[1] 2 Am. L. T. R. N. S. 402. Mr. Justice Clifford said: "Although the services were gratuitous, the contributions of the complainant became the property of the proprietor of the book, as the work was done, just as effectually as they would if the complainant had been paid daily an agreed price for his labor. He gave the contributions to the proprietor for those two editions of the work, and the title to the same vested in the proprietor, as the work was done, to the extent of the gift, and subject to the trust in favor of the donor, as necessarily implied by the terms of the arrangement. Delivery was made as the work was done, and the proprietor of the book needed no other muniment of title than what was acquired when the agreement was executed. Vested as the title and property of the contributions were in Mrs. Wheaton, she would not acquire any thing by an assignment from the contributor, as he had neither the immediate title to the contributions nor any inchoate right of copyright in those editions. He could not assign any thing, because he owned nothing *in præsenti*, as the title to his contributions, and the inchoate right of copyright for those editions, had become vested in Mrs. Wheaton as proprietor of the book. Guided by these views, the court is of the opinion that none of the authorities cited by the respondents to show that a written assignment from the complainant to Mrs. Wheaton was necessary have any proper application to the question under consideration, because the complainant never acquired any right to demand a copyright in his contributions to those two editions, but the contributions as they were made and composed, or put in form, became vested in the proprietor."

". . . Literary property, even when secured by copyright, differs in many aspects from property in personal chattels, and the tenure of the property is governed by somewhat different rules; but the difference in the nature and tenure of the property is much greater before copyright is taken out, and while the right to that protection for the same remains entirely inchoate. Title to the notes or improvements prepared for a new edition of a book previously copyrighted may, in certain cases, be acquired by the proprietor of a book from an employé, by virtue of the contract of employment, without any written assignment; and, when so acquired, the tenure of the property depends upon the terms of the contract, but it cannot be held to be a mere license where, as in this case, the contract was that the proprietor of the book should take the exclusive right to the contributions for two successive editions, together with the right to copyright the same for the protection

The decisions which have been cited on this subject were rendered before the statute now in force was passed. As has been seen, this act expressly empowers the "proprietor" of a work to secure copyright;[1] and there can be no reasonable doubt that an employer may become such proprietor by virtue of the contract of employment.

No Copyright in Work of Foreign Author Employed. — No person can secure copyright for what he has employed a foreigner to write, unless the latter be a resident within the meaning of the law. For the statute expressly declares that the production of an alien author shall not be entitled to protection.

Employer not Entitled to Copyright by Mere Fact of Employment. — The mere fact of employment does not make the employer the absolute owner of the literary property created by the person employed. Where there is no agreement or implied understanding that what is produced shall belong to the employer, it is clear that the latter acquires no title to the copyright. For the property is in the author, unless he has consented to part with it.[2] In Boucicault *v.* Fox, it appeared that the plaintiff, while employed as an actor and stage-manager at the Winter Garden Theatre in New York, of which William Stuart was owner, had written the Octoroon under an agreement with Stuart that it should be performed as long as it would run at that theatre. It was afterward claimed that Stuart had become the owner of the play by virtue of such employment.

of the property, as the inchoate right of copyright unquestionably passed to the proprietor of the book by the same arrangement. Such inchoate right is incapable of any other limitation than that prescribed by the copyright act, so that the proprietor of the book necessarily took out the copyright in the usual form. Beyond controversy, she took it out by the consent of the complainant; and it is equally clear, in the judgment of the court, that she took it out for the protection of her own property in the notes, and in trust for the complainant when her property in the notes should cease. Arrangements of the kind, it is believed, are frequently made between the proprietors of books and editors employed to prepare notes or other improvements to successive editions; and it is not perceived that there is any legal difficulty in upholding such a contract where, as in this case, it violates the rights of no one, and is entirely consistent with the public right." 2 Am. L. T. R. N. S. 414, 419.

[1] U. S. Rev. St. s. 4952.

[2] Bishop of Hereford *v.* Griffin, 16 Sim. 190; Shepherd *v.* Conquest, 17 C. B. 427; Levi *v.* Rutley, Law Rep. 6 C. P. 523; Roberts *v.* Myers, 13 Monthly Law Reporter, 396; Boucicault *v.* Fox, 5 Blatchf. 87.

But the court properly held that he had acquired no property in the piece, for the reason that there was no agreement, and nothing in the circumstances of the case, to create an implied understanding to that effect.[1]

Copyright Vests in Employer only by Agreement. — To vest the employer with the literary property and a right to secure the copyright, there must be an agreement that he, and not the person employed, is to be the owner of the work produced. But such agreement need not be express. It may be implied from the terms and conditions of the employment.[2] A mutual understanding to that effect may be created by the relations of

[1] 5 Blatchf. 87. "Our next inquiry," said Mr. Justice Shipman, "is — was the literary property in the composition, and the exclusive right to its representation, in the plaintiff? The questions, under this head, relate to the bearing, on the plaintiff's title, of the fact, that he wrote the drama while in the employ of Stuart and for hire, and also to the proof of his copyright. It is proper here to revert to the agreement under which this play was produced by the author. That agreement was, that he should write this play, and perhaps some other plays, and that he should contribute his and his wife's services at the Winter Garden Theatre as long as the plays would run there, and receive half the profits, as a compensation. This cannot be construed into a contract conferring upon Stuart, or any one else, the legal or equitable title to this drama. The title to literary property is in the author whose intellect has given birth to the thoughts and wrought them into the composition, unless he has transferred that title, by contract, to another. In the present case, no such contract is proved. The most that could possibly be said, in regard to the right of Stuart, or his trustee, in the play, is, that the arrangement entitled them to have it performed at the Winter Garden as long as it would run. There is not the slightest foundation upon which they, or either of them, can rest a claim to the literary property in the manuscript. That property was in the plaintiff, subject, at most, to a license or privilege, in favor of Stuart and Fields, to have the piece performed at the Winter Garden. Whether the plaintiff was guilty of a breach of that part of his agreement which bound him to bestow his own and his wife's services, we need not inquire here. Such a breach, if proved, would not vest the proprietors of the theatre with the title to the Octoroon.

"A man's intellectual productions are peculiarly his own, and although they may have been brought forth by the author while in the general employment of another, yet he will not be deemed to have parted with his right and transferred it to his employer, unless a valid agreement to that effect is adduced. Publishers, when they employ authors in particular literary enterprises, of course settle, in the terms of their contracts, the rights of each party and the ownership of the copyright. This was not the case of writing a book for publication and general circulation. The play was to be produced, so far as Stuart and Fields were concerned, for a special purpose, which was that the play should be brought out by the plaintiff at the Winter Garden, and be performed as long as it would run. The contract cannot, by the most liberal construction, be expanded beyond this. Under these circumstances, the plaintiff was entitled to the copyright which he obtained." Ibid. 95.

[2] Sweet *v.* Benning, 16 C. B. 459.

the parties, and the circumstances attending the agreement. But the employer cannot be considered as the owner of what is written by an author independently of the duties for which the latter is employed and paid. Thus, as in Boucicault *v.* Fox, a manager has no property in a play written by a person whom he has employed as an actor. So statutes, judicial decisions, public documents, official reports, and productions which are the direct results of official labors, may naturally become the property of the government which pays for such services. But the government can have no rightful claim to the literary property in a work produced by an officer independently of his official duties.

A case might arise wherein a writer follows so closely the directions given by his employer that the creation of the work may be due to the mind of the latter, and he may properly be regarded as the author. But the employer cannot be considered the author when he "merely suggests the subject, and has no share in the design or execution of the work, the whole of which, so far as any character of originality belongs to it, flows from the mind of the person employed." [1]

Cyclopædias and Periodicals in United States. — In the United States, there is no special statutory provision concerning the copyright in articles first published in cyclopædias, magazines, and other periodicals. The ownership of the property in these cases is governed by the same principles that apply in the case of books in general. An author may be employed to prepare an article for a publication of this kind on condition, either that the publisher is to be the absolute owner of the copyright, or that he is simply to have the right of using the article in the special work for which it was prepared. The respective rights of the parties will be determined by their agreement, which, if not express, may be implied from the terms and conditions of the employment and the attending circumstances. Where an author is expressly employed to write such articles, and, especially if he be regularly employed and paid a salary, these circumstances, in the absence of an express agreement, will go far toward supporting, and in some cases will be

[1] Jervis, C. J., Shepherd *v.* Conquest, 17 C. B. 445. See also Levi *v.* Rutley, Law Rep. 6 C. P. 523.

enough to establish, an implied agreement that the publisher is to be the absolute owner of the copyright.[1] But when a writer who is not specially employed for that purpose contributes an article to a cyclopædia, magazine, or other periodical, the natural presumption would be, in the absence of an express agreement or circumstances to the contrary, that he intended to give the right of using it only in that special publication; and, to establish a title to the copyright, it would be for the publisher to show that the author had consented to part with the absolute copyright.[2] If the publisher has acquired merely the right of publication in a special work, the right of publishing in any other form continues in the author. But the author would doubtless be barred from publishing at such a time as would defeat the advantages for which the publisher had paid.

Copyright in Person in whose Name entered. — In the United States, the legal copyright will vest in the person in whose name it has been entered. Whether or not he is the lawful owner will depend on his title to the work. A person who is not the author or owner of a work may take out the copyright in his own name, and hold it in trust for the rightful owner.[3] Thus, when

[1] Sweet *v.* Benning, 16 C. B. 459.

[2] Bishop of Hereford *v.* Griffin, 16 Sim. 190.

A large part of the American Cyclopædia was prepared by writers regularly employed, and paid salaries. They worked in a place provided by the publishers, who also supplied books of reference, stationery, and all other things necessary to the prosecution of the work. No words passed between the publishers and the writers as to copyright in the articles; but there was a mutual understanding that this was to belong to the publishers. There can be no reasonable doubt that they became the absolute owners of the copyright in the articles written under these circumstances. On the other hand, many important articles were written by persons who were not thus regularly employed, but had been specially engaged to prepare certain articles for the cyclopædia. Whether the absolute property in such contributions vested in the publishers would depend on the intention of the parties, to be determined by the nature of the agreement and the attending circumstances.

[3] Little *v.* Gould, 2 Blatchf. 165, 362; Pulte *v.* Derby, 5 McLean, 328; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402. In Little *v.* Gould, Nelson, J., said: "It has been argued by the counsel for the defendants, that the copyright in this case is void, on the ground that no authority is given by the act of Congress of 1831 for taking out the copyright in the name of a trustee, for the benefit of another. But, it may be answered, that there is nothing in the act forbidding it. The party to whom the assignment is made, whether for the benefit of another or not, holds the legal interest in the work as assignee of the author, and comes therefore within the very words of the law entitling him to the copyright. Whether a third person has an equitable interest in the work, derived from the author or from the legal assignment, is a question be-

an article has first been published in a cyclopædia, magazine, or any other publication, the legal title to the copyright, if taken out in the name of the publisher, will vest in him. But it may be the property of the author, and held in trust for him. And the same is true when the copyright of a book which belongs to the author is entered in the name of the publisher. In such case, a court of equity, if called upon, may decree a transfer of the copyright to be made to the owner.[1]

Extension for Author and Family. — Besides granting copyright to the author or owner of a work, and the assignee of such person, for twenty-eight years, the existing statute of the United States provides that, at the end of that term, the author, inventor, or designer, if living, or his widow or children if he be dead, may secure a renewal of the copyright for fourteen years.[2] As neither the owner of a work nor an assignee is mentioned in this section, it would seem that the copyright for this additional term will not vest *ab initio* in such person.[3] But elsewhere the ground is taken, that when the renewed copyright has been secured by the author, or his widow or children, it may be transferred to an assignee.[4] If the copyright granted for the original term is invalid, it will not become valid by being renewed for the additional term of fourteen years.[5]

tween those parties, in respect to which I do not see that the public interest or policy is at all concerned. The courts will take care of those equitable interests. The legal assignee of the author is competent to take out the copyright, and the Secretary of State must be regarded as standing in this position, under the act of the legislature of April 9, 1850." 5 Blatchf. 366.

[1] Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402. In the English case of Hazlitt *v.* Templeman, where it was a question whether the copyright belonged to the plaintiff or the defendant, Blackburn, J., said: "I do not wish to express a decided opinion; but my impression is that he [Hazlitt] would have been the author, and that the copyright would have been in him, although a court of equity might have called on him to transfer the copyright to Templeman." 13 L. T. N. S. 595.

[2] U. S. Rev. St. s. 4954.

[3] Pierpont *v.* Fowle, 2 Woodb. & M. 41–45. See also Marzials *v.* Gibbons, Law Rep. 9 Ch. 518.

[4] See *post*, p. 333.

[5] Wheaton *v.* Peters, 8 Pet. 591, 654, where the Supreme Court of the United States ruled that a valid copyright for the second term provided by the act of 1790 could not be secured when the copyright for the first term was void. See also Brooke *v.* Clarke, 1 Barn. & Ald. 396.

CHAPTER V.

STATUTORY REQUISITES FOR SECURING COPYRIGHT.

United States.

The several statutes of the United States have prescribed certain things to be done by a person seeking to obtain copyright; but there has been some diversity of opinion as to whether a compliance with all the conditions so imposed is essential to a complete title.

Requisites Prescribed by Acts of 1790 and 1802. — The act of 1790 [1] provided that no person should be entitled to its privileges unless he should deposit, before publication, a printed copy of the title of the book in the clerk's office of the district court of the United States where the author or the owner resided; [2] and declared that the author or owner, within two months after making such deposit, should publish a copy of the record thereof in one or more newspapers, for four weeks; [3] and, within six months after publishing the book, should deliver a copy of it to the Secretary of State of the United States.[4] By the supplementary act of 1802,[5] it was declared that every person, "before he shall be entitled to the benefit of the act" of 1790 "shall, in addition to the requisites enjoined in the third and fourth sections of said act," cause a notice of the entry of copyright to be printed on the title-page, or the page immediately following, of a book, or on the face of a map, chart, print, or engraving.[6]

Difference of Judicial Opinion as to Meaning of Acts of 1790 and 1802. — Construing these two statutes together, the Supreme Court of the United States held, in Wheaton *v.* Peters, that a performance of all the conditions prescribed by Congress

[1] 1 U. S. St. at L. 124.
[2] s. 3. [3] s. 3. [4] s. 4. [5] 2 U. S. St. at L. 171. [6] s. 1.

was essential to valid copyright.[1] Two of the judges[2] dissented from this judgment, and maintained that the only requirements essential to complete the copyright were deposit of the title, pursuant to the statute of 1790, and imprint of the notice in the book, as prescribed by the act of 1802; that the provisions concerning the publication of the record in a newspaper, and the delivery of a copy of the book to the Secretary of State, were merely directory; and that failure to comply with them did not affect the validity of the copyright. This opinion was based on the ground that the statute of 1790 expressly enacted that no person should be entitled to copyright, unless he should deposit a printed copy of the title before publication, but that its language relating to the other two requirements was merely directory, and not mandatory; and, while the act of 1802 had added a condition whose observance was essential, it could not be construed as changing the provisions in the earlier statute, to which it was merely supplementary.

This view of the act of 1790 had been taken by the Supreme Court of Errors of Connecticut,[3] and by the Circuit Court of the United States in Ewer *v.* Coxe.[4] But in the latter case the court held that the act of 1802 had not only prescribed an additional requisite, but had also made delivery of a copy of the book to the Secretary of State, and publication in a newspaper of the record of entry, essential to copyright, though they were not so under the statute of 1790. As has been said, the decision of the Supreme Court of the United States was based on the interpretation of the two statutes; and it does not appear what construction would have been given to the first one alone.[5]

While there has been this diversity of opinion as to whether delivery of copies and publication of the record in a newspaper were necessary to a complete title, it has never been questioned that the language used in the acts of 1790 and

[1] 8 Pet. 591, 654. See also King *v.* Force, 2 Cranch C. C. 208; Clayton *v.* Stone, 2 Paine, 382.

[2] Thompson and Baldwin.

[3] Nichols *v.* Ruggles, 3 Day, 145.

[4] 4 Wash. C. C. 487.

[5] Mr. Justice McLean, who delivered the judgment of the court, said that his opinion was founded chiefly on the act of 1790. 8 Pet. 665. But it does not appear what were the views on this point of the other judges in the majority.

1802 made the deposit of the title-page before publication, and the imprint of the copyright notice in the book, essential to copyright.

Requisites Prescribed by Statute of 1831. — The act of 1831,[1] which repealed the statutes then existing, expressly declared that no copyright should be secured without depositing, before publication, a printed copy of the title of the book in the clerk's office of the district court,[2] and printing the prescribed notice on the title-page or that next following.[3] The language in which these requirements were prescribed leaves no room for doubt that without their performance no copyright could be acquired. The provision, however, requiring a copy of the book to be delivered to the clerk of the district court, within three months after publication,[4] followed the form used in the act of 1790. But it has been seen that, while Mr. Justice Washington in Ewer *v.* Coxe, and the minority of the Supreme Court in Wheaton *v.* Peters, maintained that the provision in the statute of 1790 was merely declaratory, and did not affect the validity of the copyright, that doctrine is not supported by authority.

Judicial Construction of Statute of 1831. — The meaning of the statute of 1831 on the points under consideration has been fully considered by the courts. And it is now well established that a performance of the three requisites prescribed by that act were essential to the vesting of copyright.[5] Even where the notice in the book was to the effect that the copyright had been entered in 1847, whereas in fact it had been entered in 1846, the error, whether it arose from mistake or otherwise, was held to defeat the copyright.[6] So also the copyright was rendered invalid by the fact that the title-page had been deposited not before, but after, publication.[7] Printing the copyright notice on the margin of an engraving, where it would be visible when the picture was framed, was held to be a com-

[1] 4 U. S. St. at L. 436.
[2] s. 4. [3] s. 5. [4] s. 4.
[5] Baker *v.* Taylor, 2 Blatchf. 82; Jollie *v.* Jaques, 1 Id. 618; Pulte *v.* Derby, 5 McLean, 328; Struve *v.* Schwedler, 4 Blatchf. 23; Lawrence *v.* Dana, 4 Am. L. T. R. N. S. 402; Farmer *v.* Calvert Lithographing, Engraving & Map-Publishing Co., 5 Am. L. T. R. 168; Osgood *v.* Allen, 1 Holmes, 185; Chase *v.* Sanborn, 6 U. S. Pat. Off. Gaz. 932.
[6] Baker *v.* Taylor, *supra.*
[7] Baker *v.* Taylor, Struve *v.* Schwedler, *supra.*

pliance with section 5 of the act which required such notice "to be imprinted on the face" of the work.[1] The name of the publishers and the date and place of publication were held not to be a part of the title of a map to be recorded.[2]

The delivery of a copy of the book to the Smithsonian Institution, and one to the library of Congress, pursuant to section 10 of the act of 1846[3] establishing that institution, was not essential to copyright.[4]

What must be done to Secure Copyright under Statute now in Force. — Whatever grounds there may have been for doubt concerning the meaning of the earlier acts on the points under consideration are removed by the language used in the statute now in force,[5] which grants copyright to such persons only as shall comply with its provisions, and expressly declares that no person shall be entitled to copyright or maintain an action for infringement unless he shall first do three things: 1, before publication mail to the Librarian of Congress, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph, or a description of the painting, drawing, chromo, statue, statuary, or model or design for a work of the fine arts;[6] 2, within ten days after publication, deliver or mail to the same officer two copies of such book or other article, or a photograph of the painting, drawing, statue, statuary, model or design;[7] 3, print on the title-page, or the page next following, of every copy of a book, or in the case of a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, model or design, inscribe on some visible part of it, or on the substance on which it is mounted, the notice of entry of copyright in the prescribed form.[8]

Compliance with Statutory Requisites Essential to Copyright. — "There is," said Mr. Justice Sawyer, "no possible room for

[1] Rossiter *v.* Hall, 5 Blatchf. 362.

[2] Farmer *v.* Calvert Lithographing, Engraving & Map-Publishing Co., 5 Am. L. T. R. 168.

[3] 9 U. S. St. at L. 106.

[4] Jollie *v.* Jaques, 1 Blatchf. 618.

[5] U. S. Rev. St. ss. 4948–4971.

[6] s. 4956.

[7] Id.

[8] s. 4962. Two forms are prescribed, either of which may be used: 1. "Entered according to act of Congress in the year —, by A. B., in the office of the Librarian of Congress at Washington." U. S. Rev. St. s. 4962. 2. "Copyright 18—, by A. B." Act of June 18, 1874, s. 1; 18 U. S. St. at L. 78.

construction here. The statute says no right shall attach until these acts have been performed; and the court cannot say, in the face of this express negative provision, that a right shall attach unless they are performed. Until the performance as prescribed, there is no right acquired under the statute that can be violated." [1]

[1] Parkinson *v.* Laselle, 3 Sawyer, 333. To the same effect are Boucicault *v.* Hart, 13 Blatchf. 47; Carillo *v.* Shook, 22 Int. Rev. Rec. 152; Marsh *v.* Warren, 4 Am. L. T. N. S. 126; S. C. 9 Chic. Leg. News, 395; Centennial Catalogue Co. *v.* Porter, 2 Weekly Notes of Cases, 601; Benn *v.* LeClercq, 18 Int. Rev. Rec. 94.

In Parkinson *v.* Laselle, Sawyer, J., said: "It is settled by the Supreme Court in Wheaton *v.* Peters, that every act required by the act of Congress of *May 3, 1790, and of April 29, 1802,* relative to copyright, is essential to the title derived under those acts. Unless he performs every act required by these statutes, the author acquires no exclusive right. See also Jollie *v.* Jaques, 1 Blatchf. 618, and Baker *v.* Taylor, 2 Id. 82. The authority of these decisions is not questioned by complainant, but it is insisted that the present statute is different and requires a different construction. On the contrary, it appears to me to be more difficult under the present statute to escape the construction adopted by the Supreme Court in Wheaton *v.* Peters than under the former acts.

"Under section 3 of the act of 1790, there was some ground for claiming that it was only necessary to deposit a printed copy of the title to a book or map, in order to secure a copyright; and that the provisions of the latter part of this section, and in section 4, for publication of a copy of the record, and the delivery of the copy of the work, were merely directory, or at most conditions subsequent. But there is no ground for such claim under the present act. Under section 4952 of the Revised Statutes, an author of a book or map is to have 'the sole liberty of printing . . . and vending the same,' only 'upon complying with the provisions of this chapter;' that is to say, all the provisions, for no exception is made. No one provision is referred to rather than another. As the statute has not limited the acts to be performed to any one provision less than the whole, the courts have no authority to say that any one rather than another, less than the whole is sufficient. Section 4956 in express terms declares that 'no person shall be entitled to a copyright unless he shall before publication 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 printed copy of the title of the book or other article, &c.; nor unless he shall also, within ten days from the publication thereof, 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, two copies of such book, or other article,' &c. There is no possible room for construction here. The statute says no right shall attach until these acts have been performed; and the court cannot say, in the face of this express negative provision, that a right shall attach unless they are performed. Until the performance as prescribed, there is no right acquired under the statute that can be violated.

"It is claimed by the complainant that section 4962 prescribes the essentials necessary to authorize the maintenance of the action; and that the court cannot add others. It is upon this section that it is sought to distinguish this case from those arising under former acts, which did not contain the provision. The provision relied on is, that 'no person shall maintain an action for the infringement of his copyright, unless he

Section 4953 of the existing statute grants copyright for twenty-eight years "from the time of recording the title," and section 4964 gives the owner of the copyright a right of action against every person who, "after the recording of the title of any book," shall without authority publish or sell copies. Similar provisions were contained in the earlier statutes. They do not, as has been erroneously held,[1] enable a person to maintain an action at law for the violation of copyright before that right has been completely secured by performance of all the statutory requisites. The right which accrues to the author on recording the title has been described as an incomplete one which becomes perfect when the other acts prescribed by the statute are performed. "The right," said Mr. Justice McLean, in pronouncing the judgment of the Supreme Court of the United States, "undoubtedly accrues on the record being made with the clerk, and the printing of it as required; but what is the nature of that right? Is it perfect? If so, the other two requisites are wholly useless."[2]

shall give notice thereof by inserting in his several copies of every edition published . . . if it be . . . a map . . . by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: "Entered according to act of Congress, in the year . . . by A. B., in the office of the Librarian of Congress, at Washington."' But the difficulty in adopting the complainant's view is, that a cause of action must exist before an action can be maintained; and there can be no cause of action till a right exists, and that right has been violated.

"Under sections 4952 and 4956 the plaintiff can have no copyright till he has performed the prescribed conditions; and until he has acquired his copyright, there can be no violation of that right at all which can afford a ground of action. Instead of section 4952 being a limitation of the acts to be performed, or alleged in order to entitle a party to maintain an action, it imposes an additional duty upon him as a prerequisite to its maintenance. He must first acquire a copyright under the other provisions of the act, and then, in order to enforce his right against infringers, he must also give notice of his right by the means prescribed by section 4962, so that other parties may not copy his work in ignorance of his rights. This seems to be the object of the provision. An analogous provision, and for a similar purpose, copied from previous acts, is found in section 4900, relating to patent rights.

"The complainant's claim can derive no argumentative support against the express negative provisions of the statute already cited and discussed, from section 4960, providing for a penalty to be recovered from the author on failure to perform all the conditions prescribed. This seems to be intended to furnish additional guarantees against attempts of parties to avail themselves of the benefits of a copyright without first performing all the conditions prescribed in order to confer the right." 8 Sawyer, 832.

[1] Boucicault *v.* Wood, 2 Biss. 34. See this case criticised in Chap. XV.

[2] Wheaton *v.* Peters, 8 Pet. 664.

Not until all the acts prescribed by the statute are performed is the copyright perfected, and not until then can an action at law be maintained for its violation.[1] But the copyright, when completed, dates from the time of recording the title, and from that time the work is under the protection of the law. Otherwise, there might be a period between the first and the last acts necessary to perfect the copyright, during which the author's property would be exposed to piracy without any present or future remedy. Hence, a wrong-doer is made liable for a wrongful act done at any time after the recording of the title. But the remedy at law for such wrongful act does not exist until the copyright is perfected.[2] In equity, however, the author may be

"Although a printed copy of the title of such book is required before the publication to be sent to the Librarian of Congress, yet this is only as a designation of the book to be copyrighted; and the right is not perfected under the statute until the required copies of such copyright book are after publication also sent." Shepley, J., Osgood *v.* Allen, 1 Holmes, 192.

[1] Concerning one of the prescribed requisites, viz., printing the copyright notice in the book, the statute expressly declares that, unless this is done, no person shall maintain an action for infringement. s. 4962.

[2] "The acts required to be done by an author to secure his right, are in the order in which they most naturally transpire. First, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page; then the public notice in the newspapers is to be given; and, within six months after the publication of the book, a copy must be deposited in the Department of State.

"A right undoubtedly accrues on the record being made with the clerk, and the printing of it as required; but what is the nature of that right? Is it perfect? If so, the other two requisites are wholly useless. How can the author be compelled either to give notice in the newspaper, or deposit a copy in the State Department? The statute affixes no penalty for a failure to perform either of these acts; and it provides no means by which it may be enforced. But we are told they are unimportant acts. If they are indeed wholly unimportant, Congress acted unwisely in requiring them to be done. But whether they are important or not is not for the court to determine, but the legislature; and in what light they were considered by the legislature, we can learn only by their official acts. Judging then of these acts by this rule, we are not at liberty to say they are unimportant, and may be dispensed with. They are acts which the law requires to be done, and may this court dispense with their performance? But the inquiry is made, Shall the non-performance of these subsequent conditions operate as a forfeiture of the right? The answer is, that this is not a technical grant of precedent and subsequent conditions. All the conditions are important; the law requires them to be performed, and consequently their performance is essential to a perfect title. On the performance of a part of them the right vests, and this was essential to its protection under the statute; but other acts are to be done, unless Congress have legislated in vain, to render the right perfect. The notice could not be published until after the entry with the clerk, nor could the book be deposited with the Secretary of State until it was published. But these are acts not less important than those which are re-

entitled to protection as soon as the title-page is recorded, and before the copyright is completely secured, provided he has not been guilty of negligence in completing his title.[1]

It was held under the act of 1790, that the copyright was not defeated by failure to deliver a copy of the book within the time prescribed, provided such delivery was made before the beginning of the action.[2] This doctrine is clearly wrong. The statutes have expressly named the time within which copies shall be delivered, and the courts have repeatedly held that a strict compliance with the statutory requirements is essential. In the recent case of Chase *v.* Sanborn, the Circuit Court of the United States held that it was not enough, under the act of 1831, to show that a copy of the work had been delivered to the clerk of the District Court, but that it must appear that such delivery had been made within the prescribed time of three months.[3]

Requisites in Case of New Editions. — Successive editions of a book which are mere reprints of the first edition will be protected by the copyright obtained for the first edition without the title being recorded anew or additional copies delivered. The original copyright notice, however, must appear in each copy of every edition.[4] But if a subsequent edition contains new matter, or substantial changes in the old, it will be necessary, in order to protect such additions or alterations, to obtain a new copyright; in which case all the requirements of the statutes must be observed, including a notice of the new entry of copyright to be printed in such edition.[5]

quired to be done previously. They form a part of the title, and until they are performed, the title is not perfect. The deposit of the book in the Department of State may be important to identify it at any future period, should the copyright be contested, or an unfounded claim of authorship be asserted." McLean, J., Wheaton *v.* Peters, 8 Pet. 664.

[1] Pulte *v.* Derby, 5 McLean, 328. "Until these things [required by the statute] are done," said Mr. Justice McLean, "the copyright is not perfect; although by taking the incipient step, a right is acquired which chancery will protect until the other acts may be done." Ibid. 332.

[2] Dwight *v.* Appleton, 1 N. Y. Leg. Obs. 195. The work was in five volumes; the first and third, but not the others, had been delivered to the Secretary of State within the prescribed time. See also opinion of Attorney-General Wirt, in Daboll's Case, 1 Op. Atty.-Gen. 532.

[3] 6 U. S. Pat. Off. Gaz. 932.

[4] U. S. Rev. St. s. 4962; act of June 18, 1874, 18 U. S. St. at L. 78.

[5] Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402, 417–418; Farmer *v.* Calvert Lithographing, Engraving, & Map-

Must Original Copyright Notice be Printed in Revised Edition? —In Lawrence *v.* Dana, the Circuit Court of the United States held that it is not necessary to print in a revised edition the notice of the original entry of copyright, in addition to the notice of the new entry.[1]

Publishing Co., 5 Am. L. T. R. 168; Banks *v.* McDivitt, 13 Blatchf. 163, 169.

[1] 2 Am. L. T. R. N. S. 402, 417–418. The same question was raised, but not judicially discussed or decided, in Banks *v.* McDivitt, 13 Blatchf. 163, 169. In Lawrence *v.* Dana, Mr. Justice Clifford said: "Second defect in the copyright, as alleged in argument by the respondent, 'consists in the omission to give notice in said editions of the copyright secured in the original edition.' Persons desirous of securing a copyright must comply with the conditions of the copyright act, and if they fail to do so they are not entitled to the benefit of its provisions. Authorities to support that proposition are not necessary, as those conditions are prescribed by an act of Congress. Deposit must be made before publication, if the subject-matter is a book, of a copy of such book in the clerk's office of the district court, as before explained; and the applicant must give information of copyright being secured, by causing to be inserted, in the several copies of each and every edition published during the term secured, on the title-page or the page succeeding, the following words, viz., 'Entered according to act of Congress in the year , by A. B., in the clerk's office of the district court of ,' (as the case may be). Beyond doubt, the omission to comply with those requirements renders the copyright invalid, as the act provides that no person shall be entitled to the benefit of the act unless he fulfils those conditions; but the important inquiry arises, What are those conditions? Full compliance with the conditions prescribed in the fourth section of the act is conceded; but the theory of the respondents is that the fifth section of the act requires that the same notice *in totidem verbis* must be inserted in the several copies of each and every edition published during the term secured, so that the second and every subsequent edition shall correctly specify the date of the original entry. They cite no authorities which support the proposition, and they assign no reasons in support of it, except that the act makes no provision for a change of the date in the successive notices to be given, and that the omission to give notice of the original copyright in subsequent editions tends to mislead the public. Acts of Congress are to be construed by the rules of the common law, and the construction should be such as will carry into effect the true intent and meaning of the legislature; but the province of construction can never extend beyond the language employed as applied to the subject-matter and the surrounding circumstances.

"Change of date in the notice required in case of successive editions of the same book, it may be conceded, is not contemplated by the fifth section of the copyright act; but the meaning of the provision is that a new notice in the same prescribed form shall be given in every improved edition published during the term. Compliance with that requirement, when the original edition is published, is a full protection for that edition throughout the term; but it is no protection to a second edition with notes, nor to any succeeding edition with improvements, because the requirement is that the 'information of copyright secured' shall be 'inserted in the several copies of each and every edition.' Neglect to comply with that condition in a second edition will not vitiate the copyright of the original edition, if it was regularly secured, nor will a valid copy-

In my judgment this is not the right interpretation of the law. The decision was rendered under the act of 1831.

right of a second edition cure material defects in the copyright of the original edition. Copyrights of the editions of a work other than the original edition are granted for additions to, emendations of, or improvements in the work, and every copyright should bear date of the day when it was secured.

"Authors or proprietors of a book for which a copyright is secured are required by the second section of the act of the 3d of March, 1865, 'within one month of the date of publication' to transmit, free of postage or other expense, a printed copy of the book to the library of Congress at Washington, for the use of said library; and the fourth section provides that, in the construction of that act the word book shall be construed to mean every volume and part of a volume, together with all maps, prints, or other engravings belonging thereto, and shall include a copy of any second or subsequent edition which shall be published with any additions; but the proviso enacts that the author or proprietor shall not be required to deliver to the said library any copy of the second or any subsequent edition of any book, unless the same shall contain additions as aforesaid, nor of any book not the subject of copyright. Prior to the passage of that act, the courts had decided that the 'information of copyright being secured,' if duly entered in the first volume of a work of several volumes, was sufficient; but all the residue of the provision is merely in affirmance of the true intent and meaning of the copyright act. Dwight *v.* Appleton, 1 N. Y. Leg. Obs. 195. Subsequent editions without alterations or additions should have the same entry, because they find their only protection in the original copyright; but second or subsequent editions with notes or other improvements are new books within the meaning of the copyright acts, and the authors or proprietors of the same are required to 'deposit a printed copy of such book,' and 'give information of copyright being secured,' as if no prior edition of the work had ever been published; and the term of the copyright as to the notes or improvements is computed from the time of recording the title thereof, and not from the time of recording the title of the original work.

"Copyrights, like letters-patent, afford no protection to what was not in existence at the time when they were granted. Improvements in an invention not made when the original letters-patent were issued are not protected by the letters-patent, nor are the improvements in a book not made or composed when the printed copy of the book was deposited and the title thereof recorded as required in the fourth section of the copyright act. Protection is afforded by virtue of a copyright of a book, if duly granted, to all the matter which the book contained when the printed copy of the same was deposited in the office of the clerk of the district court, as required by the fourth section of the copyright act; but new matter made or composed afterward requires a new copyright, and if none is taken out, the matter becomes public property, just as the original book would have become if a copyright for it had never been secured. Publishers may be in the habit of inserting more than one notice in new editions, but there is no act of Congress prescribing any such condition. Whenever a renewal is obtained under the second section of the copyright act, the requirement is that the title of the work so secured shall be a second time recorded, and that the applicant must comply with all the other regulations in regard to original copyrights; but there is nothing in any act of Congress to show that each successive edition must specify the date of the original copyright, as contended by the respondents. Tendency to mislead the public cannot be

But the provisions of the existing statute are substantially the same as those of the former one. I shall consider the statute now in force.

Section 4962 of the Revised Statutes 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 published" words showing in what year and by whom the copyright was entered.[1] Taken in connection with the entire statute, the object and effect of this provision are reasonably clear. The statute makes no express provision for securing new copyrights for successive editions of a book. If one edition does not differ from another, they are, as far as copyright is concerned, the same work. If any one contains new or revised matter, it is, as far as it differs from another, a new work within the meaning of the law. Copyright is secured in the same manner as in the case of a new work. Hence, there is no necessity for express statutory provision for editions differing from the original. Congress, then, in requiring the notice of entry to appear in each volume of every edition, had in view but one copyright and but one notice of entry; and these were the original ones. The statute had already, in a previous section, prescribed, as conditions of securing copyright, that the title of the book should be recorded before publication, and two copies delivered after publication.[2] Nothing would be gained by requiring these things to be done again, when a new edition of the work is published under cover of the original copyright. Hence, their repetition is not required. But the purpose of the copyright notice is to inform the public when and by whom the book was copyrighted; and it is evident that this object is not attained unless this information is given in every copy, not only of the first, but of every edition published. To make this requirement clear, and to prevent the construction that the copyright once secured could not afterward be forfeited by omission to print the copyright

successfully predicated of a copyright in due form of law, where it appears that the party who secured it complied with all the conditions prescribed in the copyright act, which is all that need be remarked in reply to the suggestion of the respondents upon that subject." 2 Am. L. T. R. N. S. 418.

[1] Section 5 of the act of 1831 was substantially the same.

[2] S. 4956.

notice in any subsequent edition, Congress expressly declares that such notice shall appear in every edition. No mention is made of the notice of any new copyright obtained for a subsequent edition; and the statute cannot rightly be construed to the effect that Congress in making the provision under consideration had this notice in view. Such construction defeats the very object of requiring a notice to be given. For the notice of the new entry, while it gives the required information concerning the new copyright, does not show, what the statute expressly declares shall be shown, when and by whom was entered that copyright, which alone protects the greater part of the new edition. Moreover, to prescribe that the notice of entry of the new copyright in any edition shall be printed in that edition would be as unnecessary as it would be to re-enact the other statutory requisites essential to secure copyright in a new edition. Hence, as applied to any other than the original notice of entry, the provision of the statute under consideration is wholly superfluous. Applied to that notice, it is intelligible and useful.

It is conceded that the printing of the original notice, or the absence of it, in any subsequent edition can have no effect on the copyright in the new matter of that edition. Such matter is entirely distinct from the original work, and is protected by a copyright wholly independent of the original copyright. In other words, as has been said, the revised edition, to the extent that it differs from any preceding edition, is a new work within the meaning of the law. It is not less true that the copyright secured for a new edition extends only to what is new in that edition, and does not protect what was before published. The latter is protected by the copyright secured for it, and not by any copyright afterward obtained.

Whether, then, the original work, or any unchanged matter which appeared in it, is entitled to protection, is to be determined solely by the validity of the original copyright, and is in no wise affected by the fact whether another copyright for an improved edition has or has not been obtained. It is conceded that each copy of every edition which is not different from the original must contain the original notice, and that any copies published without such notice become common property.

The principle is the same when the original is reprinted with new matter in a new edition. The new copyright covers the new, but not the old, matter; the new notice of entry applies to what then first appears in print, but not to what was before published. In such case, the original work is reprinted without the notice of entry of that copyright by which alone it is protected. It must therefore become common property, not less than when it appears without the notice of a new entry of copyright.

I have given what in my judgment is the right construction of the statute. But it should be remembered that the contrary doctrine has been expressly affirmed by so learned a jurist as Mr. Justice Clifford.

Books in two or more Volumes. — When a book is published in more volumes than one, it is obvious that a copy of each volume must be delivered to the Librarian of Congress. If the several volumes are issued at the same time, there would seem to be no reason why the process of recording the title should be repeated in the case of each volume. But a different rule might be held to apply where the volumes are issued at considerable intervals of time. In a case decided in 1840, it was held that, where the notice of entry had appeared only in the first volume of a work in five volumes, the validity of the copyright in the other four was not thereby defeated.[1] The statute does not expressly prescribe that the copyright notice shall be printed in every volume. But, as the chief object of requiring the notice to be given is to inform and warn the public that the book is protected by a copyright, which cannot be infringed with impunity, it is clear that the intention of Congress may be often defeated, unless the prescribed notice appears in every volume of the work.

Newspapers and Magazines. — When the different parts or numbers of any publication can be regarded as independent and distinct productions, a separate copyright must be secured for each one, and all the requirements of the statute must be performed in the case of each one. Thus, each number of a newspaper, magazine, or other periodical, is a distinct publication, wholly independent of any other number. Hence, a dis-

[1] Dwight *v.* Appleton, 1 N. Y. Leg. Obs. 195.

tinct copyright must be obtained for each number. To secure copyright for an article published in a newspaper, or other uncopyrighted publication, the copyright notice printed at the head of the article, or in some other conspicuous place, would doubtless be a sufficient compliance with that provision of the statute which requires such notice to be printed on the title-page, or that next following, of a book.

Delivery of Copies to Librarian of Congress. — Section 4956 of the Revised Statutes provides, as has been shown, that no person shall be entitled to copyright unless he shall deliver or mail to the Librarian of Congress two copies of the book or article for which protection is claimed. Section 4959 declares that the owner of every copyright book or other article shall deliver or mail to the librarian "within ten days after its publication, two complete printed copies thereof, of the best edition issued, or description or photograph of such article as hereinbefore required, and a copy of every subsequent edition wherein any substantial changes shall be made."[1] Failure to comply with this requirement will subject the owner of the copyright to a penalty of twenty-five dollars.[2] But there can be little doubt that copyright may be secured by delivering two copies of the work, pursuant to section 4956, although such copies may not be of "the best edition issued," as required by section 4959.

Section 4960 provides that "the proprietor of any copyright" shall be liable to a penalty of twenty-five dollars for failure to deliver to the Librarian of Congress, within ten days after publication, two copies of the book or other article. This provision, as its language imports, doubtless applies only to publications which have been entered for copyright, and not to those for

[1] This section is an illustration of how loosely statutes are sometimes drawn. What purpose it was designed to serve is by no means clear. If it was intended to make the delivery of two copies of "the best edition" of a book a condition essential to copyright, that object would not only have been better secured by inserting the words best edition in section 4956, but it is defeated by the construction which must be given to the two sections taken together. The only effect of section 4959 is to secure for the library of Congress, under a penalty of twenty-five dollars for non-delivery imposed by section 4960, two copies of the best edition, instead of two copies of any edition, as required by section 4956. Moreover, the word description is carelessly and erroneously used in section 4959, as will be seen by a careful comparison of this with section 4956.

[2] s. 4960.

which the protection of the statute is not claimed. Surely, it is optional with an author or publisher either to accept or decline the privileges offered. In the former case, he is subject to the provisions of the statute. But when he chooses to publish his work without making any claim of copyright, and the statute grants him no privileges, there is no reason for believing that Congress intended to subject him to any statutory penalties.

Penalty for Falsely Printing Copyright Notice. — Any person who causes a copyright notice to be printed in a book, or on any other article, for which he has not obtained a copyright, is made "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."[1]

Fees for Securing Copyright. — The only fee charged for granting a copyright is one of fifty cents, to be paid to the Librarian of Congress for recording the title of a book or the description of a work of art.[2] A copy under seal of such record may be obtained from the librarian by paying fifty cents. But the taking of such copy is optional with the owner of the copyright. Its chief use seems to be as evidence in a court that the title of the work has been recorded in conformity with the law; and for this purpose a copy of the record may be obtained any time before it is needed.

Written assignments of copyright are required to be deposited in the office of the Librarian of Congress within sixty days after their execution.[3] One dollar must be paid to the librarian for recording and certifying an assignment. A copy of the assignment, with a certificate under seal of the record, may be obtained by the payment of one dollar.[4]

How to Secure Renewal of Copyright. — In order to secure a renewal of copyright for the additional term of fourteen years, which is given to the author or his widow or children, such person is required to record "the title of the work or description of the article so secured a second time," and to comply "with all other regulations in regard to original copyrights, within six months before the expiration of the first term. And such person shall, within two months from the date of said

[1] s. 4968. [2] s. 4958. [3] s. 4955.
[4] Act of June 18, 1874, s. 2; 18 U. S. St. at L. 79.

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."[1]

Great Britain.

In England, there are no statutory regulations whose observance is essential to the vesting of copyright in works of literature. Such works must be registered at Stationers' Hall before an action at law or a suit in equity can be brought for piracy; but the validity of the copyright is not affected by non-registration. Delivery of copies to certain libraries is required; but neither the copyright, nor the remedies for its invasion, are made dependent on such delivery.

Delivery of Copies to Libraries. — The present statute requires a copy of every book published to be delivered to the British Museum within a prescribed time after publication;[2] and, conditionally, to the Stationers' Company for each of the following libraries: the Bodleian at Oxford, the Public at Cambridge, the Library of the Faculty of Advocates in Edinburgh, and that of Trinity College in Dublin.[3] The author or publisher is not bound to deliver a copy for any of the four libraries last mentioned, unless a written demand is made on behalf of the library within one year after the publication of the book; and the copy delivered need not be of the best edition. The delivery to the British Museum is necessary without demand, and the copy must be one of the best printed. The penalty for failure to deliver copies, either to the British Museum or the other libraries, is forfeiture of the value of the copy which should have been delivered, and a sum not exceeding five pounds to be recovered by the librarian or other officer of the library.[4] The above provisions concerning the delivery of copies apply to all productions which may be regarded as books under the 5 & 6 Vict. c. 45;[5] including dramatic and musical compositions, maps, and charts, but not prints, engravings, photographs, works of art, &c., unless published as part of a book.

[1] U. S. Rev. St. s. 4954.

[2] 5 & 6 Vict. c. 45, s. 6. Different times for delivery are prescribed for different places of publication.

[3] s. 8.

[4] s. 10.

[5] See definition of book in s. 2.

Registration. — Books. — The statute of Anne provided that no person should be liable to its forfeitures or penalties for printing any book, unless the title thereof had been registered before publication at Stationers' Hall.[1] But this, as judicially construed, did not make registration necessary to complete the copyright, and did not bar the owner from bringing an action for damages, although the book had not been registered.[2]

The statute of Victoria now in force provides for the entry, by the owner of the copyright, in the registry book of the Stationers' Company, of the title of the book, and the time of first publication, and the name and the place of abode of the publisher and the owner.[3] The charge for registration is five shillings. A certified copy of registration may be obtained for five shillings, and is *prima facie* proof of ownership, but subject to be rebutted by other evidence.[4] The statute declares that no person shall maintain an action or suit, at law or in equity, for the infringement of copyright in a book, unless before the beginning of the action or suit the book has been registered; but "the omission to make such entry shall not affect the copyright in any book, but only the right to sue or proceed in respect of the infringement thereof."[5]

The utility of the provision requiring registration is not apparent. The validity of the copyright is in no wise affected

[1] 8 Anne, c. 19, s. 2.

[2] "It was always held," said Lord Mansfield, "that the entry in Stationers' Hall was only necessary to enable the party to bring his action for the penalty. But the property is given absolutely to the author, at least during the term." Tonson *v.* Collins, 1 W. Bl. 330. See also Beckford *v.* Hood, 7 T. R. 620; Cadell *v.* Roberts, 5 Pat. App. Cas. 493; University of Cambridge *v.* Bryer, 16 East, 317; Rundell *v.* Murray, Jac. 311; Colburn *v.* Simms, 2 Hare, 543; Murray *v.* Bogue, 1 Drew. 353. The report of Blackwell *v.* Harper in 2 Atk. 95, represents Lord Hardwicke as saying, "Upon the act of 8 Anne the clause of registering with the Stationers' Company is relative to the penalty *and the property cannot vest without such entry.*" Doubtless the words here Italicized are incorrectly reported. According to the report of the same case in Barnardiston, Ch. 213, Lord Hardwicke said that registration "is only a provision that is necessary to be complied with when the penalty of that act is taken advantage of."

[3] 5 & 6 Vict. c. 45, s. 13. In Stevens *v.* Wildy, 19 L. J. N. S. (Ch.) 190, the court expressed the opinion that the author, without making an assignment, may associate any person with himself as the registered owner of the copyright.

[4] s. 11. See Boosey *v.* Davidson, 13 Q. B. 257; Jeffreys *v.* Kyle, 18 Sc. Sess. Cas. 2d ser. 906; Hazlitt *v.* Templeman, 13 L. T. N. S. 593; Graves's Case, Law Rep. 4 Q. B. 715.

[5] s. 24.

by registration or its omission. Nor does registration serve as a notice to the public that the book is protected, and therefore cannot lawfully be reprinted without license. The owner is not required to show that the book was registered when the offence complained of was committed. Registration is merely a formal act which must be performed before the action or suit is brought, and may be done at any moment before that time. It is simply the first step in the legal proceedings against piracy.[1] But, to entitle a person to sue, a strict compliance with the requirements of the statute as to registration must be shown. A false entry of any fact required by the statute will defeat the registration.[2] It is not enough to register the month of publication; the day must be given.[3] An error of two days in the date of publication, as entered in the registry, has been held to defeat the owner's right to sue.[4] So also the registration was held to be vitiated by a slight error in the name of the firm registered as owners.[5] But, while such defects in the registration will defeat a suit already begun, a new and correct entry in the registry may be made, and another action brought.[6] No literary work can be lawfully registered before it is published; hence, an action at law or a suit in equity for the infringement of copyright cannot be brought until after the publication of the work. "It is inconsistent with the whole scheme of the Copyright Act," said Vice-Chancellor Wood, "that you should be able to register a book not published; as the act gives a right merely from the date of first publication, and it must, therefore, be idle to register a book, as it were, in embryo."[7]

[1] Murray *v.* Bogue, 1 Drew. 353; Stannard *v.* Lee, Law Rep. 6 Ch. 346; Hogg *v.* Scott, Law Rep. 18 Eq. 444; Goubaud *v.* Wallace, 36 L. T. N. S. 704. A different law has been made concerning paintings, drawings, and photographs, in which case the provisions of the statute relating to registration must be complied with before the offence is committed. See *post*, p. 281.

[2] Collette *v.* Goode, 7 Ch. D. 842.

[3] Mathieson *v.* Harrod, Law Rep. 7 Eq. 270. See also remarks of Blackburn, J., Wood *v.* Boosey, Law Rep. 2 Q. B. 355.

[4] Low *v.* Routledge, 33 L. J. N. S. (Ch.) 717. See also Page *v.* Wisden, 20 L. T. N. S. 435.

[5] Low *v.* Routledge, *supra*. But where the address of the publishers was given as the abode of the author, who did not reside in England, the registration was held to be good. Lover *v.* Davidson, 1 C. B. N. S. 182.

[6] Low *v.* Routledge, Law. Rep. 1 Ch. 42; Stannard *v.* Lee, 6 Id. 346; Hogg *v.* Scott, Law Rep. 18 Eq. 444.

[7] Correspondent Newspaper Co. *v.* Saunders, 11 Jur. N. S. 540. See also Murray *v.* Bogue, 1 Drew. 353, and authorities cited p. 280, note 3.

Cyclopædias and Periodicals. — In the case of "any encyclopædia, review, magazine, periodical work, or other work published in a series of books or parts," it is enough to register the title of the work, the date of the publication of the first volume, number, or part, and the name and place of abode of the owner and the publisher.[1] When the first volume, number, or part has been registered, all following numbers of the same work or series will be protected, without the necessity of any additional registration.[2] If the first number be registered before it is published, the registration is not valid.[3] As registration of the first number of a periodical applies to future issues, it extends to and protects matter not published at the time of registration. This principle, as just shown, has been declared to be unsound in the case of a book. But the copyright cannot vest in any number of the periodical until that number is published.[4]

Newspapers. — It has been held that articles published in a newspaper are entitled to the protection of the copyright statutes, although neither the newspaper nor the articles have been registered.[5] The unsoundness of this decision has been pointed out elsewhere.[6]

Dramatic Compositions. — According to the judicial construction of the statute, registration is not necessary either to secure the exclusive right of representing a dramatic piece, or to maintain an action for the infringement of that right.[7]

Engravings and Prints. — The copyright in engravings, prints, and lithographs is not governed by 5 & 6 Vict. c. 45, but by statutes which do not require registration.[8] But an action for piracy cannot be maintained unless the date of publication and the name of the owner appear on the print, engraving, or litho-

[1] 5 & 6 Vict. c. 45, s. 19.

[2] See Sweet *v.* Benning, 16 C. B. 459.

[3] Correspondent Newspaper Co. *v.* Saunders, 11 Jur. N. S. 540; S. C. 12 L. T. N. S. 540; Maxwell *v.* Hogg, Law Rep. 2 Ch. 307; Henderson *v.* Maxwell, 4 Ch. D. 163, on ap. 5 id. 892. See also Cas ell *v.* Stiff, 2 Kay & J. 279.

[4] See remarks of Lord Chelmsford in Platt *v.* Walker, 17 L. T. N. S. 159, quoted *ante*, p. 169, note.

[5] Cox *v.* Land & Water Journal Co., Law Rep. 9 Eq. 324.

[6] See *ante*, p. 172.

[7] Russell *v.* Smith, 12 Q. B. 217; Clark *v.* Bishop, 25 L. T. N. S. 908. See also Lacy *v.* Rhys, 4 Best & S. 873; Marsh *v.* Conquest, 17 C. B. N. S. 418.

[8] 8 Geo. II. c. 13; 7 Geo. III c. 38; 17 Geo. III. c. 57; 6 & 7 W. IV. c. 59; 15 & 16 Vict. c. 12, s. 14.

graph for which protection is claimed.[1] But engravings or illustrations published in a copyrighted book will be protected, though the name of the owner and date of publication do not appear on them.[2]

Maps. — Maps, which were formerly within the provisions of the statutes relating to engravings, are now governed by 5 & 6 Vict. c. 45.[3] Hence, the same regulations apply to them as to books.

Paintings, Drawings, and Photographs. — These productions are within 25 & 26 Vict. c. 68, which prescribes the manner of registration, and declares that "no proprietor of any such copyright shall be entitled to the benefit of this act until such registration; and no action shall be sustainable nor any penalty be recoverable in respect of any thing done before registration."[4] Under this act, an assignment must be registered to entitle the assignee to sue.[5]

Sculpture. — The 54 Geo. III. c. 56, which grants copyright in sculpture, models, and busts, and gives a special action on the case for damages as a remedy for infringement, requires the name of the owner and the date of publication to be put on the work "before the same shall be put forth or published."[6] The 13 & 14 Vict. c 104, provides[7] for the registration of such works, and imposes penalties for the invasion of the property therein; but the owner is not entitled to the benefit of such penalties, unless he has complied with the provisions relating to registration, and marked his work "registered," with the date of registration.[8]

Registration under International Copyright Acts. — The form of registration necessary to secure protection under the International Copyright Acts is prescribed by 7 & 8 Vict. c. 12.

[1] 8 Geo. II. c. 13, s. 1; Harrison *v.* Hogg, 2 Ves. 323; Thompson *v.* Symonds, 5 T. R. 41; Newton *v.* Cowie, 4 Bing. 234; Brooks *v.* Cock, 3 Ad. & El. 138; Colnaghi *v.* Ward, 6 Jur. 969; Avanzo *v.* Mudie, 10 Exch. Rep. 203; Graves *v.* Ashford, Law Rep. 2 C. P. 410; Rock *v.* Lazarus, Law Rep. 15 Eq. 104.

[2] Bogue *v.* Houlston, 5 De G. & Sm. 267; Bradbury *v.* Hotten, Law Rep. 8 Exch. 1. See also Wilkins *v.* Aikin, 17 Ves. 422; Barfield *v.* Nicholson, 2 Sim. & St. 1; Cobbett *v.* Woodward, Law Rep. 14 Eq. 407.

[3] Stannard *v.* Lee, Law Rep. 6 Ch. 346. See *ante*, p. 174, note 3.

[4] s. 4. See *Ex parte* Beal, Law Rep. 3 Q. B. 387.

[5] s. 4. Graves's Case, Law Rep. 4 Q. B. 715.

[6] ss. 1, 3. [7] s. 6. [8] s. 7.

Special requirements in the case of translations are made by 15 & 16 Vict. c. 12.[1] Section 6 of the former statute provides that in the case of a book, dramatic piece, or musical composition, which has been published abroad in print, "the title to the copy thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor of the copyright thereof, the time and place of the first publication, representation, or performance thereof, as the case may be, in the foreign country," shall be registered, and that a copy of the work shall be delivered to the officer of the Stationers' Company. In the case of dramatic and musical compositions in manuscript, the time and place of the first representation or performance are to be entered, instead of the time and place of publication. No copy is required to be deposited. In Wood *v.* Boosey, the registration of the piano-forte arrangement of an opera was held to be invalid, because the name of the composer of the opera had been entered in the registry, instead of the name of the person who had made the arrangement.[2] In the opinion of the court, the latter, and not the former, was the author of what was registered.

In Boosey *v.* Fairlie, the plaintiffs claimed the exclusive right of representing an opera composed by Offenbach, of which a piano-forte arrangement made by Soumis, but not the orchestral parts, had been published in print. There had been entered in the registry the title of the opera, the name and place of abode of Offenbach as composer and owner, the time and place of the first representation of the opera, and the time and place of the first publication of the piano-forte arrangement. A copy of the piano-forte arrangement, but not of the opera itself, had been delivered to the officer of the Stationers' Company. Vice-Chancellor Bacon ruled that the piano-forte arrangement, and not the opera itself, was the thing registered; and that, as the name and place of abode of Soumis, the author of the arrangement, had not been entered, the registration, according to Wood *v.* Boosey, was not valid.[3] The Court of Appeal, however, held that all the facts required

[1] See *ante*, p. 217.

[2] Law Rep. 2 Q. B. 340, on ap. 3 Id. 223.

[3] 7 Ch. D. 301, 307.

for the registration of the opera itself had been duly entered, and that the additional entry of the time and place of the first publication of the piano-forte arrangement and the delivery of a copy of it were superfluous acts, which did not affect the registration of the original opera. There was, therefore, a good registration of the unpublished opera, but not of the piano-forte arrangement.[1]

PUBLICATION.

Statutory Copyright begins with Publication; does not exist in Unpublished Works. — The chief object of the legislation for the advancement of learning is to secure the publication of literary works for the benefit of the public, and this consideration is a condition on which protection is extended to authors. Publication is the beginning of statutory copyright, and a condition precedent to its existence.

The statute of Anne gave copyright in a book for a term "to commence from the day of the first publishing the same;" and the statute of Victoria expressly makes "first publication" the beginning of the term of protection.[2] "Copyright," said Lord Chancellor Cranworth, "defined to mean the exclusive right of multiplying copies, commences at the instant of publication."[3] In the language of Mr. Justice Crompton, "The monopoly is vested in the author or his assigns, for the limited term after first publication. This first publication is the commencement and foundation of the right, the *terminus a quo*, the period of the existence of the right is to run, and a condition precedent to the existence of the right."[4] Furthermore,

[1] 7 Ch. D. 311. See criticism on the judgment in this case in Chap. XV. As to registration in the case of a foreign newspaper, see Cassell *v.* Stiff, 2 Kay & J. 279; in the case of a foreign print, Avanzo *v.* Mudie, 10 Exch. Rep. 203.

[2] 8 Anne, c. 19, s. 1; 5 & 6 Vict. c. 45, s. 3.

[3] Jefferys *v.* Boosey, 4 H. L. C. 955. In the same case, Mr. Justice Wightman said that neither the author "nor his assignee would be entitled to copyright until publication. Whatever right the author may have possessed before publication must have been at common law." Ibid. 886.

[4] Ibid. 847. "In Beckford *v.* Hood," continued the same judge, "which I have before referred to, and which was decided not very long after the great case in the House of Lords, the declaration averred the infringement as being within the period after the first publication; and Lord Kenyon, in saying that it was established that the right was confined to the times limited by the statute, in effect, treated the act of first publica-

the statute gives a remedy for piracy only in the case of a "book in which there shall be subsisting copyright;" and makes registration a condition precedent to bringing an action at law or a suit in equity for the infringement of copyright.[1] As publication must precede registration, it is clear that there can be no statutory protection for an unpublished work.[2]

It has been shown that, notwithstanding some diversity of opinion, the law in the United States has always been well established that copyright could not under the earlier statutes, and cannot under the existing one, be secured without performance of the three prescribed requisites relating to the filing of the title before publication, printing the notice of copyright in the book, and delivering copies within a named time after publication.[3] It is obvious that these acts cannot be done without publishing the work. Publication, therefore, is made an essential prerequisite to securing copyright; and hence there can be no statutory copyright in an unpublished work.[4]

Publication must be within Reasonable Time after Filing Title. —No time is indicated by the statute within which a work whose title-page has been recorded shall be published; nor has any more definite rule on this point been laid down by the courts than that publication must be made within a reasonable time after the filing of the title. In Boucicault *v.* Hart, where it appeared that the title had been recorded on October 24, and the work had not been published when the bill was filed in the following February, the court did not hesitate to hold that publication had not been made within a reasonable time.[5]

tion, from which such time was to run, as a condition precedent to the existence of the right." See also Colburn *v.* Simms, 2 Hare, 543.

[1] 5 & 6 Vict. c. 45, ss. 15, 24.

[2] See *ante*, p. 279.

[3] See *ante*, p. 265.

[4] In not fewer than five cases, the Circuit Court of the United States, by holding that a dramatist who files a copy of the title of his play with the Librarian of Congress is entitled to the protection of the statute, although the play is not published in print, has construed the law to the effect that copyright as well as playright may exist in an unpublished work. But this doctrine was rightly overruled in Boucicault *v.* Hart, 13 Blatchf. 47, whose authority was followed in Carillo *v.* Shook, 22 Int. Rev. Rec. 152. See Chap. XV.

[5] 13 Blatchf. 47. "There is no time prescribed," said Longyear, J., "within which actual publication shall commence. That is left entirely to the option of the proprietor." Farmer *v.* Calvert Lithographing, Engraving, &

What is a Publication. — In one sense, a work of literature or art is published when it is communicated to the public, in whatever manner this may be done; whether by the circulation of copies, oral delivery, representation, or exhibition. At common law, the word publication may have this comprehensive signification.[1] But, to determine its meaning under the statute, it is necessary to ascertain in what sense the legislature used the word. In the case of books, maps, charts, drawings, engravings, photographs, lithographs, and chromos, the only kind of publication recognized by the statute is the circulation of copies.[2] Hence, a literary composition is not published, within the meaning of the statute, when it is orally communicated to the public;[3] nor a pictorial production, excepting perhaps a painting, when it is publicly exhibited.[4]

Dramatic Compositions. — Under the statute of the United States, dramatic compositions are governed by the same rule as are general literary works. With reference to copyright, they differ in no wise from books. The right of representation is secured by the statute only in case of a dramatic composition which has been published and copyrighted as a book. Whether copyright or playright be claimed, the question of publication, as far as the vesting of the right is concerned, is determined in the same manner as in the case of a book. Circulation of copies is essential to a publication. The public performance of a drama is not such a publication as will defeat a copyright afterward obtained for the composition;[5] and it is not such a publication as the statute requires to be made before the copyright can be secured.[6]

In England, the law is somewhat different. The statute secures the right of representing or performing, not only

Map-Publishing Co., 5 Am. L. T. R. 172. But there is little doubt that the work must be published within a reasonable time after the filing of the title.

[1] See *ante*, p. 115.

[2] See Keene *v.* Wheatley, 9 Am. Law Reg. 44; Palmer *v.* DeWitt, 2 Sweeny (N. Y.), 548.

[3] See Abernethy *v.* Hutchinson, 1 Hall & Tw. 28; Bartlett *v.* Crittenden, 4 McLean, 300, 5 Id. 82; Keene *v.* Kimball, 16 Gray (82 Mass.), 545; Boucicault *v.* Fox, 5 Blatchf. 87.

[4] See Martin *v.* Wright, 6 Sim. 297.

[5] Roberts *v.* Myers, 13 Monthly Law Reporter, 896; Boucicault *v.* Fox, *supra*; Boucicault *v.* Wood, 2 Biss. 34.

[6] Boucicault *v.* Hart, 13 Blatchf. 47; Carillo *v.* Shook, 22 Int. Rev. Rec. 152.

printed, but also manuscript, dramatic and musical compositions ;[1] and declares that the representation or performance of such compositions shall be deemed equivalent to the publication of a book.[2] But representation or performance is a publication only with reference to the vesting of playright, and not of copyright. Thus, in determining the statutory right of an author to represent a drama, its public performance is treated as a publication ; but, in determining any question relating to the copyright in the same composition, representation is not a publication.[3]

Paintings and Sculpture. — What is a publication within the meaning of the statute in the case of paintings and sculpture, is a question not easily determined. Not only copies of such works, but the originals themselves, are made subjects of copyright ; and, if the principle that publication is essential to copyright is to be applied in all cases without exception, it follows that a painting or a statue must be published before copyright will vest in it. Of course, such works cannot be published in the same manner as a book. It is true that copies, such as photographs, engravings, chromos, casts, &c., may be given to the public. But, in that case, it is the copy, and not the original, that is published ; and there is here, between the thing itself and the copy, an essential difference, which does not exist in the case of a literary composition. Hence, in the Irish case of Turner *v.* Robinson, it was held that printing in a magazine an engraving of a painting was a publication of the engraving, but not of the painting.[4] The court said that the publication must be of the thing itself.

United States. — Strictly speaking, a painting or statue can be published only by being exhibited. But there is a difficulty in holding exhibition to be a publication within the meaning of the American statute. The mode of publication must correspond to the nature of the right secured. The oral com-

[1] 3 & 4 Will. IV. c. 15.

[2] 5 & 6 Vict. c. 45, s. 20. Boucicault *v.* Delafield, 1 Hem. & M. 597; Boucicault *v.* Chatterton, 5 Ch. D. 267.

[3] Clark *v.* Bishop, 25 L. T. N. S. 908; D'Almaine *v.* Boosey, 1 Y. & C. Exch. 288; Tinsley *v.* Lacy, 1 Hem. & M. 747. See also Coleman *v.* Wathen, 5 T. R. 245; Murray *v.* Elliston, 5 Barn. & Ald. 657.

[4] 10 Ir. Ch. 121, 510. As to the different meanings given to the word publication in this case and in Prince Albert *v.* Strange, see *ante*, p. 115, note 2.

munication of a literary composition is not a publication, because such use of the work is not within the right granted by the statute. So in England, where the statute secures the right of representing manuscript as well as printed dramatic compositions, the performance of a play, as has been said, is a publication with reference to the right of representation, but not with reference to the right of multiplying copies. In the United States, representation is not a publication in either case, for the reason that the statute grants playright only in the case of a dramatic composition which has been published and copyrighted as a book. This necessarily requires a play to be published in the same manner as a book. The exhibition of a painting or a work of sculpture is not strictly a publication within the meaning of the statute of the United States, because the right secured is that of copying, and not that of exhibiting. This objection may not exist in England, where, as is shown further on, the right of exhibiting, as well as that of publishing, copies is secured by the statute.

It may be maintained with reason that, to give the public the benefit of the production is as essential to copyright in the case of any work of art as in that of a literary composition; and, hence, that copyright will not vest in a painting or work of sculpture unless it has been published. But what shall be considered a publication within the meaning of the law is a question which remains for judicial determination. It is not improbable that the American courts will hold the publication of a photographic or other copy of the original to be equivalent, within the meaning of the statute, to the publication of the work itself.[1]

[1] In Oertel *v.* Wood, 40 How. Pr. 10, and Oertel *v.* Jacoby, 44 Id. 170, decided by the special term of the New York Supreme Court, in 1870 and 1872, an important question concerning the publication of a painting was raised; but the opinions throw no light on the subject. The plaintiff had painted a picture named The Rock of Ages, of which chromo-lithographs and photographs were published with the consent of the plaintiff. Neither these copies nor the painting were copyrighted, but the plaintiff claimed a common-law property in the painting. The defendant had published photographs of the painting; but it does not appear from either report whether he had copied the original or the authorized photographs. It is clear that the copies which had been published with the consent of the plaintiff were common property. But their publication, according to the decision in Turner *v.* Robinson, was not a publication of the painting destructive of the owner's

Great Britain. — What is a publication of a painting or of a work of sculpture is as doubtful in England as it is in this country. The 25 & 26 Vict. c. 68, secures copyright in paintings, and prohibits not only the circulation, but also the exhibition, of any piratical "repetition, copy, or imitation of the said work, or of the design thereof."[1] What is a publication within the meaning of this act is a question on which neither the statute nor the decisions throw any light. In Turner *v.* Robinson, it was held that neither the public exhibition of a painting, nor the printing of an engraving of it in a magazine, was such a publication as would work an abandonment of the owner's rights in the original.[2] But this case was governed by the common law, and was decided before statutory copyright in paintings was granted. It is not, therefore, an authority as to what is a publication of a painting within the meaning of the statute.

By 54 Geo. III. c. 56, copyright is given in sculpture, models, and busts, for a term of years from "first putting forth or publishing the same." The property secured by this act seems to be comprehensive enough to embrace the right of public exhibition.[3] The opinion has been judicially expressed that, within the meaning of the statute, a work may be published by being publicly exhibited.[4]

common-law right. Hence, whether publication of the work, that is, from this right was invaded depended on the moment the eye of the public is the fact whether the defendant had allowed to rest upon it. Many large copied the painting or the authorized works in this branch of art, which photograph. This vital question does decorate public squares and other not appear to have been referred to in places, are of course so published, but either case. The controlling facts and there are others, not designed for such principles were the same in both cases. purposes, which could never be pub-The decision was in favor of the plain-lished in any other way than in exhi-tiff in Oertel *v.* Wood, and against him bitions; therefore I apprehend that in Oertel *v.* Jacoby. these works of sculpture must be con-

[1] s. 6. sidered as published by exhibition at

[2] 10 Ir. Ch. 121, 510. such places as the Royal Academy and

[3] See Chap. X., where it is shown Manchester, so as to entitle them to the that a remedy is afforded by the protection of the statutes, from the common law to the extent of the date of such publication." 10 Ir. Ch. right secured by the statute. 510. In Boucicault *v.* Chatterton, as

[4] In Turner *v.* Robinson, Lord reported 35 L. T. N. S. 745, James, Chancellor Brady said: "In the stat-L. J., referring to the fact that s. 19 utes bestowing protection upon works of 7 & 8 Vict. c. 12, did not repeal any of sculpture, the *terminus a quo* from thing in 3 & 4 Will. c. 15, said: "It which the protection commences is the has a limited purpose only, which lim-

Is Circulation of Manuscript Copies Publication? — When printed copies of any literary or other work are circulated, the question of publication is simple. Whether a composition may be published, within the meaning of the statute, by the circulation of copies in manuscript, is a question on which little light is thrown either by the statutes or the decisions.[1] It may be claimed, on the one hand, that the legislature used the words publish, publication, &c., in their ordinary meaning, which is the circulation of printed copies. On the other hand, it may be urged that the purpose of making publication a prerequisite of copyright is that the public may have the benefit of the production for which protection is granted, and that this object is secured by communicating the work to the general public, though the copies circulated be in manuscript and not in print. As selling manuscript copies of a composition may be practically equivalent to the sale of printed ones, there appears to be

ited purpose is expressed in words which must *prima facie* give us the meaning of the word 'published,' which is to be that sort of thing which you can predicate of a book, or of a dramatic piece, or of a musical composition, and which you may predicate of a print, or article of sculpture, or any other work of art; that is to say, made public by those means which are appropriate to the particular article or the particular thing. A book is published by being printed; a dramatic piece or musical composition is published by being publicly represented; a print or article of sculpture is published, for the purposes of this act, by being made the subject of copy in casts or prints; and I should say with regard to sculpture and other works of art being multiplied by casts or other copies, it would depend in each case upon that which applies to the particular thing, if it be for sale or public use."

[1] In Keene *v.* Wheatley, 9 Am. Law Reg. 44, Mr. Justice Cadwallader said: "The intended meaning of the word publication in this and other statutory provisions concerning copyright is publication in print." Similar language was used by Monell, J., in Palmer *v.* De Witt, 2 Sweeny (N. Y.), 548. But in each case the court was drawing a distinction between the ordinary mode of publishing a literary composition and the representation of a play. The question of publication by the general circulation of manuscript copies was not discussed, though in the former case the court considered the private circulation of such copies.

In Bartlett *v.* Crittenden, where it appeared that a teacher had permitted his pupils to make copies of a manuscript for their private use, Mr. Justice McLean seems to have been of the opinion that a work might be published by circulating manuscript copies. "It is contended," he said, "that this is an abandonment to the public, and is as much a publication as printing the manuscripts. That printing is only one mode of publication, which may be done as well by multiplying manuscript copies. This is not denied; but the inquiry is, Does such a publication constitute an abandonment?" 4 McLean, 803. But in this case the decision, that there had been no publication, was based on the ground that the circulation of copies was private and not public.

no reason why this latter view of the law may not be adopted. Of course, to secure copyright for manuscript copies, it would be necessary to comply with the same statutory requisites that must be observed in the case of printed compositions.[1]

If the public circulation of manuscript copies is a publication within the meaning of the statute, it follows that the copyright in a printed composition may be defeated by a general sale of manuscript copies before the copyright was secured.[2]

Private Circulation of Copies not Publication. — The law recognizes a vital distinction between the public and the private circulation of copies. The owner may circulate copies of a work among a limited number of persons, with the understanding and on the condition that it is not to be made public. In such case no publication takes place, notwithstanding that the copies so distributed are printed.[3] It may sometimes be difficult to determine whether a work is given without reservation to the general public, or conditionally to a select few. But when the fact is found that the circulation of copies is public, or that it is private, the law will be determined accordingly.

The deposit of a chart with the Secretary of the Navy, for the use of the government and for preservation, but with the ex-

[1] In Rees *v.* Peltzer, 75 Ill. 475, the Supreme Court of Illinois held that giving a copy of a manuscript map, which had not been copyrighted, to the city of Chicago for public use, and selling without any restriction several copies to real-estate dealers, amounted to a publication which destroyed the common-law property in the map. The court did not expressly declare that this was a publication within the meaning of the copyright statute; but such must be the effect of the decision. It is reasonably clear that statutory copyright could not have been secured for the map after it had been made public by the circulation of manuscript copies. But such circulation would be no bar to the vesting of copyright, unless it amounted to a publication within the meaning of the statute. Moreover, the common-law property in a work is not lost until it is published within the meaning of the statute. If this manuscript map had been duly copyrighted, treating the sale of manuscript copies as a publication, it is reasonable to suppose that the copyright would have been valid.

[2] In White *v.* Geroch, 2 Barn. & Ald. 298, it was held that the copyright in a printed musical composition was not defeated by the fact that several thousand manuscript copies had been sold before it was published in print. But it cannot be satisfactorily determined whether this decision was based on the ground that the circulation of manuscript copies was a publication within the meaning of the statute, and hence the beginning of copyright; or that it was not a publication, and hence did not affect the copyright.

[3] Prince Albert *v.* Strange, 2 De G. & Sm. 652, on ap. 1 Mac. & G. 25; Bartlett *v.* Crittenden, 4 McLean, 300, 5 Id. 32; Keene *v.* Wheatley, 9 Am. Law Reg. 33.

press understanding that it was not to be published, was held not to be a publication.[1]

When a Book is Published. — A book is published when printed copies are sold unconditionally to the public. "A sale naturally imports publication."[2] But sale is not essential. A work may be published by the gratuitous circulation of copies.[3] The question of publication cannot depend on the number of copies sold; because a sale of ten copies, or even of one, is as clearly a publication as is the sale of ten thousand. Nor can it be essential that a single copy shall be disposed of before the work can be said to be published. The requirements of the law are met when the book is publicly offered for sale. Then the opportunity is given to the public to avail themselves of its advantages; and if they fail to do so, even to the extent of obtaining one copy, it is through no fault of the author or publisher. But, to constitute a publication, it is essential that the work shall be exposed for sale, or gratuitously offered to the general public; so that the public, without discrimination as to persons, may have an opportunity to enjoy that for which protection is granted. Printing itself cannot amount to a publication, for the obvious reason that a book may be withheld from the public long after it has been printed. Hence, where the publisher makes consignments of copies to other booksellers, with instructions not to sell until a specified time, publication will not take place until the copies are exposed to public sale. But, if such consignments can be properly regarded as general and unconditional sales, they will amount to a publication.[4]

[1] Blunt *v.* Patten, 2 Paine, 393, 397.

[2] Betts, J., Baker *v.* Taylor, *infra*.

[3] See Novello *v.* Sudlow, 12 C. B. 177; Alexander *v.* Mackenzie, 9 Sc. Sess. Cas. 2d ser. 748.

In Heine *v.* Appleton, Ingersoll, J., said: "The sketches and drawings were made for the government, to be at their disposal; and Congress, by ordering the report which contained those sketches and drawings to be published for the benefit of the public at large, has thereby given them to the public." 4 Blatchf. 128. The actual circulation of copies among the public would be a publication; but the order to publish would not have that effect.

[4] Baker *v.* Taylor, 2 Blatchf. 82, 85. "It is argued for the plaintiff," said, Betts, J., "that these alleged sales were only consignments of the work in advance of the publication, or that publication, by putting the book in circulation, was not made until after the date of the deposit of the title. There is no proof to support this version of the facts. A sale naturally imports publication. The purchaser having the right to know the contents of the book, and make them known to others, no

Where the owner left printed copies of a musical composition with a dealer, with instructions not to sell until a named day, the sale after that time was held to be a publication.[1]

The publication of a part of a book is not a publication of the whole.[2] Neither the publication of a piano-forte arrangement of an opera, nor that of a few of the orchestral parts, is a publication of the opera itself.[3] In such cases, there is a publication only of the part of the book or the arrangement of the opera which is published.

Place of first Publication. — Great Britain. — The 8 Anne, c. 19, was, and the 5 & 6 Vict. c. 45, is, silent as to where a work must be published in order to be entitled to copyright; but the law has been settled by the courts that the first publication must be in the United Kingdom.[4] This doctrine is based on the ground that the chief object of the copyright statutes is the advancement of learning in Great Britain, which is attained by securing there the first publication of books. "The intention of the act," said Lord Chancellor Cairns, "is to obtain a benefit for the people of this country by the publication to them of works of learning, of utility, of amusement. . . . The aim of the legislature is to increase the common stock of the literature of the country."[5]

presumption can be raised that the right was not exercised, or that an actual publication did not follow the sale. On the contrary, the presumption is the other way. And the inference is strong, that actual publication was made, as sworn to by the defendant, anterior to the 10th of November, from the fact that a printed copy of the work, then complete, was on that day deposited in the clerk's office; the deposit of the book complete for circulation, and the deposit of the title, being simultaneous acts. The 4th section of the act in express words denies all benefit to a person under the act, unless he shall, *before* the publication of his work, deposit the title-page, &c."

[1] Wall *v.* Gordon, 12 Abb. Pr. N. S. (N. Y.) 349.

[2] Low *v.* Ward, Law Rep. 6 Eq. 415.

[3] Boosey *v.* Fairlie, 7 Ch. D. 301. See also Wood *v.* Boosey, Law Rep. 2 Q. B. 340, on ap. 3 Id. 223.

[4] Clementi *v.* Walker, 2 Barn. & Cr. 861; Guichard *v.* Mori, 9 L. J. (Ch.) 227; Chappell *v.* Purday, 4 Y. & C. Exch. 485; Chappell *v.* Purday, 14 Mees. & W. 303; Cocks *v.* Purday, 5 C. B. 860; Boosey *v.* Purday, 4 Exch. Rep. 145; Boosey *v.* Davidson, 13 Q. B. 257; Jefferys *v.* Boosey, 4 H. L. C. 815; Boucicault *v.* Delafield, 1 Hem. & M. 597; Low *v.* Ward, Law Rep. 6 Eq. 415; Routledge *v.* Low, Law Rep. 3 H. L. 100; Boucicault *v.* Chatterton, 5 Ch. D. 267.

[5] Routledge *v.* Low, Law Rep. 3 H. L. 111. "If it should be said, Why is the publication to be construed to mean a British publication, and the author not to be construed a British author, and the composition a British composition? the answer seems to me to be, that the publication being made

When, therefore, a book is published in a foreign country before it is published in Great Britain, it becomes in the latter country *publici juris*, and may be republished by any one, unless protection be secured under the International Copyright Acts. But contemporaneous publication abroad, by which is meant a publication on the same day that the work is published in England, is not a bar to English copyright.[1] And, provided the two publications be on the same day, it is immaterial whether the foreign one precedes that in England.[2] Nor does it matter in how many foreign countries the work may be published, provided it appears in Great Britain at the same time. If the first publication of part of a work takes place in England, and of another part in a foreign country, English copyright will vest in the former, but not in the latter.[3]

The question whether the place of publication may be in any

the commencement of the term from which the monopoly is to run, and that publication giving rights confined to Britain, and the enactments as to the entry at Stationers' Hall before the rights as to the penalties were to attach, and the obligation imposed of delivering copies to British institutions, together with the authority of Clementi *v.* Walker, satisfactorily show that the publication must be intended to be in England; whilst there seems nothing in the act to show that the legislature in using the words authors and assigns had any intention of making any restriction as to the place of composition, or as to any personal capacity of the author or assignee." Crompton, J., Jefferys *v.* Boosey, 4 H. L. C. 850. See also language of Lord Chancellor Cairns, *post*, p. 294, note 2.

[1] Cocks *v.* Purday, 5 C. B. 860; Boosey *v.* Purday, 4 Exch. Rep. 145; Jefferys *v.* Boosey, 4 H. L. C. 815; Buxton *v.* James, 5 De G. & Sm. 80. "The second question argued at the bar is scarcely separated from the first; viz., whether the copyright which the author, or his assignee, would otherwise have had in this country, was defeated by the contemporaneous publication abroad. If it be correct to say that a foreigner, the author of a work composed abroad, and published by him in this country, is, by the municipal law of this country, entitled t· · opyright in the work, how can · ght be defeated by a contempo- .s publication abroad? In the popular sense of the word, each would be the first publication. But, if neither could be so called, we think the result would be the same; for, that, in order to defeat the claim of copyright, a prior publication in some other place, or by some other party, should be proved." Wilde, C. J., Cocks *v.* Purday, 5 C. B. 884.

[2] "With respect to the circumstance that the publication abroad and in England was not in this case exactly contemporaneous, as a publication took place at Milan a few hours before it was made in England, we conceive that this would not defeat the plaintiff's copyright here, if he had any, as the author certainly did not mean to give the work to the foreign before he gave it to the British public; and in no case is it intimated, that, to be entitled to a British copyright, the foreign author must give his work to the United Kingdom exclusively." Pollock, C. B., Boosey *v.* Purday, 4 Exch. Rep. 157.

[3] Low *v.* Ward, Law Rep. 6 Eq. 415.

part of the British dominions, or is restricted to a less area, was considered by the House of Lords in 1868, when the law was expounded to the effect that, while the statute of Victoria extends protection throughout the British dominions, publication must be in the United Kingdom.[1] The reasons for this distinction were not found in the express intention of Parliament, but were based on "various provisions and conditions contained in the act, which could not possibly be complied with, if the first publication were to take place in distant parts of the British empire."[2]

The International Copyright Act declares that the author of a book, dramatic composition, or other work mentioned in that statute, which shall be first published out of the British dominions, shall have no copyright therein, nor the exclusive right of representation, "otherwise than such (if any) as he may become entitled to under this act."[3] This provision has been judicially construed to bar every author, native or foreign, from acquiring copyright, except under the International Copyright

[1] Routledge *v.* Low, Law Rep. 3 H. L. 100.

[2] Lord Westbury, Ibid. 117. For the extent of the United Kingdom and of the British dominions, see *post*, p. 298. "By the 8th section" of 5 & 6 Vict. c. 45, said Lord Chancellor Cairns, "copies of every book are to be delivered to various public libraries in the United Kingdom, within one month after demand in writing,—an enactment which in the case of a publication at the antipodes could not be complied with. By the 10th section, penalties for not delivering these copies are to be recovered before two justices of the county or place where the publisher making default shall reside, or by action of debt in any court of record in the United Kingdom. By the 11th section, the book of registry of copyrights and of assignments is to be kept at Stationers' Hall, in London, and no registry is provided for the colonies. By the 14th section, a motion to expunge or vary any entry in this registry is to be made in the Court of Queen's Bench, Common Pleas, or Exchequer. These clauses are intelligible if the publication is in the United Kingdom, but hardly so if it may be in India or Australia. Finally, by the 17th section, there is a provision against any person importing into any part of the United Kingdom, or any other part of the British dominions, for sale or hire, any copyright book first composed or written, or printed and published, in any part of the United Kingdom, and reprinted in any country or place out of the British dominions; a provision showing clearly, as it appears to me, that publication in the United Kingdom is indispensable to copyright." Routledge *v.* Low, Law Rep. 3 H. L. 109. The determination of this question was not essential to the decision of the case before the House of Lords, as the first publication of the book in controversy had been in London. The discussion grew out of the extra-judicial opinion expressed by Vice-Chancellor Kindersley at the hearing of the case, to the effect that publication might be anywhere within the British dominions. See Low *v.* Routledge, 33 L. J. N. S. (Ch.) 724.

[3] 7 & 8 Vict. c. 12, s. 19.

Acts, for a work first published in any foreign country, whether an arrangement for international copyright has or has not been made with that country. In Boucicault *v.* Delafield,[1] and in Boucicault *v.* Chatterton,[2] the plaintiff, while resident in England, claimed, under 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45, the exclusive right of representing a manuscript play, which he had caused to be publicly performed in New York before its representation in Great Britain. He was not entitled to any privileges under the International Copyright Acts, for the reason that their provisions did not apply to the United States; and the court held that, because the drama had been first publicly represented abroad, he was barred by section 19 of 7 & 8 Vict. c. 12, from obtaining the protection to which he would have been entitled under 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45, if the first performance of his play had been in Great Britain.[3]

United States. — The statute of the United States does not expressly prescribe that the first publication of a work entitled to copyright shall be in this country. Nor has this point been directly adjudicated, although it is settled that no copyright can be obtained for a book unless a printed copy of the title-page shall be deposited before publication, and two copies of the book delivered within ten days after publication. But there can be no doubt that the proper construction of the act is contained in the general law of 5 & 6 Vict. c. 45; and it appears to have been the view taken by the courts in all of the cases, excepting Boucicault *v.* Delafield and Boucicault *v.* Chatterton, decided since the passing of the first International Copyright Act, in which it has been held that English copyright is defeated by a prior publication abroad. For those cases were, and the two cases just cited might have been, properly decided without reference to the International Copyright Acts. But it is immaterial whether section 19 of 7 & 8 Vict. c. 12, does or does not apply to cases governed by the general statutes; for it makes no change whatever in the law in those cases.

[1] 1 Hem. & M. 597.

[2] 5 Ch. D. 267.

[3] A similar provision was made by section 14 of 1 & 2 Vict. c. 59, which was the first statute providing for international copyright, and which is now repealed. As each of these acts was passed for the purpose of extending protection to foreign authors whose works were first published in their own country, and whose country gave reciprocal privileges to English authors, the natural purpose of the provision above cited would seem to be simply to declare negatively that such foreign authors should not be entitled to copyright *under that statute*, unless they should comply with its prescribed requirements. This view is strengthened by the fact that no such provision

is the same as that given to the English statutes, and that an author forfeits his claim to copyright in this country by a first, but not by a contemporaneous, publication of his work abroad.[1]

A publication, to defeat the author's claim to copyright, must be one which has been made by his authority or with his consent.[2]

Place of Printing. — The question may arise whether it is essential to the securing of copyright that the book shall be printed in the United States. On this point the statutes are silent, and there is no judicial light. Every requirement which the statute prescribes concerning the vesting of copyright may be complied with, though the work has been printed in a foreign country. Nor does the purpose or spirit of the law demand that the printing shall be done in the United States. The copyright laws were passed, not for the protection of mechanical industries, but for the encouragement of native authors, and the advancement of learning in the country. These objects are secured by the first publication here of works of literature and art; and hence such publication is made a condition precedent of obtaining the privileges granted. But printing is a thing distinct from publication, and whether it has been done in one place or in another is a question which does not affect the true purposes of the statute. If the protection of native industry were a legitimate object of the copyright law, it might with reason be claimed that all the material processes in the production of a book should be done in the country. Copyright would then be defeated, not only by printing the work abroad, but also by setting the types and casting the stereotype-plates in a foreign country, though the copies be struck off here. So, also, it would be essential that the binding should be done in this country; and the same principle, logically carried out, would require that the paper should be of home manufacture. It is not reasonable to suppose that such requirements are within the scope of the statute passed for the advancement of learning. It is clearly imma-

[1] See Wall *v.* Gordon, 12 Abb. Pr. N. S. (N. Y.), 349.

[2] Boucicault *v.* Wood, 2 Biss. 34, 39; Crowe *v.* Aiken, Ibid. 208; Palmer *v.* De Witt, 2 Sweeny (N. Y.), 530, 551, on ap. 47 N. Y. 532; Shook *v.* Neuendorff, 11 Daily Reg. (N. Y.), 985.

terial where the work has been written, and the same principle should govern the question of printing.[1]

In England, the question is in the same condition as in this country. The statutes are silent, and the point has not been judicially determined; but there are *dicta* to the effect that the printing must be done in Great Britain.[2]

Summary of the Law.

United States. — The conditions on which copyright will vest in a work may now be summarized. In the United States, the title of a book must be recorded before publication, the copyright notice printed on the title-page, or the page next following, and two copies of the book delivered or mailed to the Librarian of Congress within ten days after publication.[3] The first publication of the work must be in this country. If any work is published without compliance with these conditions, it becomes public property.

Great Britain. — In England, there are some special regulations in the case of prints, engravings, works of sculpture, paintings, and photographs; and special provision is made for protecting, on certain conditions, the works of foreign authors first published abroad. Copyright will vest in any literary work of which a British subject is the author, on the sole condition that it is first published in the United Kingdom, or is published there on the day of its first publication elsewhere. Copyright will vest in the work of a foreign author on the same condition, provided he be anywhere within the British dominions on the day his work is published in the United Kingdom. It is immaterial where an English author may be

[1] "It is difficult," says Mr. Curtis, "to extract from the act any thing like a tariff protection to the mere arts of paper-making and printing. Literary labor and the advancement of the literature of the country were the great objects of encouragement." Law of Copyright (Boston, 1847), p. 144.

[2] In Clementi *v.* Walker, decided in 1824, 2 Barn. & Cr. 861, the court expressed the opinion that the printing must be done in Great Britain. Lord St. Leonards gave expression to like views in Jefferys *v.* Boosey, 4 H. L. C. 983, 986. In Page *v.* Townsend, 5 Sim. 395, it was held that the object of the legislature was not to protect prints "which were designed, engraved, etched, or worked abroad, and only published in Great Britain." But this decision was based on the special provisions of the statute relating to copyright in prints.

[3] For the variation in these requirements in the case of works of art, see *ante*, p. 265.

at the time of publication. When copyright has once vested, protection extends throughout the British dominions.[1] While valid copyright may be secured on these conditions, an action at law or a suit in equity cannot be maintained for piracy until the work has been registered in the manner prescribed by statute. But such registration may be made at any time before the action or suit is brought.

United Kingdom and British Dominions Defined. — It is important here to note carefully the meaning of the terms used. The United Kingdom embraces England, Wales, Scotland, and Ireland; while the British dominions include "all parts of the United Kingdom of Great Britain and Ireland, the islands of Jersey and Guernsey, all parts of the East and West Indies, and all the colonies, settlements, and possessions of the crown which now are or hereafter may be acquired."[2] It will be noticed that the area within which the presence of a foreign author at the time of publication is required, and that throughout which copyright extends, are the same, namely, the British dominions; while the place of publication is restricted to a smaller territory, — the United Kingdom.[3]

[1] See Routledge *v.* Low, Law Rep. 3 H. L. 100.

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

[3] *Colonial Copyright.* — The provisions of the general copyright law, 5 & 6 Vict. c. 45, apply to all parts of the British dominions. Section 17 of this act prohibits, under heavy penalties, any person without the consent of the owner of the copyright from importing into any English colony a book copyrighted in Great Britain, and reprinted in any country out of the British dominions. A like prohibition was made in the Customs Act, 16 & 17 Vict. c. 107, s. 160, and is continued in the Consolidated Customs Act, 39 & 40 Vict. c. 36, s. 42, passed in 1876. By 10 & 11 Vict. c. 95, passed in 1847, and known as the Foreign Reprints Act, the Queen was empowered, by order in council, to suspend in certain cases the prohibition against importing English copyrighted books into the colonies. This act provides, "that in case the legislature or proper legislative authorities in any British possession shall be disposed to make due provision for securing or protecting the rights of British authors in such possession, and shall pass an act or make an ordinance for that purpose, and shall transmit the same in the proper manner to the Secretary of State, in order that it may be submitted to her Majesty, and in case her Majesty shall be of opinion that such act or ordinance is sufficient for the purpose of securing to British authors reasonable protection within such possession, it shall be lawful for her Majesty, if she think fit so to do, to express her royal approval of such act or ordinance, and thereupon to issue an order in council declaring that so long as the provisions of such act or ordinance continue in force within such colony the prohibitions contained in the aforesaid acts, and hereinbefore recited, and any prohibitions contained in the said acts, or in any other acts, against the importing, selling, letting out to hire, exposing for sale or hire,

Duration of Copyright.

In the United States, the statute grants protection in the case of all works for twenty-eight years from the time of

or possessing foreign reprints of books first composed, written, printed, or published in the United Kingdom, and entitled to copyright therein, shall be suspended so far as regards such colony; and thereupon such act or ordinance shall come into operation, except so far as may be otherwise provided therein, or as may be otherwise directed by such order in council,. any thing in the said last-recited act or in any other act to the contrary notwithstanding."

The Canadian legislature having provided for the collection of a customs duty of 12½ per cent on foreign reprints of English copyright works, the amount thus collected to go to the owner of the copyright, an order in council was made July 7, 1868, by which were suspended all prohibitions in the imperial acts against importing such works into Canada. Like provision for protecting the rights of British authors have been made by other colonies. Referring to the operation of the Foreign Reprints Act, the Royal Copyright Commissioners, in their report submitted to Parliament in June, 1878, p. xxxi, § 193, say: "So far as British authors and owners of copyright are concerned, the act has proved a complete failure. Foreign reprints of copyright works have been largely introduced into the colonies, and notably American reprints into the Dominion of Canada; but no returns, or returns of an absurdly small amount, have been made to the authors and owners. It appears from official reports that, during the ten years ending in 1876, the amount received from the whole of the nineteen colonies which have taken advantage of the act was only £1,155 13*s.* 2½*d.*, of which £1,084 13*s.* 3½*d.*, was received from Canada; and that, of these colonies, seven paid nothing whatever to the authors, while six now and then paid small sums amounting to a few shillings."

In 1875, the Dominion Parliament passed an act giving copyright for twenty-eight years to any person domiciled in Canada, or in any part of the British dominions, or being the citizen of any country having an international copyright treaty with Great Britain. To secure copyright, the book must be published or republished in Canada. Section 15 of this act provides that "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."

The Canadian act was sent in the form of a bill reserved for the Queen's approval; but as there were doubts whether it was not repugnant to imperial legislation, and to the order in council made in 1868, the 38 & 39 Vict. c. 53, was passed, authorizing the Queen to assent to the Canadian bill. It was further provided by section 4 of 38 & 39 Vict. c. 53, that "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 authorized by him, to import into the United Kingdom any copies of such book reprinted or republished in Canada." By section 5 the order in council of 1868 is continued in force "so far as

recording the title.[1] An additional term of fourteen years may be secured by the author, if he be living at the end of the first term, or by his widow or children, if he be dead.[2]

In England, the copyright in a book is granted for forty-two years from the time of first publication. If the author is living at the end of that period, the copyright will continue until seven years after his death.[3] The copyright in prints, engravings, and lithographs lasts for twenty-eight years from the time of publication;[4] in paintings, drawings, and photographs, during the life of the author, and seven years after his death;[5] and in sculpture, models, and busts, for fourteen years from first publication,[6] and the artist, if living at the end of that period, may secure protection for an additional term of fourteen years.[7]

relates to books which are not entitled to copyright for the time being, in pursuance of the said reserved bill."

The Canadian copyright act is given as a schedule to 38 & 39 Vict. c. 53. See also Reserved Act, 1875, Stat. Dom. Canada, 1876, p. xvii.

[1] U. S. Rev. St. s. 4953.

[2] Id. s. 4954.

[3] 5 & 6 Vict. c. 45, s. 3. See Marziais *v.* Gibbons, Law Rep. 9 Ch. 518, as to the construction of section 4, which provides for the extension of the copyright in works published when the statute was passed.

[4] 7 Geo. III. c. 38, s. 7. The provisions of the acts relating to prints and engravings were extended to lithographs by 15 & 16 Vict. c. 12, s. 14.

[5] 25 & 26 Vict. c. 68, s, 1.

[6] 54 Geo. III. c. 56, s. 1.

[7] Id. s. 6.

CHAPTER VI.

TRANSFER OF COPYRIGHT.

GREAT BRITAIN. — BOOKS.

By Registration. — In England, the statute provides for the transfer of copyright in books by registration, but does not require it to be done in this way. Section 13 of 5 & 6 Vict. c. 45, after providing for the registration of books in the registry of the Stationers' Company by the owners of the copyright, enacts "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 [five shillings]; 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." The entry is made on the application of the assignor, and sets forth the date of entry, title of the book, name of the assignor, and name and place of abode of the assignee. The statute makes a certified copy of the entry *prima facie* proof of assignment, "but subject to be rebutted by other evidence." [1]

This mode of transfer appears to be available only to a "registered proprietor" of the copyright. It does not, therefore, apply to transfers made before the original entry of copyright. In case the assignment has been made before publication, the assignee as owner would properly make the original entry.

[1] S. 11. See Low *v.* Routledge, 33 L. J. N. S. (Ch.) 717, 723; Low *v.* Ward, Law Rep. 6 Eq. 415; Wood *v.* Boosey, Law Rep. 2 Q. B. 340, on ap. 8 Id. 223; Graves's Case, Law Rep. 4 Q. B. 715; Boosey *v.* Fairlie, 7 Ch. D. 301.

By Bequest and in Case of Intestacy. — The act further provides for the transmission of copyright in case of the death of the owner. Section 25 declares "that all copyright shall be deemed personal property, and shall be transmissible by bequest, or, in case of intestacy, shall be subject to the same law of distribution as other personal property, and in Scotland shall be deemed to be personal and moveable estate."

Must Assignment of Copyright be in Writing?

As registration is a mode of transfer optional with the parties thereto, it becomes necessary to inquire in what other manner the ownership of copyright may be passed from one person to another. The law on this point cannot be properly determined without a critical examination of the leading decisions on the subject, nor without carefully considering each with strict reference to the governing statute. It is necessary to divide the authorities into two classes, and treat each class separately: 1, those in which the decision was governed by a statute in force prior to that of Victoria; 2, those wherein the question was controlled by the 5 & 6 Vict. c. 45.

Judicial Construction of Former Statutes. — Writing but not Attestation held to be Necessary. — Every statute before that passed in the reign of Victoria was silent as to the mode of transferring the copyright in a book. Hence, it was left to the courts to determine the requisites of an assignment. It appears that before 1814 the chancery courts assumed that copyright might be transferred by parol.[1] The question was first raised in Power *v.* Walker, decided in that year, under 8 Anne, c. 19, which imposed penalties on any person who should print or import a copyrighted book "without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed in the presence of two or more credible witnesses."[2] The plaintiff, whose title had been derived by parol, brought an action for piracy against the defendant, who pleaded the absence of a written assignment

[1] "It is settled now," said Lord Eldon, "that an assignment of copyright must be in writing, although it frequently happened that courts of equity had granted injunctions at the suit of persons claiming under assignments not in writing, until we were set right by a decision of the Court of King's Bench." Rundell *v.* Murray, Jac. 314.

[2] s. 1.

from the author to the plaintiff. Lord Ellenborough ruled that "the statute having required that the consent of the proprietor, in order to authorize the printing or reprinting of any book by any other person, shall be in writing, the conclusion from it seemed almost irresistible that the assignment must also be in writing; for if the license, which is the lesser thing, must be in writing, *a fortiori* the assignment, which is the greater thing, must also be." [1]

This reasoning was carried to its logical conclusion in Davidson *v.* Bohn, decided in 1848, when the court declared that, as a consent in writing signed by two witnesses was necessary to a license, an assignment to be valid must likewise be in writing and attested by two witnesses.[2] A written assignment with one witness was therefore held to be invalid. The question came before the House of Lords in Jefferys *v.* Boosey in 1854, when a majority of the judges were of opinion that a written assignment without witnesses was good.[3] It was considered that the necessity for attestation, if any existed under the statute of Anne, had been removed by the 54 Geo. III. c. 156, passed in 1814, which made the owner's consent in writing necessary to a license to publish, but contained no mention of witnesses. In the Scotch case of Jeffreys *v.* Kyle, which will be more fully considered further on, it was also held that after the 54 Geo. III. c. 156, attestation was not necessary to a valid assignment.[4]

In Shepherd *v.* Conquest, the Court of Common Pleas, applying the reasoning of Lord Ellenborough to the 3 & 4 Will. IV. c. 15, held that an assignment conveying the exclusive right of performing a play must be in writing; and the plaintiff failed because he claimed by a parol title.[5]

[1] 3 Maule & S. 9.

[2] 6 C. B. 456.

[3] 4 H. L. C. 815.

[4] 18 Sc. Sess. Cas. 2d ser. 906. Affirmed by House of Lords, Kyle *v.* Jeffreys, 3 Macq. 611.

Davidson *v.* Bohn appears to have been decided under 8 Anne, c. 19. Although the case was tried many years after the passing of 54 Geo. III. c. 156, no reference was made to this statute.

In Jefferys *v.* Boosey, Lord St. Leonards and Baron Alderson were of opinion that the license clause in the statute of Anne had not been repealed by the 54 Geo. III. c. 156, s. 4, since the provisions of both acts as to license might stand together; and they regarded the law as settled by Power *v.* Walker and Davidson *v.* Bohn, that a valid assignment must be in writing, and attested by two witnesses. 4 H. L. C. 994–996, 915.

[5] 17 C. B. 427. See also Barnett *v.* Glossop, 3 Dow. Pr. Cas. 625.

In the following case of Cumberland *v.* Copeland, the plaintiff, to whom the author had assigned a play by a writing attested by one witness, brought an action under 3 & 4 Will. IV. c. 15, against the defendant, for representing the piece without authority. The Court of Exchequer, declaring [illegible] were bound by Power *v.* Walker and Davidson *v.* Boosey, held the plaintiff's title to be bad for want of an assignment attested by two witnesses.[1] But this judgment was reversed by the Exchequer Chamber, which unanimously held that an assignment in writing, without witnesses, was good.[2]

In Cumberland *v.* Copeland as well as in Jefferys *v.* Boosey, the assignment was shown to have been in writing, but without witnesses. The point decided was that a written assignment, though not attested, is valid. The question whether a writing is necessary was not before the court.

The doctrine affirmed in Power *v.* Walker has been recognized in several other cases than those here reviewed. But in most, if not all, of them the question was so involved with other issues that the decisions did not turn directly on this point.[3]

The leading authorities relating to the construction of the statutes in force before the 5 & 6 Vict. c. 45, have now been reviewed. Their result is, that, before the present statute was passed, copyright could not be assigned by parol, but only by an instrument in writing, to which no attestation was required after 54 Geo. III. c. 156, became a law.

The Doctrine Maintained that Assignments need not be in Writing under English Statutes.

Former Statutes Considered. — I shall now try to show that, independently of the statute of Victoria, the doctrine affirmed by the English courts is not sound, and that the

[1] 7 Hurl. & N. 118.

[2] 1 Hurl. & C. 194. See also Marsh *v.* Conquest, 17 C. B. N. S. 418, where it was held that the assignment need not be by deed.

[3] See Latour *v.* Bland, 2 Stark. 382; Morris *v.* Kelly, 1 Jac. & W. 461; Rundell *v.* Murray, Jac. 311; Clementi *v.* Walker, 2 Barn & Cr. 861; Barnett *v.* Glossop, 8 Dow. Pr. Cas. 625; De Pinna *v.* Polhill, 8 Car. & P. 78; Colburn *v.* Duncombe, 9 Sim. 151; Hodges *v.* Welsh, 2 Ir. Eq. 266; Chappell *v.* Purday, 4 Y. & C. Exch. 485.

statutes on whose construction it was based were wrongly interpreted.

The 8 Anne, c. 19, and the 54 Geo. III. c. 156, secured to the author and his assignee the sole right of publishing a book for a named period, and declared that any other person who *should* during that period republish such book without the consent in writing of the owner of the copyright should be liable to certain penalties. In like manner, the 3 & 4 Will. IV. c. 15, gave to the author and his assignee the sole liberty of representing a dramatic composition for the term therein mentioned, and imposed penalties on any other person who should cause such composition to be performed without the written consent of the owner. The provisions of these three acts relating to the vesting of the right and its protection by penalties were the same as far as concerns the question of the necessity of a written assignment.[1] All were silent as to the mode of transferring the rights which they secured.

The distinction between an assignment and a license is that by the former the ownership of the copyright is vested in the assignee, while by the latter the licensee acquires the privilege of publishing, but no proprietary rights in the copyright. It is conceded that the provision relating to a consent in writing does not expressly govern the mode of assignment. The theory advanced by Lord Ellenborough is that this clause must by implication be construed to apply to a transfer of the copyright, as well as to a license to publish. This reasoning would be entitled to more consideration if the act prohibited every person except the author from publishing without authority in writing. But such is not the language or the intent of the statute. It expressly declares that the author and his assignee shall have the benefit of copyright, and that any person who is not the author or assignee must show a consent in writing to publish. Now, it is clear that when piracy is charged, two defences are open to the alleged wrong-doer. He may show either that he is the author or the assignee, that is

[1] As already said, the 8 Anne, c. 19, required the written consent to be attested by two witnesses, while no mention of witnesses was made in the act of George III. But the question whether an assignment must be in writing is not affected by this difference between the two statutes.

the owner of the copyright; or that he has a license in writing from the owner to publish. If he can establish the first fact, he need not prove the second. Only those who cannot prove ownership are required by the statute to produce a written license. The clause in question does not, therefore, apply to the owner of the copyright.[1] Hence, we must look elsewhere to ascertain what is necessary to constitute a good title of ownership.

The statute recognizes as owners the author and his assignee. No difficulty is presented when the author claims as owner, since authorship creates an undisputed title to ownership. But when the owner is not the author, but derives his title from him, the inquiry is raised as to what formality is required to make the transfer valid in law. The statute secures to the author and his assignee the exclusive right of publishing a book during a specified period. If the author, before parting with his property in a manuscript work, publish it as his own, the right conferred by the statute will vest in him. The copyright thus acquired may at any time afterward be transferred to another, who thereby becomes clothed with all the rights which were conferred upon the author, and the latter becomes divested of those rights. But the statute not only protects the title of the assignee thus derived after publication, but it also grants copyright in the first instance to the assignee as well as to the author. In other words, statutory copyright will vest *ab initio* either in the author or in his assignee. When, therefore, the author has parted with his property in a work not yet published, the owner of the manuscript may become the first publisher, and thereby secure to himself the copyright conferred by the statute. As the lawful owner of the manuscript, his standing under the statute is the same as if he were the author.

Here, then, are two different classes of persons embraced within the meaning of assignee as used by Parliament: 1st, those to whom an assignment of statutory copyright in a pub-

[1] "The statute does require the defence of license to be so [in writing] proved; and that in case of a plaintiff claiming under a license, and suing for a statutable penalty, the license should be so proved; but it appears to leave the assignee, suing according to the common law, to prove his case under that law." Erle, J., Jefferys *v.* Boosey, 4 H. L. C. 882.

lished work has been made after the securing of such right by the author; 2d, those to whom the author's rights were transferred before publication, and, consequently, before the creation of statutory copyright, and who are entitled to secure for themselves the statutory copyright by virtue of being the owners of the manuscript.[1]

Now, in cases wherein the title has passed before the creation of the statutory right, the statute cannot rightly be construed to regulate the form of transfer.[2] As there can be no statutory copyright in an unpublished work, the right thus transmitted before publication exists only by common law. Hence, the mode of transfer must be governed by the common law, which is the only law applicable; and, if the title held by the assignee is good by the common law under which it was derived, it must, in the absence of express legislation to the contrary, be equally valid under the statute. Therefore, as a parol assignment is valid when made by the common law,[3] it follows that such assignment will continue to be sufficient under the statute in cases wherein the transfer has taken place before the vesting of the statutory copyright; that is, before publication.

What, then, is the mode of assignment after publication, and after the statutory copyright has once vested in the author? If any formalities or requirements were prescribed by Parliament, they would doubtless have to be observed. But, as already said, the statute is silent on this point. Hence, according to a well-established rule of construction, the mode of transfer can be governed only by the common law; and by the common law, as has been said, a good assignment may be made by word of mouth.

Lord Ellenborough's theory, that the mode of assignment is impliedly governed by the clause of the statute requiring a license to be in writing, has been applied indiscriminately to all cases of transfer, whether made before or after publication.

[1] See *ante*, pp. 238–242.

[2] Mr. Justice Erle rightly said: "Even if the statute should be held to annul the property after publication, still it leaves the property before publication as it was; and then the right of the plaintiff below stands; for he took by assignment, before publication, when the statute had no operation." Jefferys *v.* Boosey, 4 H. L. C. 878.

[3] See *ante*, p. 104.

The important distinction between an assignment made prior and one subsequent to the vesting of the statutory copyright appears either not to have been observed, or to have been disregarded. I have tried to show that this construction of the statute is erroneous in either case. But, whatever grounds there may be for enlarging the meaning of the license clause so as to embrace an assignment of the copyright in a published work, they wholly disappear in the case of a transfer made before publication. The clause of the statute which imposes penalties on any person publishing a book without the written consent of the owner of the copyright applies only to one who reprints what has already been published. Statutory copyright begins with publication, before which it has no existence, and hence can neither be violated, nor protected by statutory penalties. It exists only for a given term, and it is only during this period that its invasion is guarded against by penalties. The right must exist before it can be violated, and it cannot exist before publication. The statute does not prohibit or impose penalties for the unauthorized publication of a manuscript, but only for the unlicensed republication of a work in which copyright has vested. Such is the plain reading of the 8 Anne, c. 19, and of the 54 Geo. III. c. 156; but this meaning is put beyond doubt by the language of 5 & 6 Vict. c. 45, s. 15, which prohibits any person, without the written consent of the owner, from printing "any book in which there shall be subsisting copyright."

The clause imposing penalties in the absence of a written license applies, therefore, solely to published productions. The penalties cannot attach nor the written license be required for an act done before publication, and before the statutory right vests. The provision does not apply to what is done outside of the statute. Now, we have seen that the section which secures copyright to the assignee recognizes assignments made before as well as those made after the vesting of the statutory right. It is, therefore, more extensive in its operation than the clause requiring a written license. Hence, if the reasoning were sound that an assignment made after publication must be in writing, because a license in writing is required to reprint a published work, the analogy fails when the transfer has been

perfected before publication; since, before publication, the license clause of the statute has no force.

The cases which have been reviewed present a marked instance of the force of the custom, too common in English and American courts, of following precedent without examining the sufficiency of the grounds on which such precedent is based, and without seeking to ascertain the true principles by which alone the law can be rightly determined. When the question as to the validity of a parol assignment of copyright came before Lord Ellenborough in Power *v.* Walker, there was neither judicial authority nor express statutory directions on the subject.[1] The point appears not to have been thoroughly considered in that case, and the supposed meaning of the statute was reached by applying to one of its clauses reasoning as fallacious as it was novel. The judgment in Davidson *v.* Bohn, the next case in which the issue was directly tested in a court of law, was based solely on the precedent of Power *v.* Walker; and in every subsequent case, in which the construction under consideration has been affirmed or recognized, it has been affirmed or recognized simply on the authority of those two cases. Of course, to adopt Lord Ellenborough's conclusion is to accept his reasoning. But his reasoning as well as his conclusion, when accepted, has been accepted on his authority, and without inquiry as to its soundness.[2]

Judicial Opinions Against the Soundness of the Prevailing Doctrine. — While the doctrine founded on the authority of Lord Ellenborough, that copyright could not be transferred by parol under the statutes preceding that of Victoria, has not been overruled in any case yet reported, its soundness has been disputed or questioned by many British judges. In expressing his opinion in the House of Lords, in Jefferys *v.* Boosey, Mr. Justice Coleridge said of Power *v.* Walker and Davidson *v.* Bohn: "It is remarkable that both these are cases merely of refusing a rule for a new trial, the latter mainly proceeding on the authority of the

[1] The question had not been determined by a court of law. See *ante*, p. 302, note 1, as to the course of the chancery courts.

[2] In view of the potent influence of precedents in the English courts, I am convinced that, if Lord Ellenborough had held a parol assignment to be sufficient, this construction would have been followed and confirmed in subsequent cases.

former, and neither of them fully argued; both, I must take leave to say with most sincere respect, founded on reasoning which is any thing but satisfactory."[1] In Cumberland *v.* Copeland, in the Court of Exchequer, one of the judges questioned the soundness of the judgments in Power *v.* Walker and Davidson *v.* Bohn, and another expressly declared that those cases had been wrongly decided; but both thought they were binding precedents. Baron Bramwell used the following strong language: "If I had for the first time to construe the statute of Anne, I should not put upon it the construction which the court did in Power *v.* Walker. It seems to me that the whole difficulty is attributable to the mistake which I cannot help thinking the court made in that case. They construed the statute as requiring an assignment of copyright to be in writing, not as a consequence of the necessity of a license in writing signed by two witnesses, in order to justify what would otherwise be a piracy; but, as an inference or conclusion from such a license being required, they considered that an assignment of copyright must also be in writing. That decision was corroborated in Davidson *v.* Bohn, and recognized in the House of Lords, and it is now too late to question it."[2] In Jeffreys

[1] 4 H. L. C. 906. "The statute of Anne," said the same judge, "speaks, in respect of works already printed, 'of the author who hath not transferred to any other, the bookseller, the printer, or other person or persons, who hath purchased or acquired the copy of a book in order to print the same;' and in respect of books not then printed and published, it speaks of 'the author and his assignee or assigns:' in both cases being entirely silent as to any special form of transfer or attestation, and using words which embrace assignees in law, and by devolution, as well as assignees by act of the parties. This is the part of the section which either confers or regulates the limited copyright; and because, in the penal part of the clause which follows, an exception is made in favor of those who are licensed by a consent in writing, attested by two witnesses, it has been twice held that the assignees in the first part must be such as claim under an assignment in writing so attested." Ibid. 905.

Mr. Justice Crompton thought that Power *v.* Walker was a binding authority; but said that he would "not stop to inquire how far such a doctrine, if now propounded for the first time, might or might not be satisfactory." Ibid. 854.

See also the views of Erle, J., *ante*, p. 306, note 1, p. 307, note 2.

[2] 7 Hurl. & N. 133. "I am not prepared to say," remarked Channel, B., "that if I had to construe those statutes [8 Anne, c. 19, and 54 Geo. III. c. 156] for the first time, I should concur with the decisions in Power *v.* Walker and Davidson *v.* Bohn; but we cannot overrule them. If I am right in my view that the statute of Anne is in force for some purpose, I must construe it according to the decisions, although not satisfactory to my mind." Ibid. 135.

v. Kyle, three of the four judges of the Scotch Court of Session expressed their dissatisfaction with the doctrine propounded by Lord Ellenborough. "If the question," said Lord Deas, "were now to be decided as to the construction of the act of Queen Anne, I should agree with those who think that the statute did not regulate the form of assignments, but only the form of license to publish, and that the form of assignments was left to be regulated by the common law. Assuming copyright to be the creature of statute, and to cover only publications by British subjects within Britain, it appears to me that, when property has been so created, and the form of assignments not regulated, these are to be what the common law requires." [1]

It is hardly necessary to add, that the views above quoted are in the nature of *obiter dicta*, and therefore have no binding force as precedents; but, as the opinions of able jurists speaking from the bench, they should at least show the necessity of a thorough judicial examination of the doctrine under consideration, in order to determine what is the sound law on this subject.

Does Present Statute Require Assignment to be in Writing? We have thus far considered the question of assignment solely in connection with the statutes passed before the reign of Victoria, with the view of showing that, not even under those acts on which it is based, can the construction announced by Lord Ellenborough be sustained. But suppose Lord Ellenborough's reasoning to be sound, and that the acts to which it was applied were rightly construed, will the statute now in force admit of

[1] 18 Sc. Sess. Cas. 2d ser. 914. Lord Ivory, referring to Power *v.* Walker and Davidson *v.* Bohn, said: "I confess, with reference to these authorities, although not satisfied with the grounds on which they are rested, that I should be slow to disturb authorities which had been pronounced and acted on so long." Ibid. 910. Lord President M'Neill, citing Power *v.* Walker, said: "That decision, standing for a long time undisturbed, would certainly be one which I should be unwilling to go against in the construction of the statute, although my own judgment would not readily lend its consent to the reasons upon which it proceeds." Ibid. 915. See also the views of the same judges given *post*, pp. 314, 315, as to the construction of 5 & 6 Vict. c. 45.

Mr. Justice Byles, in Lacy *v.* Toole, 15 L. T. N. S. 512, after asking counsel whether there was any provision in 3 & 4 Will. IV. c. 15, as to the attestation of an assignment of the right to represent a drama, said: "Nor does it seem that there is any provision even that an assignment must be in writing."

the same construction? The affirmative of this question is supported by a single chancery decision. In the recent case of Leyland *v.* Stewart, the Master of the Rolls ruled that the construction given to the earlier statutes is applicable to the 5 & 6 Vict. c. 45, and that, under this act, an assignment, unless made by entry in the registry at Stationers' Hall, must be in writing.[1]

In my judgment, this decision is wrong; and is the result of following the earlier authorities, in disregard of the plain provisions of the existing statute. This statute contains language which should remove all doubt concerning the mode of transfer since it was passed. Like the earlier statutes, it makes the printing of a book in which copyright has vested unlawful without the written consent of the owner; and excepting the definition of assigns, and the provision relating to transfer by registration, bequest, and in case of intestacy, it contains no express enactment concerning the mode of assignment. It employs the word assignee in the same sense in which it was used in the antecedent acts; but, unlike those acts, it expressly defines the meaning which the word shall have. Section 2 declares that "the word 'assigns' shall be construed to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by operation of law, or otherwise." This language seems to be conclusive of the question under consideration. It is at once a definition of an assignee and of an assignment. It declares in effect that any transfer which vests the rights of the author in the assignee shall be valid, whether made before or after publication, whether under the statute or the common law, and whether by sale, gift, bequest, or by operation of law, or otherwise. The formality of a writing is not required. If the transfer be made under the common law before the vesting of copyright, and be valid by that law, its validity is recognized by the statute. If, either before or after statutory copyright has vested, the author by parol sells or gives his interest to another; or if the right passes in case of bankruptcy, marriage, or intestacy, or otherwise by the operation of law, although there be no writing,—

[1] 4 Ch. D. 119.

the transmission will come within the above definition, and meet the requirements of the statute. In other words, a sound construction of the statute must lead to the conclusion, that a parol transfer of copyright, whether made before or after publication, is good in law.

Authorities in Favor of Doctrine that under Present Statute Copyright may be Transferred by Parol. — In harmony with this view are the judgment of the Common Bench in Cocks *v.* Purday,[1] and the *dicta* of the Scotch judges in Jeffreys *v.* Kyle.[2] In the former case, it appeared that the plaintiff had bought from Hoffmann, of Bohemia, the exclusive right of publishing in Great Britain a musical composition which at the time of purchase had not been published anywhere. Hoffmann had bought the composition from the author, Labitzky. No writing appears to have passed between these two persons; but by the Austrian law, which prevailed in Bohemia, a parol transfer of copyright was valid. The sale by Hoffmann to Cocks was made by letter, and no formal assignment was executed until nearly a year after the latter had published and copyrighted the work in England. The defendant argued that the plaintiff's title was not good, because it had not been derived by a written assignment. The court, after quoting the definition of assigns in section 2 of 5 & 6 Vict. c. 45, said: "There being then a sale in this case valid by the law of Austria, where it was made, the interest of the author became vested in the plaintiff before publication, so as to make him an assignee within the meaning of the third section; and he, therefore, had a good derivative title."[3]

If the statute of Victoria can be rightly construed as requiring every assignment, whether made before or after publication, to be in writing, this decision is clearly wrong. In such case, it would be immaterial whether the transfer were good or bad under a foreign law. The question would be wholly governed by the English statute.[4] But the judgment in Cocks *v.*

[1] 5 C. B. 860.

[2] See *post*, p. 814.

[3] Wilde, C. J., 5 C. B. 885.

[4] The judges who advised the House of Lords in Jefferys *v.* Boosey, 4 H. L. C. 815, were divided in opinion as to the validity in England of an assignment valid in Milan. See also Chappell *v.* Purday, 14 Mees. & W. 303. The principle which governs the question is clear. An assignment of English copyright made after publica-

Purday is sound; and is an express authority to the effect that, when a valid transfer, whether by writing or parol, is made before publication, it must be held to give the assignee a good title under the statute. It is true that what the court directly decided was that the transfer of the property in an unpublished work made in a foreign country, and valid by the law of that country, must be held as giving to the English buyer a good title in England. But the principle is the same when a sale of an unpublished work is made in England under the common law. The court in this case did not consider the question of an assignment made after publication.

At the trial of Jeffreys *v.* Kyle before the Lord President, the title acquired by the plaintiff, who had bought a song from the author, and registered himself as owner of the copyright under 5 & 6 Vict. c. 45, but who had no other writing than the author's receipt for the purchase-money, was held to be valid. This decision was affirmed by the Court of Session,[1] and by the House of Lords,[2] which held that an assignment made after the 54 Geo. III. c. 156, need not be attested. But the question as carelessly brought on appeal before these two tribunals was as to the necessity of attestation; and the court was precluded by the pleadings from directly passing on the validity of a parol assignment. Nevertheless, three of the four judges of the Court of Session questioned, as has already been shown,[3] the soundness of the construction which had been given by the English courts to 8 Anne, c. 19, and 54 Geo. III. c. 156; and maintained that, whatever might be the true meaning of those statutes, a writing could not be considered necessary under the 5 & 6 Vict. c. 45. "Even before that statute," said Lord Ivory, "there were other titles than the mere title of a deed of assignment, which effectually carried the property

tion, is an assignment of a right granted and regulated by an English statute. If any form is prescribed or required by the statute, the assignment, wherever made, must be in that form. But a transfer of the property in an unpublished work is not a transfer of a statutory right, and hence is not governed by the statute. If the transfer is made in England and is good by the common law, or if made in a foreign country and is valid by the law of that country, the buyer becomes the owner of the property, and is an assignee entitled to secure the statutory copyright, provided the work be a proper subject of copyright.

[1] 18 Sc. Sess. Cas. 2d ser. 906.

[2] Kyle *v.* Jeffreys, 3 Macq. 611.

[3] *Ante*, pp. 310, 311.

of copyright; *e. g.*, in a case of bankruptcy. There it has been held that the transference is good. So also in intestacy, where a party takes up the rights of his ancestor, what carries the property of the deceased also effectually carries the copyright belonging to him. The legal effects of marriage have the same effect. In the event of her marriage, all right would be carried from Miss Cook to her husband. Therefore it would be difficult to hold that all right of transfer was to be denied under the statute. In short, there are a great many cases in which, it being essential that the party to whom the right is to be transferred should be vested in such right, and properly secured, still that such right is carried by common law without any formalities. The statute of Victoria does away with all that; because it says, in its interpretation clause, that the word assigns shall be construed to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book; and whether acquired by sale, gift, bequest, or by operation of law, or otherwise. And in its operative clause, section 13, it goes on to deal with the question of succession of a legal assignment." He then expressed the opinion, that "a party holding a good assignment at common law would have been supported in any question raised under the recent statute" of Victoria.[1]

The Lord President, M'Neill, thought that, under the definition of assigns in the statute of Victoria, "any thing that would instruct a sale or gift, or any right in that way whatever, would make the party in whose favor such gift was made proprietor."[2]

In Hazlitt *v.* Templeman, where it appeared that the copyright in a work, of which the plaintiff was author, had been registered under the statute of Victoria, with the verbal consent of the plaintiff, in the name of the defendant as owner, it was held that such registration was *prima facie* evidence of the defendant's title, which was not rebutted by the absence of proof of a written assignment.[3] But the facts in this case and

[1] 18 Sc. Sess. Cas. 2d ser. 911.
[2] Ibid. 917.
[3] 13 L. T. N. S. 593.

the questions involved were such that the decision throws little light on the question of assignment.

Leyland *v.* Stewart,[1] then, is the only case yet reported in which it has been held that an assignment under 5 & 6 Vict. c. 45, must be in writing; and this was a suit in chancery in which the Master of the Rolls, overlooking or disregarding the significant definition of assignee contained in it, applied to that statute the same construction which had been given to the earlier ones. Opposed to this decision is the authority of the Common Pleas in Cocks *v.* Purday,[2] the judgment of the Lord Ordinary in Jeffreys *v.* Kyle, and the *dicta* of a majority of the Court of Session in the same case.[3]

From this review of the question, it will be seen that the law governing the form of assignment under the statute now in force cannot be regarded as judicially settled. But the weight of authority, taking those cases in which alone this statute has been considered, and which alone can be regarded as binding authorities on the question of its meaning, is in favor of the doctrine that the copyright in a book may now be assigned by parol.

I have tried to show that the accepted construction of the earlier statutes is wrong; that its soundness has been questioned by many able jurists; and that, whether sound or unsound, the authorities by which it is supported cannot be regarded as settling the judicial construction of the statute now in force. I have thus treated the subject, in the belief that, when the question shall again be brought before a high judicial tribunal, the law will be carefully and thoroughly examined with special reference to the statute of Victoria, and determined, not by precedent, but by sound principles.

Engravings, Paintings, Photographs, &c.

Engravings and Prints. — The statutes relating to prints and engravings do not prescribe the mode of assigning the copyright; and the law in such case has not been judicially determined. Parliament has prohibited the publication of such productions without the written consent of the owner, signed in the presence of two witnesses. If the mode of transfer is

[1] 4 Ch. D. 419. [2] 5 C. B. 860. [3] 18 Sc. Sess. Cas. 2d ser. 905.

governed by this provision, as in the case of books, it will follow that an assignment must be in writing, and signed by two witnesses.[1] But section 2 of 8 Geo. II. c. 13, has an important bearing on this question. It provides "that it shall and may be lawful for any person or persons who shall hereafter purchase any plate or plates for printing from the original proprietors thereof, to print and reprint from the said plates without incurring any of the penalties in this act mentioned." This seems to be a bar to applying to the license clause in the case of engravings the same reasoning that has been applied to the license clause in the case of books. The true construction of the provision above quoted would appear to be, that any person may acquire the copyright in an engraving by buying the plate; and there is nothing in the statute and no principle which requires that such sale of the plate or transfer of the copyright shall be accompanied by a writing.

Maps. — As maps are within the provisions of the statute relating to books,[2] the mode of transferring the copyright must be the same as in the case of books.

Paintings, Drawings, and Photographs. — In the case of these productions, the assignment of the copyright must be in writing, but need not be attested. Section 3 of 25 & 26 Vict. c. 68 declares that "all copyright under this act shall be deemed personal or moveable estate, and shall be assignable at law; and every assignment thereof, and every license to use or copy by any means or process the design or work which shall be the subject of such copyright, shall be made by some note or memorandum in writing, to be signed by the proprietor of the copyright, or by his agent appointed for that purpose in writing."[3]

Registration of the assignment is made necessary to give the assignee the benefits of the act;[4] but the statute does not provide for transferring the copyright by means of registration.

The statute further provides that, when any person makes for another, or sells to another any painting, drawing, or the

[1] 8 Geo. II. c. 13, s. 1; 17 Geo. III. c. 57.

[2] See *ante*, p. 174.

[3] See Strahan *v.* Graham, 16 L. T. N s. 87, on ap. 17 Id. 457.

[4] s. 4. Graves's Case, Law Rep. 4 Q. B. 715.

negative of any photograph, the former shall not retain the copyright, except by an agreement in writing signed by the latter; and the latter shall not acquire the copyright, except by a like agreement signed by the former.[1]

Mode of Transfer in the United States.

It is to be regretted that, in copying from the statute of Anne the license clause, which in England has given rise to an unsatisfactory and questioned construction of the law governing the transmission of copyright, Congress has failed to prescribe in unmistakable language the requisites of a good assignment.

Former Statutes. — The act of 1790[2] and that of 1831[3] prohibited any person from publishing a copyrighted book without the owner's consent in writing, signed by two witnesses. Both were silent respecting the mode of transfer. The first and only legislation on this point before 1870 was the supplemental act of 1834, which declared "that all deeds or instruments in writing for the transfer or assignment of copyrights, ... shall and may be recorded in the office where the original copyright is deposited and recorded."[4]

What form of assignment was requisite or sufficient under these several acts is a question which has not received thorough judicial consideration. The Supreme Court of New York, in 1832, following the English decision in Power *v.* Walker, ruled that an assignment under the act of 1790 must be in writing, but that a verbal agreement to assign was valid.[5] Besides this decision of a State court, there are *dicta* respecting the form of assignment by two justices of the Supreme Court of the United States. In Stevens *v.* Cady, Mr. Justice Nelson, applying the English theory to the license clause[6] of the statute of 1831, remarked that an assignment "must be in writing, and signed in the presence of two witnesses;" but added that it was "unnecessary, however, to express an opinion upon this point."[7] In Little *v.* Hall, Mr. Justice McLean said *obiter* that "a formal transfer of a copyright by the supplementary act of

[1] s. 1.
[2] s. 2; 1 U. S. St. at L. 124.
[3] s. 7; 4 Id. 438.
[4] Id. 728.
[5] Gould *v.* Banks, 8 Wend. (N. Y.) 562.
[6] s. 7.
[7] 14 How. 532.

the 30th of June, 1834, is required to be proved and recorded as deeds for the conveyance of land ; and such record operates as notice."[1] But this question was not before the court. Mr. Curtis, more soundly interpreting the meaning of the act of 1834, says : " This statute seems to recognize the doctrine that transfers of copyright must be in writing; but it does not expressly declare that they shall be so."[2]

Meaning of Statute in Force. — There is, then, no reported decision which can be regarded as an express authority, binding on the federal courts, to the effect that, under the statute cited, an assignment of copyright was required to b in writing. It remains to consider the statute passed in 1870, and now in force. Its meaning respecting the question under consideration has not been judicially considered. Like the antecedent acts, it declares unlawful the publication of a copyrighted book " without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses."[3] Unlike those statutes, it provides that " 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."[4]

Mode of Transfer before Publication. — Whatever effect these provisions may have respecting the requisites of an assignment of the copyright in a published book, the statute cannot, in my judgment, be rightly construed as governing a transfer made before publication, and hence before the statutory right attaches. In other words, if the statute can be considered as regulating the mode of transfer, it is only in the case of works in which the statutory copyright has vested that it can have this effect ; and such copyright will not vest in an unpublished work.[5] The important distinction between a transfer made before and one

[1] 18 How. 171.

[2] Law of Copyright (Boston, 1847), p. 233.

[3] U. S. Rev. St. s. 4964.

[4] s. 4955.

[5] It is not necessary here to consider the exceptional case in which an inchoate or equitable statutory right may exist in a work between the time of filing the title and the time of publication. The question must be treated with reference to the general rule, that only published works are protected by statutory copyright.

made after statutory copyright has vested, which is to be observed in determining whether the mode of assignment is governed by the statute, has been fully considered in the examination of the English statutes, which, in this respect, are like our own.[1] It is enough here to add, that the act of Congress now in force expressly provides for granting copyright in the first instance to the owner of a manuscript;[2] and hence copyright will vest *ab initio* in the owner, whether he is or is not the author. When, therefore, a person has become possessed of the author's property in an unpublished work, he is the proper one, as owner, to secure the statutory copyright. As his title was acquired before publication, its validity is determined by the common law under which it was derived, and not by the statute.[3]

Must Assignment of Copyright in Published Book be in Writing? — We come now to the inquiry, whether the statute prescribes the mode of assigning the copyright in a published work. The solution of this question depends on the meaning to be given to sections 4955 and 4964 above referred to. The latter makes no reference, direct or indirect, to the subject of assignment; but the theory has gained currency in England, from whose statutes this clause has been copied, and, as we have seen, has been twice recognized in this country, that the provision under consideration, though intended to apply simply to licenses to publish, must be construed to prescribe the mode of assigning the copyright. I have already endeavored to show that this construction is unwarranted and indefensible.[4] As it is not supported by any authority binding on a court of the United States, it is to be hoped that, when the question is presented for judicial determination, the subject will be thoroughly examined, and the decision grounded on sound principles.

The only express provision in the Revised Statutes relating to assignments is section 4955, which declares that "copyrights

[1] *Ante*, pp. 306–308.

[2] U. S. Rev. St. s. 4952.

[3] In Little *v.* Gould, 2 Blatchf. 165, 362, the author's rights in manuscript reports were held to have passed to the Secretary of State, although there was no writing. It was "regarded as an assignment by operation of law." Conkling, J., Ibid. 183. To the same effect is Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402.

[4] *Ante*, p. 304 *et seq.*

shall be assignable in law by any instrument of writing," and provides for the recording of such assignments. This language plainly allows that an assignment need not be attested. Any writing, clearly expressing the intention of the parties to that effect, will be sufficient to pass the ownership of copyright. It has also been decided that an assignment, though not recorded, will be valid as between the parties, and as to all other persons not claiming under the assignor.[1]

Does section 4955 require that an assignment of copyright to be valid under the statute must be in writing? If Congress intended to make such a law, it failed to use the proper language for that purpose. The words, "copyrights shall be assignable in law by any instrument of writing," are declaratory, and not mandatory. Their true meaning, as determined by established principles of construction, is, that copyright is transferable, and that a simple writing, without attestation, seal, or other formality, shall be sufficient as a valid assignment. The act does not expressly declare, and its language strictly interpreted does not imply, that a writing shall be necessary, and that an assignment not in writing shall be void. But it is reasonable to suppose that, in enacting this provision, Congress intended to regulate the mode of transferring copyright, and to make a writing essential to a valid assignment. And the courts may construe the statute in accordance with this intent, rather than follow the strict meaning of the language used.

The question, therefore, as to the form of assignment remains for judicial determination. But whatever the law may be declared to be in the case of assignments made after publication, the statute cannot rightly be held to apply to transfers of literary property made before publication. In such case, the form of assignment is governed by the common law, which, as has been shown, recognizes the validity of parol transfers.[2]

Transmission by Bequest and in Case of Intestacy. — By section 4952, copyright is secured to the executors or administrators of the owner. It may, therefore, be transmitted by

[1] Webb *v.* Powers, 2 Woodb. & M. 407, 510. This case was decided under the act of 1834, whose governing clause was the same in effect as that contained in the statute now in force.

[2] See *ante*, p. 104.

bequest; and there seems to be no good reason why, in case of intestacy, it will not pass to heirs without the necessity of a writing.[1]

In Case of Bankruptcy. — The question whether copyright will pass from a bankrupt to his assignee without a writing does not appear to have been directly adjudicated. In Mawman *v.* Tegg, where it appeared that the author, who was one of the original owners and publishers of a work, had gone into bankruptcy, and his copyright had passed to assignees, from whom it was bought by the plaintiffs, Lord Eldon said: "Whatever question there may be in some cases, whether an interest in copyright does or does not pass without writing, it would, I apprehend, be difficult to maintain that there must be an instrument in writing between the bankrupt and his assignees."[2]

It has been held that statutory copyright must be in existence before it can be assigned in law.[3] But an agreement may be made to assign at a future time;[4] in which case an equitable title may vest in the assignee.[5] So the owner's common-law rights may be assigned before publication; in which case the statutory copyright may be secured by the assignee.[6]

[1] In Latour *v.* Bland, Abbott, J., said, that under the statute of Anne, which was silent concerning the transmission of copyright by bequest and in case of intestacy, "if the author died without assigning his copyright, the interest would go to his heirs." 2 Stark. 385. Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402, was a case in which copyright had been transmitted to heirs; but whether by bequest or otherwise does not appear from the report.

[2] 2 Russ. 392. *In re* Curry, the Irish Commissioner in Bankruptcy expressed the opinion that copyright would pass to the bankrupt's assignee without a writing. 12 Ir. Eq. 391, 392. See also the views of Lord Ivory, *ante*, pp. 314, 315, and Stevens *v.* Benning, 1 Kay & J. 168, on ap. 6 De G., M. & G. 223.

[3] Colburn *v.* Duncombe, 9 Sim. 151; Sweet *v.* Shaw, 3 Jur. 217; Pulte *v.* Derby, 5 McLean, 328; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402, 414. "It is true," said Vice Chancellor Shadwell, in Sweet *v.* Shaw, "not only with respect to an assignment, but also with respect to a lease, as Littleton points out, that there cannot be a release of a future right, and in consequence, there cannot be an assignment of any thing that does not now exist." 3 Jur. 219.

In Little *v.* Gould, 2 Blatchf., the contract between the Secretary of State of New York and the plaintiffs had reference to matter not in existence, and it was declared to be an assignment of copyright. The equitable title clearly passed to the plaintiffs. The court seems not to have expressly considered the question of the legal title.

[4] Gould *v.* Banks, 8 Wend. (N. Y.) 562; Leader *v.* Purday, 7 C. B. 4.

[5] Sims *v.* Marryat, 17 Q. B. 281; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402.

[6] See *ante*, pp. 238–242.

Form of Written Assignment. — No particular form of writing has been prescribed as essential to make a good assignment. There appears to be no reason why any writing may not be sufficient which clearly expresses that an assignment of the copyright is made for a good consideration. It has been held in two English cases that a receipt for the purchase-money is not a valid assignment of the copyright. But in one it appeared that the receipt had been destroyed, and the plaintiff denied that he had made an assignment to the defendant.[1] And in the other the receipt had reference to the sale of the American copyright alone;[2] moreover, the decision was rendered before the doctrine of Davidson *v.* Bohn, that two witnesses are necessary to a valid assignment, had been overruled. In the Scotch case of Jeffreys *v.* Kyle, Lords Ivory[3] and Wensleydale[4] expressed the opinion that a receipt is sufficient as an assignment.

There seems to be no reason why the same writing may not serve as a receipt for the purchase-money and an assignment of the copyright.[5] But, to operate as an assignment, it would doubtless be necessary that the writing should contain the agreement itself by which the copyright has been passed. When the agreement is expressed in one paper, and the payment of the money acknowledged in another, the former, and not the latter, is obviously the assignment. And not unfrequently the money for the copyright is paid, and a receipt given, on an agreement that the assignment shall be made at some future time. In this case, no transfer is effected when the receipt is passed; and a writing which shows that such was the agreement cannot operate as a legal assignment.[6]

In Cocks *v.* Purday, a sale made by letter was held, under the circumstances, to be a valid transfer.[7]

[1] Latour *v.* Bland, 2 Stark. 382.

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

[3] "If there is not here," said Lord Ivory, "an express assignation, there is certainly an implied assignation, corroborated by the writing in this lady's book, in which she notes the disposal of her copyrights." 18 Sc. Sess. Cas. 2d ser. 911.

[4] 3 Macq. 617.

[5] For the effect which a receipt may have on the agreement of the parties, see Howitt *v.* Hall, 6 L. T. N. S. 348; Strahan *v.* Graham, 16 L. T. N. S. 87, on ap. 17 Id. 457.

[6] Colburn *v.* Duncombe, 9 Sim. 151; Sims *v.* Marryat, 17 Q. B. 281; Levi *v.* Rutley, Law Rep. 6 C. P. 523.

[7] 5 C. B. 860. See this case considered *ante*, p. 313.

In Lacy *v.* Toole, which was an action against the defendant for representing a play written by the plaintiff, the defence was that the latter was not the owner of the playright in the piece. A letter was produced in which the plaintiff, in reply to a letter from a third person, had written to the latter, "I accept the offer you therein make me, and agree to the conditions you propose for cancelling my debt to you; viz., to let you have my drama of Doing for the Best, in discharge of £10 of the sum due." The court expressed the opinion that this letter was a valid assignment, but left it to the jury to find whether the agreement was to transfer the property in the play, or simply to license its use. The verdict was in favor of the defendant, and the letter was accordingly held to amount to an assignment.[1]

Sale of Stereotype Plates. — As the copyright in a work is entirely distinct from the property in the stereotype plates from which it is printed, a sale on execution of such plates gives to the buyer no right to print and publish copies of the work.[2] But when the owner of the copyright voluntarily sells

[1] 15 L. T. N. S. 512.

[2] Stevens *v.* Cady, 14 How. 528; Stevens *v.* Gladding, 17 Id. 447; Carter *v.* Bailey, 64 Me. 458. "The sole question is," said Mr. Justice Curtis, "whether the mere fact that the plaintiff owned the plate, attached to it the right to print and publish the map, so that this right passed with the plate by a sale on execution. And upon this question of the annexation of the copyright to the plate it is to be observed, first, that there is no necessary connection between them. They are distinct subjects of property, each capable of existing, and being owned and transferred, independent of the other. It was lawful for any one to make, own, and sell this copperplate. The manufacture of stereotype plates is an established business, and the ownership of the plates of a book under copyright may be, and doubtless in practice is, separated from the ownership of the copyright. If an execution against a stereotype founder were levied on such plates, which he had made for an author and not delivered, the title to those plates would be passed by the execution sale, and the purchaser might sell them, but clearly he could not print and publish the book for which they were made. The right to print and publish is therefore not necessarily annexed to the plate, nor parcel of it.

"Neither is the plate the principal thing, and the right to print and publish an incident or accessory thereof. It might be more plausibly said that the plate is an incident or accessory of the right; because the sole object of the existence of the plate is as a means to exercise and enjoy the right to print and publish. Nor does the rule that he who grants a thing, grants impliedly what is essential to the beneficial use of that thing, apply to this case. A press, and paper, and ink are essential to the beneficial use of a copperplate; but it would hardly be contended that the sale of a copperplate passed a press, and paper, and ink, as incidents of the plate, because necessary to its enjoyment.

"The sale of a copperplate passes the right to such lawful use thereof as the purchaser can make, by reason of the

the plates, the rights acquired by the buyer are to be determined by the intention of the parties. "What rights would pass by such a sale," said Mr. Justice Curtis, "would depend on the intentions of the parties, to be gathered from their contract and its attendant circumstances. In this case, the owner of the copyright made no contract of sale, and necessarily had no intention respecting its subject-matter." [1]

The opinion has been expressed *obiter* by the Supreme Court of the United States that copyright is not subject to seizure and sale on execution,[2] but that it may be reached by a creditor's bill.[3]

ownership of the thing he has bought; but not the right to a use thereof, by reason of the ownership of something else which he has not bought, and which belongs to a third person. If he has not acquired a press, or paper, or ink, he cannot use his plate for printing, because each of these kinds of property is necessary to enable him to use it for that purpose. So, if he has not acquired the right to print the map, he cannot use his plate for that purpose, because he has not made himself the owner of something as necessary to printing as paper and ink, or as clearly a distinct species of property as either of those articles. He may make any other use of the plate of which it is susceptible. He may keep it till the limited time during which the exclusive right exists shall have expired, and then use it to print maps. He may sell it to another, who has the right to print and publish; but he can no more use that right of property than he can use a press, or paper, which belongs to a third person. . . .

"For these reasons, as well as those stated in 14 How. 528, our conclusion is, that the mere ownership of a copperplate of a map, by the owner of the copyright, does not attach to the plate the exclusive right of printing and publishing the map, held under the act of Congress, or any part thereof; but the incorporeal right subsists wholly separate from and independent of the plate, and does not pass with it by a sale thereof on execution." Stevens *v.* Gladding, 17 How. 452.

[1] Stevens *v.* Gladding, 17 How. 452. See also Fullarton *v.* M'Phun, 3 Sc. Sess. Cas. 2d ser. 243.

[2] "There would certainly be great difficulty," said Mr. Justice Curtis, "in assenting to the proposition that patent and copy rights held under the laws of the United States are subject to seizure and sale on execution. Not to repeat what is said on this subject in 14 How. 531, it may be observed that these incorporeal rights do not exist in any particular State or district; they are coextensive with the United States. There is no provision of any act of Congress, or in the nature of such rights themselves, to give them operation elsewhere, so as to subject them to the process of courts having jurisdiction limited by the lines of States and districts. That an execution out of the Court of Common Pleas for the county of Bristol, in the State of Massachusetts, can be levied on an incorporeal right subsisting in Rhode Island or New York, will hardly be pretended. That by the levy of such an execution the entire right could be divided, and so much of it as might be exercised within the county of Bristol sold, would be a position subject to much difficulty. These are important questions, on which we do not find it necessary to express an opinion, because in this case neither the copyright, as such, nor any part of it, was attempted to be sold." Stevens *v.* Gladding, 17 How. 451. See also Stevens *v.* Cady, 14 Id. 531.

[3] "No doubt," said Mr. Justice

RENEWAL OF COPYRIGHT CONSIDERED WITH REFERENCE TO ASSIGNMENT.

The American statute now in force grants copyright absolutely for twenty-eight years, and provides that the author if living, or his widow or children if he be dead, shall have the same exclusive right for the further term of fourteen years.[1] The act of 1831 was to the same effect.[2] The question arises, whether an assignment of copyright made under either of these statutes divests the author, or his widow and children, of the right to the second term of protection thus provided for, and whether the assignee becomes vested with that right. This question cannot arise in England, because the statute of that country does not provide for such extension.[3]

Author may Divest Himself and Family of Right to Renewal. —It may be claimed that the provision of the American statute above referred to was intended for the personal benefit of the author or of his family. It is reasonably clear that the copyright for the additional term will vest only in the author, if he be living. But there appears to be no reason why he may not divest himself of the right thus reserved for him, either by parting absolutely with his entire interest in a work, or by an agreement to convey the copyright for the additional term when it shall be secured. In the former case, he has no interest in the work, and cannot rightly claim the additional privilege guaranteed to him by the statute. In the latter case, he is bound by his agreement to transfer to another the right when it shall be secured to him. The principle is the same in case the author be not living at the end of the first term. Then the

Nelson, "the property may be reached by a creditor's bill, and be applied to the payment of the debts of the author, the same as stock of the debtor is reached and applied, the court compelling a transfer and sale of the stock for the benefit of the creditors. But, in case of such remedy, we suppose it would be necessary for the court to compel a transfer to the purchaser, in conformity with the requirements of the copyright act, in order to vest him with a complete title to the property." Stevens *v.* Cady, 14 How. 531. See also Cooper *v.* Gunn, 4 B. Mon. (Ky.) 594.

[1] U. S. Rev. St. ss. 4953, 4954.

[2] ss. 1, 2; 4 U. S. St. at L. 436.

[3] See Marzials *v.* Gibbons, Law Rep. 9 Ch. 518, as to the construction of section 4 of 5 & 6 Vict. c. 45, which provides for an extension of the copyright in books published before the statute was passed. See also Brooke *v.* Clarke, 1 Barn. & Ald. 396.

copyright for the additional term will vest only in his widow or children. But their rights are dependent on his. Their title is derived from him, and stands or falls with his. There must be a good foundation on which to rest their claim. If the author has parted with his absolute property in the work, and could not, if living, himself secure the copyright, it seems to be clear that his representatives are equally incapable of securing it, for the reason that the work does not belong to them. So, when he has bound himself to assign his future term, there is no reason why such agreement should not be equally binding on them after his death, unless there is in it some condition or other circumstance to warrant a different construction. The provision under consideration was, doubtless, intended to secure to the author and his family a privilege which is not given directly to an assignee; but it is not reasonable to suppose that the object of the statute was to reserve to the author or his family any rights with which he has voluntarily parted, and for which he has received and enjoyed the consideration.[1]

Effect of Transfer before Publication on Renewal. — When the transfer is made before publication, the assignment is not of the statutory copyright, because that is not then secured, and does not exist.[2] When an author has conveyed all his right, title, and interest in a manuscript, the assignee becomes the absolute owner, and may secure to himself the copyright for the term of twenty-eight years. The author, having parted with his entire property, can rightly claim no further interest in it, and has nothing on which to base a claim for copyright during the additional term of fourteen years provided for an author, his widow or children. But in transferring the exclu-

[1] The 8 Anne, c. 19, after granting copyright for an absolute term of fourteen years, provided, section 11, "that after the expiration of the said term of fourteen years the sole right of printing or disposing of copies shall return to the authors thereof, if they are then living, for another term of fourteen years." In Carnan *v.* Bowles, 2 Bro. C. C. 80, where it appeared that a general assignment of the author's interest in a work had been made, it was contended by counsel that the copyright for the absolute term alone had passed, and that the contingent term was intended by Parliament as a "personal bounty to the authors only." The court held that the author had conveyed all his interest in the copyright, the contingent as well as the absolute term. To the same effect is Rennet *v.* Thompson, cited in Carnan *v.* Bowles, Ibid. 81.

[2] Pulte *v.* Derby, 5 McLean, 328; Paige *v.* Banks, 7 Blatchf. 152, on ap. 13 Wall. 608.

sive right to publish his manuscript, the author may limit the duration of that right in the assignee to twenty-eight years, and reserve to himself all further rights. In this case, also, the assignee may secure, and will be the owner of, the statutory copyright for twenty-eight years; but at the end of that period the author, or his widow or children, becomes entitled to secure the copyright for the further term of fourteen years.

Rights of Parties Determined by Agreement. — Whether the entire or a limited property in the work thus passes from the author to the assignee depends on the agreement made by them. If that is precise and clear, the respective rights of the parties to it are easily determined. But not unfrequently the agreement is expressed in such words that it is doubtful whether the entire or a limited interest was intended to be conveyed. Its meaning then becomes a question for judicial construction. An absolute sale of a manuscript, an assignment of all right, title, and interest in it, an agreement that the assignee shall have for ever the exclusive right of publication, would naturally, in the absence of any thing to the contrary, be construed as a transfer of the entire property. But when "the copyright" is assigned, it may admit of doubt whether the parties had in view the statutory term of twenty-eight years, which is the only term which the statute gives to an assignee, or whether by the word copyright was meant the author's entire interest in the work.[1]

Absolute Assignment before Publication gives Unlimited Right to Publish. — In Paige *v.* Banks, it had been agreed that Alonzo C. Paige, the reporter of the New York Court of Chancery, in consideration of $1,000 to be paid for each volume of manuscripts, "shall and will furnish the said Gould & Banks,

[1] In Rundell *v.* Murray, it appeared that the plaintiff had given to the defendant the right to publish a manuscript, without any limitation as to time, and at the end of fourteen years claimed the copyright for the contingent term provided for by the statute of Anne. Lord Eldon said, "I conceive that an author will not be taken to have assigned his contingent right in case of his surviving fourteen years, unless the assignment is so expressed as to purport to pass it; but I have been at a loss throughout the argument to understand what difference the expiration of that term can make in this case." Jac. 315. Without deciding in whom the copyright was, but considering that the plaintiff had given an unconditional right to publish, and had acquiesced in the publication for fourteen years, the Chancellor dissolved the injunction which had been granted.

in manuscript, the reports of the said court for publication, and that the said Gould & Banks shall have the copyright of said reports to them, and their heirs and assigns for ever." The copyright was entered in the name of the publishers. At the end of twenty-eight years the author took the necessary steps to secure to himself the copyright for the further term of fourteen years; and after his death his executors sought to enforce that right against the defendants, who also had entered in their own names the copyright for the same term. The agreement was made when the act of 1790 was in force, under which copyright could not last longer than twenty-eight years. The additional term of fourteen years was provided for by the statute of 1831, which was passed after the agreement had been made. For the plaintiffs, it was contended that the words in the contract, that the publishers "shall have the copyright of said reports," were to be construed as limiting the transfer to the copyright known to the law at the date of the contract; viz., for twenty-eight years. The Supreme Court of the United States, affirming the judgment of the Circuit Court,[1] held that the agreement was for an unlimited publication, and that the publishers had acquired, as against the author, the perpetual right to publish and sell the work. Hence, the latter had for ever barred himself from interfering with the right of the former to publish.[2]

[1] 7 Blatchf. 152.

[2] 13 Wall. 608. The contract was thus construed by Mr. Justice Blatchford in the Circuit Court: "It is to be noted, in respect to this agreement, that Gould & Banks are not limited by it to the publication of any specified number of copies of each volume. Mr. Paige is to furnish the reports in manuscript, for publication. The publication is to be made by Gould & Banks. The number of copies to be published of each volume is unrestricted. Mr. Paige is to be paid one thousand dollars for each volume published. The publication spoken of everywhere in the agreement is the publication of a volume. When such volume is once published, Mr. Paige is to have, within six months after the publication thereof, that is, within six months after the first printed copy is made public, the one thousand dollars. No matter how many copies of the volume shall be, after that, printed or sold by Gould & Banks, Mr. Paige is never to have any more from them, as compensation, in respect of such volume, than the one thousand dollars. These provisions clearly give to Gould & Banks, as against Mr. Paige, the perpetual right to print, publish, and sell copies of such first volume, without giving to Paige any further compensation, in respect thereof, beyond the one thousand dollars, unless some other clause in the agreement restricts such right on the part of Gould & Banks.

"It is claimed that such right is restricted by the provision that Gould & Banks shall have the copyright of the reports to them, and their heirs and assigns for ever. It is contended that, under that provision, the whole agree-

The court did not express an opinion as to whether the copyright entered by the author for the term of fourteen years was

ment is to the effect that Gould & Banks are to have, as against Mr. Paige, the exclusive right to publish and sell the volumes of reports no longer, at most, than during the term known to the law, under the act of 1790, at the date of agreement, as the term for which a copyright could be obtained; that is, twenty-eight years, or not beyond the 5th of January, 1858. But the provision in respect to copyright was inserted in the agreement for the sole purpose, manifestly, of making it clear that Gould & Banks were to be understood to be such assignees of Mr. Paige, as the author of the books, as could, under the act of 1790, secure to themselves a copyright. There is no provision in the agreement for the taking out of a copyright by Mr. Paige, and for the transfer thereof to Gould & Banks. The provision in the agreement in respect to copyright cannot be held to cause the agreement to confer any less rights on Gould & Banks, if such provision be availed of by them, than if they do not avail themselves of it. If they had not chosen to take out any copyright, as proprietors, of any volume of the reports, they would have had, as against Mr. Paige, the perpetual right to print, publish, and sell the reports. If they had not chosen to avail themselves of the provision of the agreement in regard to copyright, in respect to the first volume, the construction of the agreement would have been in no manner dependent upon the existence or contents of such provision. Nor can it be dependent thereon when, as against others than Mr. Paige, Gould & Banks have availed themselves of the privilege of copyrighting such volume." 7 Blatchf. 155.

In delivering the opinion of the Supreme Court, Mr. Justice Davis said: "Independent of any statutory provision, the right of an author in and to his unpublished manuscripts is full and complete. It is his property, to his disposal. He may assign a qualified interest in it, or make an absolute conveyance of the whole interest. The question to be solved is, Do the terms of this agreement show the intent to part with the whole interest in the publication of this book, or with a partial and limited interest? . . . It is insisted by the appellants that a just interpretation confines the agreement to a mere assignment of the interest in such copyright, as is provided for in the act of 31st May, 1790; that this was the law in force when the contract was entered into; that the fourteen years therein provided for, with the right to a prolongation of fourteen years more, is all that the publishers at most are entitled to; and that they are excluded necessarily from the benefit of the provisions conferred by the act of the 3d February, 1831, granting to authors an additional extension of fourteen years. In our view this is too narrow a construction. The fair and just interpretation of the terms of the agreement indicate unmistakably that the author of the manuscript, in agreeing to deliver it for publication at a stipulated compensation, intended to vest in the publishers a full right of property thereto. The manuscript is delivered under the terms of the agreement 'for publication.' No length of time is assigned to the exercise of this right, nor is the right to publish limited to any number of copies. The consideration is a fixed sum of one thousand dollars. Whether one or one hundred thousand copies were published, the author was entitled to receive, and the publishers bound to pay, this precise amount.

"As between the parties to the agreement the absolute interest was conveyed by the stipulation of Paige, that he would furnish the manuscript for publication. Paige could no longer do any act after such delivery for publication inconsistent with the absolute ownership of the publishers. But it

valid as against others than the defendants. But there can be little doubt that it was void, and such is the effect of the decision. Nor was it necessary to inquire into the validity of the copyright, which had been taken out in the name of the defendants for the same term. But it has been shown elsewhere that an assignee is not entitled to secure copyright for this additional term.[1]

Absolute Assignment of Copyright held to Carry Future Playright. — In an English case, it appeared that a dramatist had assigned his copyright in a farce to be the "absolute property" of the assignee, who published it and became the owner of the statutory copyright. There was then no statutory right of representation; but afterward the 3 & 4 Will. IV. c. 15, was passed, giving to the author or his assignee the sole liberty of performing a dramatic composition. It was held that the author's entire interest had passed to the assignee by the assignment, and that the latter, therefore, was entitled to the exclusive right of representation conferred by the statute above mentioned.[2]

Effect of Assignment after Publication on Renewal. — After

was proper, for the protection of the publishers, that they should be in position to assert the remedies given by the law against intruders; and it is to this end it is added in the agreement, '*and* the said Gould & Banks shall have the copyright of said reports to them, their heirs and assigns for ever.' It is not covenanted that the publishers should take out the copyright, nor is there any express agreement for an assignment to them by Paige, if he should take it out. Undoubtedly, the provision that the publishers 'should *have* the copyright' would authorize them to apply for it; and, if Paige had taken it out in his own name, it would have inured to their benefit. But, as between Paige and the publishers, the rights of the latter could not be estimated differently, whether they had or had not availed themselves of the provisions of the act." 13 Wall. 614.

See also Cowen *v.* Banks, 24 How. Pr. 72, where the court expressed the opinion that the written agreement, "if there were nothing else in the case," would be rightly construed as limiting the interest assigned to the copyright for the first term of fourteen years given by the act of 1790. But the author having testified in a previous action that in making the agreement his intention was to convey his "whole interest in the copyright of the work," this testimony was admitted as evidence in the present case; and the court held that the assignees had acquired the author's contingent interest in the second term of fourteen years given by the act of 1790, and that they were entitled to become the absolute owners of this term, under section 16 of the act of 1831. It was ordered that the contract be reformed so as to conform to the intention of the parties.

[1] See *ante*, p. 261.

[2] Cumberland *v.* Planché, 1 Ad. & El. 580. For the statutory provisions now in force in England concerning the transfer of playright, see Chap. XV.

a book has been published, and within twenty-eight years from the time of publication, the only copyright in existence, and hence the only one which can be assigned, is that secured for twenty-eight years. The copyright for the second term of fourteen years cannot be assigned before it has been secured, and it cannot be secured until the first term has ended. I have already endeavored to show that the author may bind himself by an agreement to assign it when it shall have been secured, and that such agreement may be made binding on his personal representatives; also, that he may make such assignment of his rights in a published work as will bar him and his family from claiming for themselves the copyright for the future term of fourteen years.[1] What effect an assignment which has been made after publication will have on the future rights reserved for the author by the statute will depend, as in the case of a transfer made before publication, on the nature of the agreement. For the author may part with every right and interest which he has in the work, or he may transfer the existing statutory copyright alone. And the question in each case is, whether the language of the agreement is comprehensive enough to embrace all rights in the work, or whether it properly applies only to the existing statutory copyright. An assignment of the "copyright" would naturally have the latter restricted meaning, unless there is something else to show that a greater interest was intended by the parties to be passed. Thus, where the author had assigned "the copyright" of one book, and, with reference to another, had agreed that "the copyright shall be considered the joint and equal property" of himself and the assignee, the Circuit Court of the United States held that the assignment did not extend beyond the first term of fourteen years which, at the time the agreement was made, had been secured under the act of 1790 then in force; and that no interest was passed in the second term of fourteen years given by that statute, nor in the term of fourteen years created for the benefit of the author by the act of 1831, which was in force when the cause of action arose.[2]

[1] See *ante*, p. 326; also, Paige *v.* Banks, 7 Blatchf. 152, on ap. 13 Wall. 608.

[2] Pierpont *v.* Fowle, 2 Woodb. & M. 41–45. "In respect to both copyrights, also," said Mr. Justice Wood-

Assignee cannot make Renewal. — Section 4954 of the Revised Statutes, which provides for a renewed term of copyright, makes no mention of an assignee. The view has been elsewhere expressed that the copyright for this term will not vest *ab initio* in an assignee, but only in the author, his widow or children.[1] Hence, when an author has assigned his entire interest in a work, and has thereby or otherwise barred himself and his family from securing the copyright for the second term, the assignee is powerless to make the renewal for his own benefit.

Author may Assign Renewed Term. — But when the copyright has been acquired by the person entitled to secure it, can it be transferred to an assignee? This question has not been judicially determined.[2] The object of the legislature manifestly was to create an additional right for the express benefit of the author and his family. This object would not be promoted, but rather defeated, by denying to him and them the power to transfer the right after it has been secured. The value of property is increased by the capacity of the owner to alienate it. Moreover, the provision of the statute, that "copyrights shall be assignable,"[3] doubtless applies to those granted for fourteen years not less than to those for twenty-eight years. The sound construction, then, would seem to be that the copy-

bury, "the complainant conveyed *eo nomine*, not a term of twenty-eight years, nor one as long as he should be entitled, nor all his interest of every kind in the book or its manuscript; but simply, as to the first, 'the copyright of said book,' and, as to the last, 'the copyright' of it 'shall be considered the joint and equal property of said P. and F.' The only copyright then existing or taken out for either was for fourteen years only. One contract was dated July 21, 1823, and one July 12, 1827. That copyright which had been then taken out was the subject-matter of the contracts. No words are used looking beyond that; no consideration was paid or talked of beyond that. There was no mutuality beyond that; for the payment of the last was made in another copyright, in another book, where the author might not secure the first term, or, if he did, might not be willing to renew the copyright. The renewal of the copyright in either of these was then uncertain, and not, to appearance, contemplated by either side. When the assignment was made, it doubtless referred to what was in existence, and not to any future contingency, nor to what was personal for the author, if spared to old age, nor for what any compensation was specially either asked or made." Ibid. 42. See Cowen *v.* Banks, 24 How. Pr. 72.

[1] See *ante*, p. 261.

[2] In Paige *v.* Banks, as has been shown, *ante*, p. 328, it appeared that the copyright for the additional term of fourteen years had been renewed by the assignees. But the court was not called upon to inquire into its validity.

[3] U. S. Rev. St. s. 4955.

right for the renewed term of fourteen years is capable of being assigned after it has been secured.

Limited Assignment.

The question has been raised whether copyright can be divided, and any part of it assigned. The English statute provides for the registration by the owner of a copyright "or of any portion of such copyright," and enacts that such registered owner, by entry in the registry, may assign "his interest, or any portion of his interest" in the copyright.[1] The American statute is silent on this point.

One or More of Several Rights in a Work may be Assigned. — It is clear that, without destroying the unity of the copyright, a qualified interest, or certain rights embraced in it, may be assigned. Thus, the owner may make to one or more persons an absolute conveyance of any part of his interest in the whole. In this case, the copyright becomes the undivided property of joint owners. The exclusive right of publication and sale vests, not in one independently of the others, but in all. So, also, statutory copyright embraces several rights which, though created and conferred by the same statute, may be regarded as independent and distinct rights, capable of being separately owned and used by different persons. Thus, the statute gives to the owner of a dramatic composition the exclusive right to print it, and the sole liberty of performing it. Either of these rights may be absolutely assigned independently of the other;[2] and in England this fact is recognized by the statute. Whether one or both of these rights pass by the assignment will depend on the intention of the parties, as expressed in their agreement.[3] Again, in the United States, an author, in securing copyright in a literary composition, may reserve to himself the exclusive right to translate or dramatize it; and, as has been elsewhere maintained,[4] he has the exclusive right, without special reservation, to abridge it. The owner may,

[1] 5 & 6 Vict. c. 45, s. 13. Referring to this provision, Mr. Justice Maule said, that the author or owner "may assign the copyright to less than the full term." Davidson *v.* Bohn, 6 C. B. 458.

[2] Roberts *v.* Myers, 13 Monthly Law Reporter, 396.

[3] See Chap. XV., Transfer of Playright.

[4] See Chap. IX.

doubtless, assign any of these rights without parting with the others, or the original copyright. In this case, also, the copyright in the original, that is, the right to publish and sell it, continues whole. The author parts with the right, which is embraced in the original copyright, to translate, dramatize, or abridge. Another may be thus clothed with authority to publish a translation, dramatization, or abridgment; but such production, when published, is protected by a new copyright, independent of that which has vested in the original work. An absolute assignment of the copyright would doubtless carry the right to translate, dramatize, or abridge the work, unless such right is specially excepted in the assignment. If a translation, dramatization, or abridgment has been published and copyrighted, no interest in the copyright of such publication could pass by a transfer of the copyright in the original work.

Copyright Indivisible as to Locality. — There can be little doubt that copyright is indivisible as to locality. The property is of such a nature that it cannot be practically divided among independent owners, so that each may have the exclusive right of publication and sale for a distinct part of the same country. In the United States, for instance, it would be obviously impracticable for one person to exercise the exclusive right of publishing and selling a book in New England, another in the Southern, and another in the Western, States. On this principle, the persons claiming to be exclusive publishers of the same book might be as numerous as the States. Any number of persons in the same or in different States may be authorized to publish contemporaneously. But in that case there is no assignment. The author remains the absolute owner of the copyright, and each publisher is a mere licensee, without power to prevent publication or sale by any other person.[1]

Copyright may be Assigned for One or More of Several Countries. — This difficulty does not arise, nor is the principle the same, when the right of publication for an entire country is transferred. In Jefferys *v.* Boosey, where it appeared that Ricordi, of Milan, who was the owner of all rights in Bellini's Opera, *La Sonnambula*, had assigned to Boosey the right of publication

[1] See Keene *v.* Wheatley, 9 Am. Law Reg. 46.

in Great Britain, Lord St. Leonards, Lord Chief Baron Pollock, and Mr. Baron Parke expressed opinions that copyright is indivisible as to locality, and that there cannot be an assignment of a part of the right for a particular country or a part of a country.[1] But a majority of the judges who advised the House of Lords were of opinion, and the effect of the judgment is, that the owner might assign the exclusive right of publication in Great Britain, and reserve to himself the Austrian copyright.[2] So an American author, who on certain conditions can secure a copyright for his work both in the United States and in England, may make a valid assignment of the English copyright to one person, and either himself retain or assign to another the American copyright.[3] But in such case there is no division of copyright. The copyright granted by one government is wholly distinct from that conferred by another. When protection is secured for the same work in different countries, there is a separate and independent copyright for each country. Each copyright is a unit, and may be absolutely assigned independently of another; and no inconvenience will necessarily result therefrom.[4]

[1] "Now, if there is one thing," said Lord St. Leonards, "which I should be inclined to represent to your Lordships as being more clear than any other in this case, it is, that copyright is one and indivisible. I am not speaking of the right to license; but copyright is one and indivisible, or is a right which may be transferred, but which cannot be divided. Nothing could be more absurd or inconvenient than that this abstract right should be divided, as if it were real property, into lots, and that one lot should be sold to one man, and another lot to a different man. It is impossible to tell what the inconvenience would be. You might have a separate transfer of the right of publication in every county in the kingdom." 4 H. L. C. 992. See Views of Pollock, C. B., Ibid. 940; of Parke, B., Ibid. 939.

[2] The House of Lords decided that the English copyright was not valid, but on the ground that the author was a foreigner, and not in England at the time of publication. Numerous cases might be cited, such as D'Almaine *v.* Boosey, 1 Y. & C. Exch. 288, and Cocks *v.* Purday, 5 C. B. 860, where a foreigner, retaining the copyright for his own country, had assigned the right of publication in Great Britain, and the validity of the English copyright was not questioned on the ground that the author's entire rights in the work had not been assigned.

[3] See Low *v.* Ward, Law Rep. 6 Eq. 415; Routledge *v.* Low, Law Rep. 3 H. L. 100.

[4] In Jefferys *v.* Boosey, where it appeared that the assignor, reserving to himself the Austrian copyright, had assigned the British copyright, Mr. Justice Crompton said: "It was suggested in argument that if the right was an entire right, it could not be divided, so, for instance, as to make an assignment of English copyright to one person for Yorkshire, and to another for Middlesex; and I think that in such case there would be great diffi-

Is Copyright Divisible as to Time? — Whether copyright is divisible as to time, so that it may be assigned for any period less than the full term, is a question not easily determined. It is clear that the owner of the copyright may transfer the exclusive right of publication for any limited time. But is the person who has acquired this right a licensee or an assignee?[1] If the former, he has but an equitable title in the copyright, while the legal title remains in the owner. But an assignment must vest the assignee with a legal title to the copyright, and with the rights of ownership, at least during the time for which the assignment has been made. Is, then, the copyright for the entire term capable of division into two or more terms, so that the legal title to one part will vest in the assignee, and the legal title to the remainder continue in the assignor? Or must the legal title to the undivided whole pass from the assignor and vest in the assignee during the time for which the assignment is made; and, if so, does it return *per se* to the assignor at the end of that time? In other words, when an author has assigned his copyright for a limited time, is it necessary that it shall be assigned back in order to revest him with the legal title? These questions, which have not been judicially considered, are involved in so much doubt that no attempt will be here made to answer them.[2]

If, however, it should be held that the title as a whole passes to the assignee, he would be regarded as an owner for a limited

culty. In such a case as the present, however, I regard the right of the author to the English copyright as an entire thing under our municipal statutes; and as not being parcel of or derived out of any thing else." 4 H. L. C. 857.

[1] Such a transfer had been made in Howitt *v.* Hall, 6 L. T. N. S. 348; but the court did not determine whether it amounted to a limited assignment, or a mere license.

[2] It is my opinion that copyright is indivisible as to time, and that the entire legal title must either remain in the author or pass from him to the assignee. In the former case, the agreement would create not an assignment, but a license. In the latter case, the assignor having become divested of the legal title, an assignment would, in my judgment, be necessary to revest him with it. In Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402, where it appeared that the copyright had been taken out for a limited purpose, by a person who was not the absolute owner, it was held that the legal title had vested in such person, and that an assignment was necessary to vest the absolute owner with it. But this is not strictly analogous to the case of a limited assignment such as is considered in the text; for the reason that, in Lawrence *v.* Dana, the absolute owner of the copyright had never been vested with the legal title.

time or purpose, and doubtless as holding the copyright in trust for the owner of the remainder of the term; and, if the title would not return *per se* to the latter when he became entitled to it, a court of equity, if called upon, would decree a retransfer to be made.[1]

May Limited Assignee Transfer Copyright? — The question may also arise, whether an assignee for a limited term may transfer the copyright to a third person. It would seem to be clear that he cannot make a valid assignment for a longer time than that during which the right is to continue in him. If the copyright is divisible, so that the legal title is in the assignee for a part of the term and in the author for the remainder, there seems to be no reason why the former may not transfer his title. But, if the title for the entire term vests in the assignee, he would doubtless be considered as holding it in trust for the absolute owner; and in that case it may be questioned whether he has the power to transfer it to a third person.[2]

Rights of Assignor and Assignee as to Selling Copies.

The Law as Construed in England. — In England, it has been held, 1, that, after the copyright has been assigned, the assignor has the right to sell copies printed before the assignment was made; 2, that an assignee for a limited term is entitled, after the expiration of that term, to continue the sale of copies printed during the term.

In Taylor *v.* Pillow, where it appeared that the defendant had continued to sell copies of a song after he had sold the copyright to one of the plaintiffs, Vice-Chancellor James said: "I was at first in favor of the plaintiff's view; but, on looking at the copyright act, 5 & 6 Vict. c. 45, I find that the definition given of copyright is, 'the sole and exclusive liberty of print-

[1] Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402, 417. See also Hazlitt *v.* Templeman, 13 L. T. N. S. 503; Stevens *v.* Cady, 14 How. 531. See *ante*, p. 201, note 1.

[2] In Pulte *v.* Derby, where the defendant was in possession of the legal title, the court expressed the opinion *obiter* that he could not without the consent of the owner transfer it to a third person. 5 McLean, 335. But in this case the defendant was not an assignee, but had taken out the copyright in his own name, merely for the purposes of a contract which he had made with the author for the publication of two editions of a book.

ing or otherwise multiplying copies;' and, unless there is some stipulation to the contrary in the conditions of sale, the vendor of a copyright may print any number of copies up to the time of the sale, and retain and sell such copies after disposing of the copyright." [1]

In Howitt *v.* Hall, it appeared that the defendants, having bought "the copyright" for four years in a book of which the plaintiff was the author, were still continuing, several years after the end of that term, to sell copies which they had printed during the four years. The court, in refusing to enjoin such sales, held that the purchase of the copyright carried the right of printing; and that, while this right reverted to the author at the end of four years, the publishers were entitled to sell, after the expiration of that term, all copies which had been printed in good faith during the term. "The copyright acts," said Vice-Chancellor Wood, "were directed against unlawful printing (8 Anne, c. 19, and 5 & 6 Vict. c. 45, s. 15); and when, as in this case, the defendant had acquired the right of lawfully printing the work, he was at liberty to sell at any time what he had so printed." [2]

In United States, may Assignor Sell Copies after Assignment? — The doctrine affirmed in the two cases just cited cannot, in my judgment, be rightly adopted in this country. Copyright is not defined by the statute; but its meaning is expressed in the section which confers the right. This declares that the author or owner of a book shall "have the sole liberty of printing, reprinting, publishing, . . . and vending the same." [3] Copyright, as here secured, is the right, not only of exclusive printing, but also of exclusive sale. The legislature further declares the right of exclusive sale to be an essential part of copyright, by expressly prohibiting unlawful selling as well as unlawful printing.[4] So essential to the true meaning of the

[1] Law Rep. 7 Eq. 420.

[2] 6 L. T. N. S. 348. See also Murray *v.* Heath, 1 Barn. & Ad. 804.

[3] U. S. Rev. St. s. 4952.

[4] Id. s. 4964. If the statute secured only the right of printing, and prohibited only unlawful printing, it is obvious that copyright would not be violated by the unauthorized importing and selling of copies reprinted abroad. The statute cannot prevent unlicensed printing in a foreign country. But it protects the owner against piracy from this source, by giving him the exclusive right of sale, and by expressly prohibiting the importing of copies without his consent, and the sale of such copies.

word is the act of selling, that statutory copyright does not begin until the book is first offered for sale to the public.[1] To limit the sense of the word to printing is to change its true meaning and abridge the right. When, therefore, the owner sells or assigns the copyright in a work, he conveys the exclusive right to print and the exclusive right to sell that work. Obviously, the right of sale is not exclusive in the assignee, and he has not become vested with the copyright, for which he has contracted, as long as the assignor is at liberty to sell copies. When the assignee acquires the copyright, he becomes vested with the exclusive right of printing and selling the work. The assignor is then wholly divested of any right to print or to sell; and he cannot sell a single copy of the work without invading the copyright which he has transferred.

It may be argued that the exclusive right of sale acquired by the assignee applies only to the copies printed by him after the assignment, and not to those printed before he came into possession of the copyright. But this view is contrary to the nature of copyright, which embraces the right to sell exclusively, not merely certain copies, but all copies of the work. When the copyright is assigned, the assignor grants the exclusive right to sell the work itself; and from that time the assignor and all other persons, without the consent of the assignee, are excluded from selling copies, no matter when or by whom printed. There is, however, this limitation to the assignee's exclusive right to sell: At the time of the assignment, various booksellers may have on hand copies of the work, which were bought before the copyright was transferred. Such copies are beyond the control of the assignor. The liberty to sell them is a right which vested before the assignment was made, and cannot be disturbed by any subsequent change in the ownership of the copyright. Hence, the assignee has no right to interfere with such sales, though made after the assignment. But a wholly different principle applies to the copies which the assignor has printed, but not sold. In parting with the copyright, he voluntarily parts with the right to sell such copies, and in effect covenants not to sell them.

[1] Copyright begins with publication, which takes place when the book is publicly offered for sale, or is given to the public.

May Assignee sell Copies after End of Limited Assignment? — The same principle governs the rights of the parties to an assignment for a limited time. When the copyright is sold or assigned for a specified term, the assignee becomes vested with the exclusive right to print and to sell during that term, and the assignor parts with all rights both of printing and of selling. At the end of the term, the assignor becomes revested with the exclusive right of printing and of selling, and no right to print or to sell remains in the assignee. What the assignee receives from the assignor for a limited time, he is bound to return to him at the end of that time. What he receives is the exclusive right to print and to sell the work; what he must surrender is the exclusive right to print and to sell the work. And, as has been above shown in an analogous case, the right to sell, which reverts to the assignor, is exclusive, not merely with reference to the copies that may be printed by him after such reversion, but with reference to all copies of the work, excepting those held by persons who bought from the assignee while he was in possession of the copyright. The assignee, but not such buyers, are excluded from selling after the term of the assignment has ended.

It may be urged that the assignee may have a large stock of copies on hand at the end of the term; and that, unless he is free to sell them, he may be subject to heavy losses. The answer to this is, that he has not agreed for, paid for, or acquired the right to sell, except for a limited time. He must exercise his own judgment as to the number of copies which he can sell during that time. He prints at his own risk. If he prints more copies than he can sell, the fault is with him, and not with the assignor; and so he, and not the assignor, must bear the loss. Of course, as in the first case above considered, there may be an express or an implied agreement that the assignee shall have the right to sell whatever copies he may have on hand at the expiration of the term of the assignment.

I have thus endeavored to show what is the true interpretation of the law, when the copyright is assigned without any express or implied agreement as to the sale of copies. When such agreement has been made, the rights of the parties will be controlled by it.

English Decisions Questioned. — The judgments in Taylor *v.* Pillow and Howitt *v.* Hall were based on the ground that copyright, as defined by the statute, is the exclusive right of printing copies; that the statute is directed only against unlawful printing; and hence that the sale of copies, which have been lawfully printed, is not a violation of copyright. It is a question whether, on the point under consideration, the English statute in spirit, if not in letter, is not the same as the American; and whether, under the former as well as the latter, the true meaning of copyright is not the exclusive right of printing and selling. It is true that, by the statutory definition, English copyright is limited to printing; but it is not true that the statute is directed against unlawful printing alone. It prohibits unlawful importing and selling,[1] and thereby in effect secures the exclusive right of sale.

Author may not Reproduce Work after Assignment. — When an author has parted with his copyright in a work, he is not at liberty to reproduce substantially the same matter in another publication.[2]

Warranty of Title. — Where a person had sold in good faith the exclusive right of publishing a book for a term of years, and it afterward appeared that he had no title to the copyright, it was held that the representations which he had innocently made, that the copyright was in him, amounted to an express warranty of the title, and that he was liable to damages for a breach of that warranty.[3]

[1] 5 & 6 Vict. c. 45, ss. 15, 17, 23.

[2] Rooney *v.* Kelly, 14 Ir. Law Rep. N. s. 158; Colburn *v.* Simms, 2 Hare, 543.

[3] Sims *v.* Marryat, 17 Q. B. 281. It appears that after Dr. Shebbeare had been enjoined (Duke of Queensbury *v.* Shebbeare, 2 Eden, 329) from publishing Clarendon's History, which he had bought from Mr. Gwynne, he recovered damages against the latter for falsely representing that he had a right to print that work. See Millar *v.* Taylor, 4 Burr. 2330, 2397.

CHAPTER VII.

AGREEMENTS BETWEEN AUTHORS AND PUBLISHERS.

As the owner of the literary property in a work which he has created, the author may make of it any disposition he pleases. He may make an absolute assignment of the copyright, or an assignment for any limited term. He may convey a limited interest in the undivided copyright, and thereby make one or more persons joint owners with himself. Without parting with the ownership, or any part of it, he may confer upon another the right to use the work for a limited time, or for specified purposes; may license another to publish exclusively, or more than one to publish contemporaneously; may grant an irrevocable license to publish for a term, or a license revocable at will.

In ascertaining what rights the author has conveyed, the first point to be established is, whether the agreement made by him is an assignment of the copyright, or whether it is merely for a restricted use of the work. Assignments have already been treated. Here will be considered those agreements by which an author, without parting with the copyright, gives to a publisher certain privileges of publication and sale. In order to ascertain the respective rights of the parties under an agreement of this kind, it will be necessary to determine the duration or extent of the right given to publish, whether or not it is exclusive, and how the contract may be ended and the rights created by it annulled. The law on this subject may be best understood by reviewing the leading cases which have been decided.

Agreement for Publication of One Edition. — Number of Copies Specified. — In Sweet *v.* Cater, the plaintiff sought to restrain the defendants from publishing a work containing matter copied without authority from the tenth edition of Sir Edward Sug-

den's Treatise on the Law of Vendors and Purchasers, of which the plaintiff was the publisher. The rights of the plaintiff had been acquired under a written contract with the author, by which it was agreed that the former should print, at his own cost and in a certain style, twenty-five hundred copies of the tenth edition of this work, sell each copy at a named price, and pay to the author a specified sum for the privilege of publication. The defendants contended that, under this agreement, the title, equitable as well as legal, to the copyright was in Sir Edward Sugden, and that the plaintiff was a licensee, not exclusive, but merely to sell twenty-five hundred copies; and, therefore, that he had no right to prevent any other person from publishing the work. The court held that, while the legal title was in the author, the plaintiff had acquired an equitable title sufficient to give him a standing in a court of chancery. The injunction was granted on condition that the plaintiff would undertake to try his right at law; and Sir Edward Sugden, having refused to permit the action to be brought in his name, the defendants were ordered to admit at the trial that the plaintiff was the legal owner of the copyright in the tenth edition of the work.[1]

The direct decision in this case was that the contract with the author gave to the plaintiff the right, while any of the twenty-five hundred copies published by him remained unsold, to restrain any person not claiming under the author from publishing the same work. But Vice-Chancellor Shadwell went further, and expressed the opinion that the plaintiff had acquired the exclusive right to sell twenty-five hundred copies; and that, until they should be sold, not even the author was at liberty to publish any copies of the work.[2]

[1] 11 Sim. 572.

[2] "Now by this contract," said the Vice-Chancellor, "there is an obligation which is binding on both parties. Sweet is to sell at a given price; and therefore Sir E. Sugden has bound himself to abstain from doing any thing which might at all interfere with the act which Sweet was to do. Suppose that, before the two thousand five hundred copies, which form the tenth edition, are sold, Sir E. Sugden (to put a hypothetical case) should fancy that he had a right to sell another edition to another bookseller, with the immediate right of publication; I apprehend that this court would certainly restrain him from doing so, on this contract. It is not merely optional with Sweet whether he will sell or not; but he is bound to sell, and to sell in a given manner. It is most probable that, when Sir E. Sugden drew this agreement, he was looking forward to the

Agreement Indefinite as to Duration and Number of Copies. — Subsequent Editions, if called for. — Transfer of Rights of Publisher in Bankruptcy to Third Persons. — In Stevens *v.* Benning,[1] the contract between William Forsyth, the author, and Robert Saunders and William Benning, the original publishers, of a Treatise on the Law relating to Composition with Creditors, came up for judicial construction. The agreement was that the book should be published at the expense and risk of the publishers, and that the net profits should be divided equally between them and the author. Nothing was said about the copyright, the number of copies to be printed, or the absolute duration of the agreement. It was, however, agreed that, in case the first edition should be sold, "and a second or any subsequent edition of the said book be required by the public," Forsyth should make the necessary revision, and Saunders & Benning should publish "the said second and every subsequent edition" on the same conditions agreed on for the original publication. It was further provided, that, in case any edition should not be entirely sold within five years after publication, the publishers might dispose of the unsold copies in such manner as they deemed most advisable, in order that

time when he might think it right to publish some subsequent edition; and he was taking care to impose an obligation on Sweet to sell; and, while he imposes that obligation, he is himself bound at the same time to perform his part of the contract, which is not to interfere with the sale of the book. I think that, upon the plain construction of this contract, Sweet has obtained a right in the copyright of the work, to the extent that he is to be at liberty to be the sole publisher of it until the whole edition, consisting of two thousand five hundred copies, shall be sold. He therefore is an assign of the copyright, in a limited sense." 11 Sim. 578.

It appeared that some of the passages in the defendant's publication had been published in earlier editions of Sir Edward Sugden's work, as well as in the tenth; and, as to these, it was contended that the plaintiff had no right to complain. On this point the Vice-Chancellor said: "But I do not think that that fact at all alters the case; for the entire copyright in all those prior editions was vested in Sir E. Sugden when he made the agreement with the plaintiff; and my opinion is that the effect of that agreement was to give to the plaintiff, as against Sir E. Sugden and all persons claiming under him, a right to insist that the matter contained in the tenth edition should not be published whilst he was performing his part of the contract, by selling that edition to the public. And, that being my view of the case, I think that, although the passages may be contained in some prior edition, yet, if they are contained in the tenth edition as well, the court ought to prevent their being copied." Ibid. 580.

[1] 1 Kay & J. 168, on ap. 6 De G., M. & G. 223.

the account might be "finally settled and closed." The first edition was published by Saunders & Benning in 1841. Afterward, John Kirton Gilliat succeeded Saunders in the firm, which now assumed the title of William Benning & Co., and in 1844 published a second edition of the work revised by the author. In 1851, William Benning was adjudged a bankrupt, and afterward his assignees and Gilliat assigned to Stevens & Norton the contract which had been made by Saunders & Benning with Forsyth. At the same time, about four hundred copies of the second edition of Forsyth's book were transferred to Stevens & Norton. In the mean time, William Granger Benning had published a third edition of the work revised by Forsyth, who was ignorant of the transactions by which Stevens & Norton claimed to have acquired their rights. The latter firm now sought to restrain the further publication of the book by W. G. Benning, and also applied for an account of profits.

Both Vice-Chancellor Wood, before whom the suit was first brought, and the judges on appeal, found great difficulty in determining the precise nature of the contract between Forsyth and Saunders & Benning, and the rights of the original parties under it.[1] They agreed, however, that it was not an assignment of the copyright. The Vice-Chancellor expressed the opinion that the first publishers were entitled, and were bound, to publish on the terms of the agreement as many

[1] Vice-Chancellor Wood regarded the contract as "a special kind of agency, under which the agents were bound to sell, and to take the risk of there being no profits upon themselves." 1 Kay & J. 175. But, in the following case of Reade *v.* Bentley, the same judge, in considering a like contract, remarked that the defendant was more than a mere agent of the plaintiff. "A mere agent," he said, "may be paid, as the defendant was to be paid, by a share of the profits: but a mere agent never embarks in the risk of the undertaking; and here the defendant took upon himself the whole expense and risk of bringing out the work. Clearly, therefore, the case is something more than one of simple agency." 4 Kay & J. 662. Lord Justice Knight Bruce thought that whatever rights vested in Saunders & Benning, by virtue of the contract with Forsyth, they acquired "by way of joint adventure with him or of partnership with him." 6 De G., M. & G. 229. Lord Justice Turner expressed the opinion, that, if there was a partnership, it was "not in the copyright, but in the copies printed under the license contained in the agreement. In that case, the court has nothing to do with the question of partnership, except as regards the unsold copies." Ibid. 231.

editions as might be required by the public, and that during the existence of the contract they had the exclusive right of publication and of sale;[1] that the agreement was terminable by failure to comply with its material conditions; and that after its termination the author would not be at liberty to publish until the first publisher had sold the editions printed under the agreement.[2] It was, however, not necessary to

[1] "In the contract, however, no mention is made of copyright, which is a right so well known and defined that I should expect, if it was intended to part with it, the intention would have been clearly expressed. However, such an intention may be inferred; and it is argued that it must necessarily be inferred here, because Mr. Forsyth agreed that Messrs. Saunders & Benning should 'print, reprint, and publish' his work upon certain conditions, of which one was, that, if any further edition should be required, as soon as the first and subsequent editions were sold Mr. Forsyth would make all the necessary alterations and additions thereto, and the publishers would print and publish every subsequent edition, upon certain specified conditions; and they were to have the power of selling, by auction or otherwise, all copies unsold five years after the date of publication. The conditions in favor of the publishers are, that they were to have the sole control of the mode of printing and publishing, taking all the risk; and, after deducting the charges and expenses incurred, they were to give Mr. Forsyth one-half of the profits, and to account with him in a certain manner. The most that I could infer upon this contract, as to its equitable effect in favor of Messrs. Saunders & Benning, if they were now before me, would be, that, during its subsistence, they performing all the conditions on their part, Mr. Forsyth would not be at liberty to transfer to any other person the right of printing and publishing this work, nor himself to conduct the publication of it through other hands.

"Then, it is argued that the sole power of printing, reprinting, and publishing is, in fact, the copyright. And, no doubt, if an author, in consideration of a sum of money paid to him, agrees that certain persons shall have the sole power of printing, reprinting, and publishing a certain work, for all time, that would be parting with the copyright; but if the agreement is that the publishers, performing certain conditions on their part, should, so long as they do perform such conditions, have the right of printing and publishing the book, that is a very different agreement. The legitimate inference from this contract is, that, so long as the publishers duly and properly perform their duty with reference to all that they have engaged to do, Mr. Forsyth should not be at liberty to defeat the benefit of his own agreement, by publishing a new edition before the former editions are sold off. As the Vice-Chancellor observed in Sweet *v.* Cater, 11 Sim. 572, by such an agreement, although not an assignment of the copyright, the author would incur obligations, and therefore could not interfere with the interest acquired by the publishers under it." 1 Kay & J. 173.

[2] "The question which struck me, and on which I desired to hear the defendant's counsel, was whether, combining the clause of the agreement which obliges the publishers to incur all the expenses of printing and publishing, with the last clause, which provides that, in case all the copies of any edition should not be sold off within five years after the time of publication, they might sell them by auction or otherwise, the result was not that when once an edition of the book had

decide these questions, as the original parties to the agreement were not before the court. Nor was it necessary to determine what rights had passed to the assignees in bankruptcy. But the Vice-Chancellor, after pointing out the circumstances under which the original publishers might have been entitled to an injunction, incidentally remarked, that "it would be very possible for the assignees, disposing of the remaining copies of this work as part of the bankrupt's effects, as they might properly do if they could prove clearly that no disadvantage would thereby be occasioned to Mr. Forsyth, and if they made such sale within a reasonable time, to sustain a suit for an injunction under similar circumstances."[1]

The judgment was that the contract in controversy was in the nature of a personal engagement; and hence that the rights and obligations created by it, whatever they were in the case of the original parties, were not transferable, and therefore had not passed to the plaintiffs. Nor was the standing of the plaintiffs the same as that of the assignees in bankruptcy through whom they claimed to have derived their interests. The injunction was accordingly refused.[2]

been printed, and all the expenses incurred, the publishers might have a right in that edition somewhat similar to that recognized in Sweet *v.* Cater, 11 Sim. 572; so that they might contend, that, having incurred all the liabilities, and having performed their duty by doing every thing necessary on their part to bring the book into the market, they had a right, until they had realized their profit, to prevent the author from interfering with them by bringing into the market any thing which might deteriorate the value of what they had on hand; and that, therefore, no new edition of the book should be published which would destroy the value of the former one. I still think that Messrs. Saunders & Benning, suing under this agreement, and showing that they had performed their part and were ready to continue to do so, would be entitled to prevent Mr. Forsyth from disposing of a third edition of his work until they had sold the preceding edition." 1 Kay & J. 176.

[1] 1 Kay & J. 177.

[2] "The principal question then is," said Vice-Chancellor Wood, "whether this agreement is a personal engagement or not. It would be difficult for me to say, that, in a contract of this kind, the author is utterly indifferent into whose hands his interests under such an engagement are to be intrusted. It is not merely a question of his literary interests; but certain publishers undertaking to incur the expenses of bringing out the work, and fixing the price, the author is to have a share of the profits; and they are to decide in what shape the book is to come out, and at what price it is to be sold, and are to account with him. I must say, that, in my opinion, these are peculiarly personal considerations; and that this contract bears the impress of being a personal contract in all these respects. It could not be a matter of indifference to Mr. Forsyth, that the assignees in bankruptcy of Mr. Benning should be at liberty to transfer the future right of fixing the price of

This decision was affirmed on appeal; but it does not appear how far the judges agreed with the views expressed by the Vice-Chancellor as to the respective rights of the original parties to the agreement.[1]

this and subsequent editions, and the right to call upon him to fulfil his duty of preparing a new edition, and the risk which might be incurred in conducting it, and the other benefits and obligations of the agreement, to any one they might think proper; possibly to some one not even carrying on the trade of a bookseller, as might happen in case of an absolute sale to the best bidder. Regarding the agreement as a contract for the purchase of a limited right, according to the view of the Vice-Chancellor of England in Sweet *v.* Cater, 11 Sim. 572, it is still impossible that it should be indifferent to Mr. Forsyth that it should pass from a respectable firm in London to booksellers residing in a remote part of the country, or to other persons unable to fulfil the engagements entered into with him. The contract, therefore, is one which involves personal considerations; and, framed as it is, I must regard it as a special kind of agency, under which the agents were bound to sell, and to take the risk of there being no profits upon themselves." 1 Kay & J. 174.

"I still think," continued the Vice-Chancellor, "that Messrs. Saunders and Benning, suing under this agreement, and showing that they had performed their part and were ready to continue to do so, would be entitled to prevent Mr. Forsyth from disposing of a third edition of his work until they had sold the preceding edition. But the case here is a very different one. It is not necessary for me even to say what would be the position of the assignees in bankrupcy in this case. I think it would be very possible for the assignees, disposing of the remaining copies of this work as part of the bankrupt's effects, as they might properly do if they could prove clearly that no disadvantage would thereby be occasioned to Mr. Forsyth, and if they made such sale within a reasonable time, to sustain a suit for an injunction under similar circumstances. The case here, however, is different. Mr. Benning's assignees and Mr. Gilliat have disposed of this property to the present plaintiffs; and they now say that the rights under the agreement have been transferred to them, and that they are, therefore, entitled to prevent Mr. Forsyth from selling or disposing of a third edition of this book. If that be the correct view, I must hold that every right which Messrs. Saunders & Benning had under the agreement has passed to the present plaintiffs, and that they have a right to call upon Mr. Forsyth to publish a new edition, and have been put in all respects in the place of Messrs. Saunders & Benning; and that this personal agreement, as I must consider it, has been transferred to these plaintiffs, with whom Mr. Forsyth has entered into no contract. In the particular case before me, if that were so, of course Mr. Forsyth would be in as good hands as he was before; but that can make no difference in the law of the case. The assignees were not bound to take care to whom they sold the property, their only duty being to get the best price they could for it; and if any other gentleman in a remote part of the country, or even residing abroad, had been the purchaser, they would have been at liberty to part with it to him; in which last case the purchaser could not have interfered with Mr. Forsyth in bringing out a new edition." Ibid. 176.

[1] 6 De G., M. & G. 223. Lord Justice Knight Bruce, one of the judges on appeal, while sustaining the refusal of the Vice-Chancellor to grant an injunction, and believing that the duties imposed by the contract were personal

Division of Profits on Copies Sold above Specified Number. — Publisher Bankrupt. — Author claims as Partner in Unsold Stock. — In a case in the Irish Bankruptcy Court in 1848, it appeared that Curry & Co. had published three novels by Charles Lever, under an agreement that they should bear the expense of publication, and pay to the author a specified sum for a certain number of copies, and should divide with him the net profits on the copies sold beyond that number. While a large

to the contracting parties, and not capable of vicarious performance, seems to have been of the opinion, that certain rights under the contract might have passed to the plaintiffs. He also had the impression that not even the original publishers, had they retained their rights and position under the contract, would have been entitled to the injunction prayed for in this case. He said: —

"In acceding, as I do, to the propriety of the course taken by the Vice-Chancellor, I consider it as perfectly consistent with the notion, that the plaintiffs may have some ground of claim under the agreement of December, 1840, on which their bill is founded; may be entitled to have an account or to maintain an action or actions against one or both of the defendants. The only question, I repeat, with which we are dealing, is one of granting or not granting an interlocutory injunction; and for that purpose it must be observed that such interest, if any, in the copyright of Mr. Forsyth's work on Composition with Creditors, as the other parties to the agreement acquired under it, they acquired, I apprehend, not exclusively of Mr. Forsyth, but by way of joint adventure with him, or of partnership with him, in respect and for the objects of which he undertook the fulfilment by himself personally of certain duties to them, and they undertook the fulfilment by themselves personally of certain duties to him; nor on either side, without the consent of the other, could there be a vicarious performance, a performance by deputy or by assignee, of the duties thus undertaken. At least, so I understand the instrument and the matter; nor do I see that the duties were on either side of such a nature as that their performance specifically could have been enforced by a court of equity. My impression, therefore, is that had Messrs. Saunders & Benning, parties to the agreement of 1840, retained their original position and rights under it, they could not successfully have asked an injunction against Mr. Forsyth, such as that prayed by the bill before us.

"If this opinion is correct, the plaintiffs clearly cannot do so; but, if incorrect, it does not of necessity follow that such an injunction ought to be granted to them. For in them, however trustworthy, Mr. Forsyth has not agreed or intended to place confidence; with them, however respectable, he has not consented to associate himself. In the way of specific performance, there must be at least as much difficulty between him and them as between him and the other parties to the agreement of 1840. I do not assert that the plaintiffs have not, or that they have, been wronged. If wronged, they may proceed for damages or compensation, or an account; but any such injunction as that now sought seems to me plainly impossible. The appeal, not supported in my judgment by Morris *v.* Colman, 18 Ves. 437, or Lumley *v.* Wagner, 1 De G., M. & G. 604 (cases which I do not question), appears to me opposed by a great body of binding authority, as well as by principle, and one of course to be dismissed with costs." 6 De G., M. & G. 228.

number of printed copies remained unsold, Curry became bankrupt, when Lever claimed to be entitled as partner to one-half of the unsold stock, and to have a special lien on the other half, entitling him as a preferred creditor to be paid in full for whatever balance might be due him. The commissioner held that, if Lever was a partner in the unsold stock, he was a mere dormant and secret partner; and, as the whole of the stock had been in the possession and disposition of the bankrupt, it passed to the creditors under the Bankrupt Act;[1] and that, for the same reason, Lever had no special lien on it. The commissioner said that the question as to whom the copyright belonged was not within the jurisdiction of the court; but he expressed the opinion that, as Curry had been permitted to advertise himself as the owner, the copyright should be dealt with as his property in bankruptcy.[2]

Agreement Indefinite as to Duration and Number of Copies. — Division of Profits. — Publisher may fix Selling Price. — Author may End Agreement by Proper Notice. — The contracts made by Charles Reade and his publisher, Richard Bentley, which came up for judicial construction in the two suits brought by the former against the latter, were similar to that discussed in Stevens *v.* Benning; except that in the agreements of Reade and Bentley there was no provision binding on either party for the publication of a second or any following edition of the books. In the first contract, made in 1852, it was agreed that Bentley should publish at his own expense and risk Reade's novel Peg Woffington; and that, after certain expenses and allowances were deducted, the profits of every edition printed should be divided equally between author and publisher. In 1853, a similar agreement was made by the same parties for the publication of Christie Johnstone. The price at which the books were to be sold was not specified. An edition of five hundred copies of Peg Woffington having been published and sold at 10*s.* 6*d.* a copy, Bentley, against the protest of Reade, prepared to issue an edition of the same novel at 3*s.* 6*d.* a copy. The latter notified the former not to publish, served a written

[1] 6 & 7 Will. IV. c. 14, s. 86. Repealed by 20 & 21 Vict. c. 60, s. 2; but see 35 & 36 Vict. c. 58, s. 5.

[2] *In re* Curry, 12 Ir. Eq. 382, 390.

notice for a dissolution of the partnership, if any existed, between them, and applied for an injunction to restrain the publication of the second edition. Vice-Chancellor Wood held that under the agreement the publisher was the proper person to fix the price; that he was at liberty to continue publishing successive editions until he received notice to end the agreement; and that such notice, to be operative, must be given before any expense on a future edition had been incurred. The court, therefore, refused to interfere with the sale of the second edition, for which the publisher had made disbursements before receiving from the author notice to end the agreement.[1]

[1] Reade *v.* Bentley, 3 Kay & J. 271. In the contract were these words: "The books sold to be accounted for at the trade sale price, reckoning twenty-five copies as twenty-four, unless it be thought advisable to dispose of any copies, or of the remainder, at a lower price, which is left to the judgment and discretion of the said Richard Bentley." The meaning of this provision was thus explained by the Vice-Chancellor: "There being this special clause, showing that in a particular case the diminution of price is to be left to the discretion of the publisher, it was argued that the inference is, that the publisher has no such discretion, except in the particular case there mentioned. It is quite obvious that this clause was introduced with no such view, but because Mr. Bentley is to bring out the work, and, in bringing it out, he is to fix a certain price to the trade. He is aware that there are persons who are in the habit of purchasing all these works for resale. There is a certain quantity in the first instance offered to the trade, as it is called, who send in their orders, each buyer for a certain quantity of copies, and it is brought out to the trade at a price which is fixed upon each edition. Then it might happen that some copies would remain unsold. Mr. Bentley first agrees to account with the author for all copies at the trade price; but then, as that might be rather too hard upon the publisher, who has had all the expense of bringing out the work, it is agreed, that, if any copies remain unsold, he is to have liberty, as regards that edition, to dispose of the unsold copies at a lower price. That is the obvious meaning of this clause; and it has no reference to the general question of fixing or not fixing the price." Ibid. 277.

"The question then arises," said the Vice-Chancellor, "if Mr. Bentley was to publish at his own risk, who was to fix the price of the work? The agreement is entirely silent upon this point, and it is left to be inferred from the nature of the contract between the parties. I am decidedly of opinion, that the plaintiff's view, that he was to have a voice in fixing the price, is not consistent with the terms of the agreement. I think, if he intended to retain such a power, it is scarcely possible to conceive that he should have allowed a term so important to be omitted from the agreement; and, when I look to the words of the agreement, I see that Mr. Bentley is to be the publisher, that he is to bear the expense, and to make all payments; and considering also that it is the business of the publisher to make his expenses and profits balance, that he is the person to whom the author has intrusted that department, the publisher taking the whole charge and risk, and the whole duty of bringing out the work as he thinks

Soon after, when Bentley had published two editions of Peg Woffington and four of Christie Johnstone, and was intending to issue a new edition of each novel, but had made no outlay for that purpose, Reade again served on him notice to end the agreements between them, and applied for an injunction against such intended publication. The direct issue now raised was, whether Reade had the power to end the agreements, and prevent the publisher from printing an edition on which no expense had been incurred. Vice-Chancellor Wood was of opinion, that, if the author were powerless to end the agreement, the publisher would be at liberty to issue any number of successive editions, and at the same time prevent the author from publishing a single copy. Moreover, as it had been held in the first suit of Reade *v.* Bentley that the publisher was the proper person to fix the selling price of the book, he would have, by parity of reasoning, the power to determine the time of issuing a new edition. He might thus be enabled to postpone indefinitely the publication of an edition for which there might in reality be a demand. In this case, also, the author would be powerless to publish. On the other hand, the author could not, under the agreement, compel the publisher to issue more than the first edition. Such "a construction," said the Vice-Chancellor, "which would leave the author fast bound, and the publisher entirely free, after the publication of one edition, is not a reasonable construction to adopt in considering the effect of an agreement of this character." The court decided that no interest in the copyright had been transferred, and that the agreement created no "more than a joint adventure," terminable by the author, with a revocable license to publish. As the contract provided for an adjustment of accounts when the profits of each edition should be ascertained, the time of making such adjustment was held to be the proper time for ending the agreement. The injunction was, therefore, granted

best for the interest of both parties, it seems to be necessarily incident to the duty which he has to perform, that he should have the right also of determining the price at which the work should be brought out. I think the construction of the agreement is plain enough up to this point, that the defendant, the publisher, is to fix the price of the work; that he is to choose the embellishments and every thing else connected with its publication; and that he is to do this for all editions which should be brought out during the subsistence of the agreement." 3 Kay & J. 275.

to restrain the publication of the editions on which no expense had been incurred by the publisher.[1]

[1] Reade *v.* Bentley, 4 Kay & J. 656. "Lord Justice Turner," said Vice-Chancellor Wood, "looked upon the agreement in Stevens *v.* Benning, in the double light of a license and a partnership; speaking, however, less decidedly as to its being a partnership. He says, 'Next, if there was a partnership, then, if the agreement does not affect the copyright, the partnership was not in the copyright, but in the copies printed under the license contained in the agreement' (6 De G., M. & G. 231); viewing it, therefore, as a license for the publication of the work, and then a joint adventure between the author and publisher in the copies so to be published. If that were the effect of the agreement in the present case, the question would still remain, whether the license be irrevocable.

"In the former suit between these parties, 3 Kay & J. 271, the plaintiff claimed a right to prevent the publication of an edition with respect to which the defendant had been allowed to incur various expenses before the plaintiff had taken any steps to determine the joint adventure between them. In the present suit, his claim is wholly different. He does not attempt to interfere with the publication of an edition which the defendant had commenced, and incurred expense in preparing for publication, before he exercised the option of determining the agreement. His claim is limited to editions about which no such expense had been incurred by the defendant; and his argument is, that, unless he has a right to determine the agreement as to all such editions, the consequence will be, that, during the whole of the defendant's life, he may be under an obligation to the defendant, while the defendant will be under no reciprocal obligation to him. It is true, that, according to Stevens *v.* Benning, a license like the present would, I apprehend, be restricted to the defendant personally, and would not extend to his executors, or to any future partner or assignee; but, if the defendant's construction be correct, it follows that so long as he lives and is willing to continue publishing fresh editions of the work, so long, according to the doctrine in Sweet *v.* Cater, the plaintiff will be precluded from asserting a right to publish any competing edition. The defendant could compel the plaintiff to abstain from publishing a single copy of the work, so long as he expressed his readiness to continue publishing. But the plaintiff has no reciprocal power. He could never compel the defendant to publish more than a single edition of the work. His powers are limited to what the contract gives him; and, according to the contract, when the defendant has published a single edition the contract on his part is fulfilled. That is a position of considerable hardship for an author, and one which ought to be clearly shown, upon the face of a contract, to have been contemplated by the parties who entered into it. Besides, the plaintiff might be placed in a position of still greater hardship, if the defendant's construction be correct. In the former suit between the parties, in reference to this agreement, I held, that, although the agreement is silent on the subject, yet inasmuch as the defendant was to bear the risk of the publication, he was the proper person to fix the price; and, by parity of reasoning, he would be the proper person to fix the time and mode of publication; and, in the exercise of his discretion on that subject, it might well happen that the defendant, acting perfectly *bona fide* and upon an honest conviction that circumstances were unfavorable for the publication of a further edition, would decline indefinitely to publish, but without resigning his contract. The author, at the same time, might be of a contrary opinion, and yet for months or even years he might be kept in suspense, and pre-

Agreement for First Edition of Specified Number, and Unlimited Second Edition if called for. — Pulte *v.* Derby was a contro-

vented from publishing on his own account until his publisher should be of opinion that the time had come for the revival of the public interest in the work. That is a position of difficulty and hardship to which an author ought not to be reduced, unless the contract is express and clear upon the subject.

"On the other hand, it was very ably urged by the defendant's counsel, that, if the plaintiff has the right of determining the agreement, he is bound to show from the contract at what precise time that right commences. If he can arrest the publication of a third, fourth, or fifth edition, the same argument, it was said, must apply to the second; and if the plaintiff cannot fix upon some particular time at which, according to the contract, his right is to commence, the inference must be, that the agreement is only determinable by a joint resolution of both parties. As regards a second edition, this argument is particularly forcible, although possibly it might apply to others. The publisher may urge that he has given the benefit of his talents and position as a publisher; that he has invested his capital, sparing no expense, in bringing out the first edition, in the expectation of being recouped the cost of the first by the sale of the second and subsequent editions; that as to one of the works in question he has even gone so far as to have it stereotyped with that view; and that, to hold the author entitled at his own instance to determine an agreement like the present, when the first edition has been published, would be to enable him, by an arbitrary and unreasonable exercise of that power, to deprive the publisher of all his profits." 4 Kay & J. 663.

The meaning of the word edition was thus construed by the Vice-Chancellor: "This consideration makes it necessary to inquire, whether, upon the face of the agreements, any definite time can be reasonably said to be pointed out for the determination of the joint adventures in question; or whether the terms of the agreements are such as necessarily to hold the plaintiff bound for an indefinite series of editions, and thus to subject him to the disadvantages to which I have referred. Now, on carefully reading through each agreement, it appears to me, that, at all events, certain definite times are distinctly pointed out for the adjustment of the accounts, and that those times are the successive periods when the various receipts and payments on account of the successive editions have been ascertained.

"It was said that the court must first ascertain the meaning of the term edition; that when a work has once been stereotyped, the term edition is no longer applicable; that when a work is published in what are called 'thousands,' twenty thousand or thirty thousand being circulated, each thousand could not properly be called an edition. Now, I apprehend, that, not merely in point of etymology, but having regard to what actually takes place in the publication of any work, an edition of a work is the putting of it forth before the public, and, if this be done in batches at successive periods, each successive batch is a new edition; and the question whether the individual copies have been printed by means of movable type or by stereotype, does not seem to me to be material. If movable type is used, the type having been broken up, the new edition is prepared by setting up the type afresh, printing afresh, advertising afresh, and repeating all the other necessary steps to obtain a new circulation of the work. In that case, the contemplated break between the two editions is more complete, because, until the type is again set up, nothing further can be done. But I apprehend it makes no substantial difference, as regards the meaning of the term edi-

versy in the Circuit Court of the United States, growing out of a contract for the publication, by the defendants, of a book of which the plaintiff was the author. The agreement was that the defendants should have "the exclusive right to print and publish an edition of one thousand copies," at their own expense, and that they should pay to the plaintiff fifteen cents for each copy sold. It was further agreed "that, if the said Derby & Co. find a second edition called for, the said Pulte is to revise and correct a copy of the first edition ready for the press, which the said Derby & Co. agree to have stereotyped at their own cost, having the exclusive use and control of the plates, printing as many copies as they can sell, paying to said Pulte the sum of twenty cents for each and every copy sold." The copyright was entered in the name of the publishers, and after the first edition of one thousand copies had been sold stereotype plates were prepared, and a second edition of fifteen hundred copies, revised by the author, was printed. Afterward the defendants published two thousand copies, which were represented on the title-page as the third edition. The plates were then transferred to A. S. Barnes & Co., under a contract to publish, and account to the defendants, on the same terms mentioned in the agreement between the plaintiff and the defendants. The complainant, alleging that the publication of

tion, whether the new thousand have been printed by a resetting of movable type, or by stereotype, or whether they have been printed at the same time with the former thousand, or subsequently. A new edition is published whenever, having in his storehouse a certain number of copies, the publisher issues a fresh batch of them to the public. This, according to the practice of the trade, is done, as is well known, periodically. And if, after printing twenty thousand copies, a publisher should think it expedient, for the purpose of keeping up the price of the work, to issue them in batches of a thousand at a time, keeping the rest under lock and key, each successive issue would be a new edition in every sense of the word. The persons who framed this agreement appear to have understood the word in this sense. The agreement provides that, 'after deducting from the produce of the sale the charges for printing, paper, advertising, embellishments (if any), and other incidental expenses, the profits remaining of every *edition* that shall be printed of the work' shall be divided as specified. It uses the word edition to designate that periodical issue which is capable of being made the subject of a separate account of profit and loss.

"Such, then, being the meaning of the word edition, the agreement provides, that, so soon as all the charges and expenses, and all the receipts in respect of each edition, shall have been ascertained, the accounts shall be taken, and the profits divided. That is the period distinctly pointed out by the agreement for the adjustment of the accounts." 4 Kay & J. 666.

the third edition was in violation of his rights, applied for an injunction against the sale of that edition. The defendants filed a cross-bill, alleging that the copyright was in them, and praying that the complainant be enjoined from publishing the book, as he was about to do.

There was no controversy respecting that part of the agreement which gave to the defendants the exclusive right to publish and sell the first edition of one thousand copies. The questions brought before the court related to the second clause of the contract, which provided for the publication of a second edition of the work. The difficulty in determining the true effect and meaning of this provision grew out of the fact that the number of copies of which the edition should consist was not specified; the publishers being authorized to prepare stereotype plates, and to print "as many copies as they can sell." The court held that it had no jurisdiction, and on this ground refused to grant an injunction. But Mr. Justice McLean construed the contract to the effect, that the defendants had acquired the right to publish as many copies of the second edition as they could sell; that the second edition could not be limited "to the number of copies that may be struck off at one impression;" that "the defendants were not to be limited to the publication of the second edition, if they could sell more than happened to be published on that occasion;" and that "the mere fact of inserting in the title-page in the third impression, the 'third edition,' cannot cut off the defendants from the right expressly given in the agreement."[1]

[1] 5 McLean, 828. After referring to the circumstance that the copyright, with the presumable sanction of the author, had been entered in the names of the defendants, Mr. Justice McLean said: "Now, this fact goes strongly to show that the contract was intended to operate as long as the defendants, in the language of the agreement, could 'sell the copies of the book.' If such were not the understanding of the parties, it is reasonable to suppose that there would have been a restriction to the exercise of this right, in the contract. The counsel for the complainant contend that a restriction does appear upon the face of the agreement. And this is found, it is said, in the provisions made for the publication of the first and second editions. The first edition was limited to one thousand copies. And, should a second edition be called for, plates were to be provided by the defendants, and they were authorized to 'print as many copies as they can sell.' Does this limit the second edition to the number of copies that may be struck off at one impression? Such a supposition is contrary to the words of the agreement. The advantage of stereotype plates to the publishers is

If by this language it was meant that the publishers were entitled to print as many copies of the second edition as could be sold, and that the size of that edition was not necessarily determined by the number of copies that were struck off at the first printing, the ruling is doubtless correct. But if the meaning intended to be expressed by the court was that the defendants were empowered to publish what might properly be considered a third edition, the soundness of the construction may well be questioned. The contract cannot rightly be construed as an assignment of the copyright. It gave the publishers the right to publish a second edition of unlimited size; but they had no authority to issue a third edition. The dividing line between two editions is often uncertain and of difficult

to enable them to strike off additional copies without delay, and with little increase of expense, as they shall be called for. This is known to all publishers and authors, and this was provided for in the agreement. The defendants were authorized to 'print as many copies as they can sell.' Now, how are they to ascertain the number of copies they can sell, until the stock on hand shall be exhausted, or nearly exhausted, and a demand is made for more? They are no more able to ascertain this important fact on the publication of the second edition than on the publication of the first one. The fact can only be known in the progress of the sale, and this shows that the defendants were not to be limited to the publication of the second edition, if they could sell more than happened to be published on that occasion. And it also shows the propriety of preparing the stereotype plates.

"The contract seems to be susceptible of no other interpretation. The words authorizing the defendants to print as many copies as they can sell must be stricken out of the contract, to give to it a different construction. Effect must be given to every part of the contract, if one part be not repugnant to another. There is no repugnancy in any part of the contract to the above provision. On the contrary, it harmonizes with every part of the agreement, and especially with the acts of the parties in having the copyright vested in the defendants, and with the preparation of the plates. Plates, it is believed, are rarely if ever used when only one edition or impression of a work is contemplated; they are now uniformly used when a continued and an increasing demand is anticipated.

"To this view it is objected that there is no provision in the agreement for the third edition. There is only a provision that the defendants may print as many copies as they can sell; and the mere fact of inserting in the title-page in the third impression, the 'third edition,' cannot cut off the defendants from the right expressly given in the agreement. In a Court of Chancery, the substance of a thing is more regarded than the form. Whether the defendant stated in the title-page the third impression, or the third edition, is immaterial. The only objection perceived to the title-page is, that the third edition purports to have been revised and corrected by the author. This applies to the second edition, and not to the third. But it is supposed to have been an inadvertence in copying the title-page of the second edition. It is clear this could not have been inserted with a view to injure the complainant." 5 McLean, 332.

determination. The word edition is indefinite and variable in its meaning. It may be used in different senses, by different persons, at different times and in different places. The meaning to be ascertained is that in which it was understood by the parties who used it. Whether the two thousand copies complained of in Pulte *v.* Derby were in reality a part of the second, or constituted a third, edition was a question of fact, to be determined by the attendant circumstances. Whether they were one or the other in the meaning of the parties to the agreement was a question depending on the sense in which the word edition had been understood and used by them. If, in the meaning of the parties when the agreement was made, such additional copies were properly a part of the second edition, the publishers were within the authority of the contract; but, if they could fairly be considered to be a new edition, their publication was in violation of the author's rights.[1]

[1] The chief difficulty in determining the rights of the parties under the second part of the contract lay in defining the limits of the second edition. It was clear that the author had given no authority to publish what could properly be understood to be a third edition. Having expressly limited the first edition to one thousand copies, he agreed that, if a second edition should be called for, the publishers should publish that also; and, as it was not foreseen how many copies of that edition it would be well to publish, the number was not specified, but was left to be determined by the public demand. The words that the publishers should print "as many copies as they can sell," on which so much stress was laid by the court, applied exclusively to the second edition, and had no other force than to negative the inference that might have been drawn if express words had not been used, that the second edition was to be of the same size as the first; viz., one thousand copies. As the number of copies of which the second edition should consist was not expressly limited, the publishers, except for the implied limitation just referred to, would have been fully entitled, even if the words above quoted had been omitted, to publish as many copies of the second edition as they could sell; and the insertion of these words did not enlarge that right, or extend it beyond the second edition. For the second edition, the publishers first printed fifteen hundred copies. They afterward issued two thousand copies. with the imprint "third edition" on the title-page. The fact that the two thousand copies, thus printed separately and distinctly from the fifteen hundred, were represented by the publishers to be the third edition, was a most significant circumstance in determining whether, in the meaning of the agreement, they were a third edition or a part of the second.

Mr. Justice McLean attached much importance to the fact that stereotype plates had been prepared for the second edition. In Reade *v.* Bentley, Vice-Chancellor Wood expressed the opinion that it was immaterial, in determining the limits of an edition, whether the copies had been printed from stereotype plates or ordinary types. See *ante*, p. 355, note.

The cross-bill raised the important question, whether the defendants had acquired the right, not only of publishing the work themselves, but also of preventing the author, or any person claiming under him, from issuing an edition while they were the authorized publishers. On this point the court expressed the opinion, that, as the copyright had been entered in the name of the defendants, the legal title was in them, but only for the purposes of the agreement; that they had the exclusive right to publish on the conditions of the contract, but were not empowered to transfer the copyright, nor to publish except on the terms agreed on; and that the author was not entitled to publish the work in disregard of the contract.[1] As the agreement was for the publication of two editions, the defendant's rights were restricted to those two editions, and hence they would cease when the second edition should be sold.

Agreement for Use of Matter in Specified Editions. — In Lawrence *v.* Dana,[2] it appeared that the complainant, William Beach Lawrence, at the request of Mrs. Wheaton, widow of Henry Wheaton, had prepared two annotated editions of Wheaton's Elements of International Law; of which one was issued in 1855, and the other in 1863. Both were published by Little, Brown, & Co., of Boston; and the copyright in each was entered in the name of Mrs. Wheaton. The complainant prepared the notes, without asking or receiving pay for his services. He alleged that it had been understood and agreed between Mrs. Wheaton and himself that she should be entitled to the use, in those two editions, of the matter prepared by him; but that, subject to this use, the property in such matter should be his, and that she should hold in trust for him the copyrights taken out in her name. The agreement for the publication of the first of the two editions was oral. Concerning the second edition, Mrs. Wheaton agreed in writing "to make no use of Mr. Lawrence's notes in a new edition, without his written consent," and to give to him "the right to make any use he wishes to of his own notes." On this agreement the complainant based his suit.[3] After these two editions had been sold, Mrs.

[1] 5 McLean, 335. [2] 2 Am. L. T. R. N. S. 402. [3] See Ibid. 405.

Wheaton employed the defendant to prepare another annotated edition, which was also published by Little, Brown, & Co. The complainant alleged that this edition contained matter copied from his notes in the two preceding editions, and hence infringed his copyright therein. The court held that Mrs. Wheaton had acquired the right to use Lawrence's notes in the two editions as agreed, but not otherwise; that the legal title to the copyright was in her; that the copyright was the property of Lawrence, in whom vested the equitable title which entitled him to maintain his suit in equity; that neither Mrs. Wheaton nor any one claiming under her had a right to use Lawrence's notes, without his consent, in any publication other than the two editions agreed on.[1]

[1] "The legal title to the copyrights," said Mr. Justice Clifford, "is in Mrs. Wheaton or her legal representative; and the complainant claims, in the first place, that the same is held in trust for him as the equitable owner of the notes by virtue of the original arrangement under which the same were prepared. Secondly, the complainant claims that the negative as well as the affirmative promise contained in the agreement in regard to the use of the notes was binding upon Mrs. Wheaton; and that both are obligatory upon her legal representative, and all others having notice of the existence of those covenants.

"Two principal objections are taken by the respondents to the claim of the complainant that he is the equitable owner of the notes under the original arrangement. First, they deny that the proofs in the case warrant any such finding, especially as the theory is denied in the answer. Second, they contend that Mrs. Wheaton, if such was the agreement, could not legally copyright the notes; as it would show that she was but a mere licensee, and that the copyrights in that state of the case would be void on that account.

"First, conclusive proof to show what was the original understanding between the parties is found in the correspondence upon the subject. Unaided by any one, the complainant prepared the notes, but with the express understanding that he would do so without any charge, and that the property of the same, so far as respected the new edition, should vest in the proprietor of the book, and that she should take out the copyright and remain, as she was, the sole and exclusive owner of the entire book. Liberal, however, as the agreement was toward the proprietor of the book, yet it did not include any thing except that edition; and when the second annotated edition was prepared under a similar arrangement, as conceded by both parties, the agreement was not extended beyond that publication. Confirmation of those propositions is unnecessary, as they are not controverted by the respondents. They deny that it was agreed between the parties that the notes should ever afterward become the property of the complainant; but they do not allege nor offer any proof tending to show that his agreement with Mrs. Wheaton extended beyond the annotated editions. Tested by these indubitable facts, the rights of the parties are plain, and easy to be understood. As the proprietor of the book, Mrs. Wheaton, by virtue of that arrangement, became the absolute owner of the notes as they were prepared, so far as respects the editions in question; and she also acquired therewith the right to copyright the same for the

Agreement with State Reporter for Publication of Law Reports. — In Little *v.* Hall, it appeared that the complainants by a contract with Christopher Morgan, the Secretary of State of New York, and George F. Comstock, the State Reporter, were to publish and have the copyright of reports of decisions to be prepared by Comstock. The last named received a salary from the State for acting as reporter, and the copyright in the reports was to be the property of the State. When three volumes of reports had been published under the agreement above referred to, Comstock ceased to be State Reporter; but afterward, with the consent of the court, he prepared, from manuscripts, some of which had come into his hands while reporter, and others had been given to him by the judges after the expiration of his term of office, a fourth volume of reports, which was bought and published by the defendants. The plaintiffs republished this volume, and sought to enjoin the sale of the edition published by the defendants. The Supreme Court of the United States held that the complainant's contract had been made with Comstock as State Reporter; and that, whatever claim they might have against him for failure to supply the manuscripts to them, they could not be considered as the owners of the copyright in the volume of reports prepared by him after he had ceased to be State Reporter.[1]

protection of the property; but she did not acquire thereby any right or title, legal or equitable, to use the notes in a third edition of the annotated work without the consent of the complainant. Proof to support any such right or title is entirely wanting in the record, and no such right or title is set up in the answer. Such omission confirms the view that no such right or title was intended to be conveyed; and the subsequent conduct of the parties in executing the memorandum tends strongly to the same conclusion.

"Second, suppose the facts to be so, then the respondents contend that the copyrights are void, because, as they insist, the applicant for the same was a mere licensee of the author of the notes; but the court is of a different opinion, for the reasons already given, as well as for others yet to be mentioned." 2 Am. L. T. R. N. S. 418.

[1] 18 How. 165. "After the expiration of his official term, Comstock did not and could not act as reporter. His successor, having been appointed and qualified, discharged the duties of the office and received the salary. . . . As his term of office had expired, he was unwilling to publish the fourth volume without compensation for his labor. This changed his relations with the plaintiffs, as that contract was made as reporter, and on the supposition that he would be continued in that office. . . . Comstock could not have published the work as reporter without the consent of the court of appeals, and also the Secretary of State, who was required to secure the copyright to the State; and for his labor in preparing the notes, references, &c., and superintending the printing, he could have received no compensation.

"Without saying what effect might

Principles Drawn from Foregoing Cases. — Certain general principles may now be drawn from the cases which have been examined. These cases present contracts which, with respect to the duration or extent of the right to publish, may be arranged in three general classes: 1, those in which the number of copies to be published, or the time during which publication is to continue, is expressly limited; 2, those in which the right of publication and its duration are made conditional on a certain event; 3, those in which the agreement is indefinite as to the number of copies to be published, or the period through which publication is to extend.

A person who has acquired the right to publish only one edition of a work cannot publish another edition, without authority.[1]

Where the agreement is for the exclusive publication of a specified number of copies, the publisher acquires the right to print and sell on the terms of the contract that number of copies; and, while those terms are observed by the publisher, the author is powerless to revoke the authority given, or himself to publish, until the number of copies agreed on has been sold.[2]

An agreement which is made conditional on a certain event becomes binding on the occurrence of that event. Thus, where the contract provided that, if a second edition should be called for, the publishers should publish it, the latter acquired the

have been given to the contract had the relation of the parties remained unchanged, we are unable to say, as the case now stands before us, that the plaintiffs were the legal owners of the manuscript within the copyright law. The contract was made by Comstock as reporter, whose duties were regulated by law; and the obligations of the complainants as publishers were embodied in the contract, and were incompatible with any publication on private account. The entire labor of the work was performed by Comstock, not as reporter, but on his own account. It is, we think, not a case for a specific execution of the contract; and in effect that is the object of the bill. . . . Under the changed relation of the parties, the plaintiffs cannot be considered as the legal owners of the manuscript for the purposes of the contract under the copyright law. Whatever obligation may arise from the contract under the circumstances as against Comstock must be founded on his failure to furnish the manuscripts to the plaintiffs, and of such a case we can take no jurisdiction as between the parties on the record." McLean, J., Ibid. 171, 172.

[1] Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402. See also Delf *v.* Delamotte, 3 Jur. N. S. 933.

[2] Sweet *v.* Cater, 11 Sim. 572; Pulte *v.* Derby, 5 McLean, 328. See also Blackie *v.* Aikman, 5 Sc. Sess. Cas. 719.

right, and became bound, when a second edition was called for, to publish that edition on the terms of the contract.[1] Under such agreement, the question whether a new edition is demanded by the public is not left solely to the discretion of the publisher; but is one of fact, which may be determined by proof.[2] But, where the agreement was for the publication of a single edition, and, without any special provision for that purpose, had in view the issue of following editions, the court was of opinion that it was left to the publisher to determine the proper time for bringing out a new edition.[3]

An agreement that the publishers shall publish a second edition, if demanded by the public, and print as many copies as they can sell, — an exclusive publication being understood, — gives them the right, when such demand arises, to publish and sell as many copies as can properly be considered to belong to that edition, and to prevent the author, or any one claiming under him, from publishing until such copies shall be sold.[4] And so, where the publishers are authorized and agree to publish as many editions as may be demanded, there can be little doubt that they have the right, and are bound, to continue the publication on the terms of the agreement as long as they can sell the book. In this case, the rights and obligations of the parties are ended only when the demand for the book ceases, or the conditions of the contract are violated.[5]

When neither the time during which the publication is to last, nor the number of editions or copies to be published, is specified, the publisher is not bound to publish more than the first edition; and the author, by giving proper notice, may end

[1] Pulte *v.* Derby, 5 McLean, 328.

[2] "If Derby & Co. find a second edition called for, they are bound to prepare the plates, and publish a second edition. Now, if a second edition was called for, which is a fact susceptible of proof, could the defendants, in the exercise of their discretion, refuse to publish? Such a ground would be in opposition to the spirit of the contract; and it is supposed that a Court of Chancery, looking at the whole contract, would have compelled them to publish. The discretion vested in the defendants was not an arbitrary one, but a discretion to be governed by facts, and on the establishment of the facts the right of the complainant could be enforced." McLean, J., Ibid. 334.

[3] Reade *v.* Bentley, 4 Kay & J. 665.

[4] Pulte *v.* Derby, *supra.*

[5] Such was the agreement in controversy in Stevens *v.* Benning. The case was decided on other grounds. But Vice-Chancellor Wood expressed *obiter* the same view of the law that is given in the text. See *ante*, p. 347, note 1.

the contract, and prevent the publication of any following edition.[1] But the publisher is at liberty to continue publishing successive editions on the terms of the contract until the receipt of such notice; and the author is not entitled to restrain the publication or sale of any edition on which the publisher has incurred expense before receiving notice to end the agreement.[2]

The publisher is bound to observe the terms of the contract as to manner and style of publication, selling price of copies, &c.[3] If the price at which the book is to be sold is not named in the agreement, it is left to the judgment of the publisher;[4] and, on the same principle, he would be the proper person to determine the style in which the book is to appear.[5] But while the publisher, in the absence of a special agreement, may determine the style of publication and the selling price, it would seem that this liberty would not entitle him to publish in a style, and to sell at a price, which would be clearly and positively injurious to the literary reputation or pecuniary interests of the author, unless there are circumstances to show that the consent of the latter is to be presumed.

A contract which is not, as well as one which is, terminable at will, may be ended by the neglect or refusal of the publisher to comply with its material conditions.[6] When the manner and style of publication, the selling price of copies, or other material particulars, are specified in the contract, it is reasonable to conclude that the publisher's rights are dependent on

[1] Reade *v.* Bentley, 3 Kay & J. 271, 4 Id. 656; Warne *v.* Routledge, Law Rep. 18 Eq. 497.

[2] Reade *v.* Bentley, *supra*. As to the time when the agreement may be ended, and the meaning of "edition," see opinion of Vice-Chancellor Wood, *ante*, p. 355, note.

[3] Sweet *v.* Cater, 11 Sim. 572; Stevens *v.* Benning, 1 Kay & J. 168, on ap. 6 De G., M. & G. 223. And so, in Pulte *v.* Derby, the court remarked that the publishers had no power "to publish the work except upon the terms of the contract." 5 McLean, 335.

[4] Reade *v.* Bentley, 3 Kay & J. 271. See also Stevens *v.* Benning, *supra*. Where it had been agreed that the book should be sold "to the public" at one shilling, the Irish Commissioner in Bankruptcy, holding that a sale to another publisher at a reduced price was no violation of the agreement, said: "There is nothing in the words or spirit of the agreement restricting the price to the trade; and every person, however little acquainted with the business of a bookseller and publisher, knows how enormously those prices differ." *In re* Curry, 12 Ir. Eq. 387.

[5] See *In re* Curry, Ibid. 388.

[6] Stevens *v.* Benning, *supra*.

his observance of these provisions. He has no authority to publish except on such conditions; and the author would seem to have the power, if not to compel him to publish on the terms agreed on, at least to prevent him from publishing in disregard of them. The author would thus be free to license another to publish, but not in violation of whatever rights the first publisher may have acquired with respect to any copies that he may have already printed in compliance with the terms of the contract.[1]

The contract in controversy in Stevens *v.* Benning was held to be in the nature of a personal engagement, and the duties imposed by it not capable of vicarious performance. Hence, the rights acquired by the publisher were not transferable.[2] The same opinion was incidentally expressed by the court in Reade *v.* Bentley, of the agreement which had been made by the parties to that suit.[3] The consideration in these contracts was that the author should receive a share of the profits. And the opinion of the court on the point under consideration was evidently based on the ground, that the benefits to be received by the author were dependent to a material degree on the judgment, enterprise, reputation, and business facilities of the publisher, and that these were important considerations on which the author had relied in making the agreement. These reasons would also prevail where the author is to receive a royalty on the copies sold; but they would lose their force

[1] In considering the equitable force of an agreement between the author and his publishers, Lord Justice Turner said: "It was, however, said that there was a personal equity against Mr. Forsyth operating in this mode; that Mr. Forsyth could not, as between him and Messrs. Saunders & Benning, have permitted a third edition of the work to be issued whilst copies of the second remained unsold under the agreement. How the case would have stood if Messrs. Saunders & Benning had remained in a position to perform their part of the agreement, I need not give any opinion; but, if there was a personal equity on one side, there must also be on the other. If Messrs. Saunders & Benning are not in a situation to perform their personal part of the contract, neither in my view of the case could they in equity enforce, as against Mr. Forsyth, any contract which he had entered into with them." Stevens *v.* Benning, 6 De G., M. & G. 231.

[2] 1 Kay & J. 168, on ap. 6 De G., M. & G. 223. As to what rights might pass to an assignee in bankruptcy, see *ante*, p. 348.

[3] "It is true," said Wood, V. C., "that, according to Stevens *v.* Benning, a license like the present would, I apprehend, be restricted to the defendant personally, and would not extend to his executors, or to any future partner or assignee." 4 Kay & J. 664.

where a definite sum has been agreed on for the privilege of publication. In the latter case, the author would not sustain direct pecuniary loss in consequence of a change of publishers. His literary interests might be thereby affected; but it may be doubted whether this circumstance would operate to annul the contract.[1]

In ascertaining the respective rights of the parties under an agreement, it is necessary to determine whether an exclusive publication is agreed on, or whether there is reserved to the author the power to license others to publish contemporaneously. Of course this question does not arise when the contract is express on this point. But, not unfrequently, nothing is said concerning the intentions of the parties in this respect. There is no doubt, however, that the publisher may acquire the right of exclusive publication and sale for a definite period, or during the existence of the contract, without express words in the agreement to that effect.[2] Indeed, in the absence of express words or controlling circumstances to the contrary, the natural presumption in some cases would seem to be that an exclusive publication was understood; since a copyrighted book is usually brought out by but one publisher at the time,

[1] In Pulte *v.* Derby, it appeared that the defendants, who had acquired the right of publication in consideration of paying the author a royalty on each copy sold, had, without the author's consent, transferred to another firm the stereotype plates, under an agreement to publish, and account to the defendants, on the terms of the agreement between the latter and the author. The question whether the defendants had the power to make such transfer of their rights under the contract was not decided. Nor did the court express any opinion on this point, unless the following language had reference to it. After remarking that the legal title to the copyright was in the defendants, but only for the purposes of the contract, Mr. Justice McLean said: "The right covers their interest, and protects it, so long as they shall be engaged in the publication and sale of the work. Beyond this, they are not considered as having the right. They cannot transfer it. They have no power to assign the copyright, nor to publish the work, except upon the terms of the contract." 5 McLean, 335. The views of the court are here clearly expressed to the effect, that the defendants could not assign the copyright, or transfer their title to it; and the language might reasonably be understood to mean that they were not entitled to transfer the stereotype plates, and authorize another to publish, as they had done. But whether the court was or was not of this opinion cannot be affirmed with certainty.

[2] Sweet *v.* Cater, 11 Sim. 572; Stevens *v.* Benning, 1 Kay & J. 168; Warne *v.* Routledge, Law Rep. 18 Eq. 497. In Reade *v.* Bentley, 3 Kay & J. 271, 4 Id. 656, though the question was not discussed, it was not denied that the publisher's rights under an indefinite agreement were exclusive during the existence of the agreement.

who undertakes the publication, and expects to realize his profits, on the implied understanding that he is to be the sole publisher for the time agreed on, or as long as the agreement lasts.[1]

Unless an assignment of the copyright has been made, the legal title, the possession of which is necessary to sustain an action at law for piracy, remains in the author. But the publisher may acquire an equitable title sufficient for the assertion of his rights in a Court of Chancery.[2] In the United States, when the copyright is entered in the name of the publisher, the legal title will vest in him for the purposes of the agreement. It is then held in trust for the owner.[3]

Rights of Parties after Agreement is Ended. — When a contract for an exclusive publication is terminable at will, or by non-compliance with its provisions, the question is raised as to what are the rights of the parties after the agreement has been ended. It is conceded that the publisher may sell all the copies printed under the agreement.[4] But is this right exclusive, so that he may prevent the author, or any one claiming under him, from publishing until such copies shall have been sold? In Stevens *v.* Benning, Vice-Chancellor Wood, in considering a contract terminable by circumstances, expressed the opinion that the publisher would continue to have the exclusive right of selling the copies which had been printed before the termination of the agreement.[5]

Publisher's Right to Sell after Agreement is Ended held not to be Exclusive. — This issue was directly raised in the recent case of Warne *v.* Routledge. The plaintiffs had orally agreed with Mrs. Cook to publish, at their own expense, a book written by her, and entitled How to Dress on £15 a Year as a Lady,

[1] In a recent case, the English Court of Chancery held that a contract between a manager of a theatre and an actor must be understood to be for the exclusive services of the latter during the period for which he had been engaged, though there was no express agreement that he should not act elsewhere. Montague *v.* Flockton, Law Rep. 16 Eq. 189.

[2] Sweet *v.* Cater, 11 Sim. 572; Reade *v.* Bentley, *infra*.

[3] Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402; Pulte *v.* Derby, 5 McLean, 328, 385.

[4] Reade *v.* Bentley, 3 Kay & J. 271, 4 Id. 656; Warne *v.* Routledge, Law Rep. 18 Eq. 497; Howitt *v.* Hall, 6 L. T. N. S. 348.

[5] See *ante*, p. 347, note 2.

by a Lady, to sell at a shilling a copy, and to pay her a penny for each copy sold. Nothing was said as to how many copies or how long the plaintiffs should publish, or whether they should be the sole publishers. When forty-four thousand copies had been printed, and forty-two thousand sold, the author notified the plaintiffs of the termination of the agreement, and immediately authorized the defendants to issue a new edition. The plaintiffs now sought to restrain such publication until the copies printed by them under the agreement should be sold. The Master of the Rolls, Sir George Jessel, held that the plaintiffs were entitled to be the exclusive publishers while the agreement lasted; but that after its termination, though they were at liberty to sell the copies previously printed, they had no power to prevent the author or any person claiming under her from publishing.[1]

[1] Law Rep. 18 Eq. 497.

"Looking at the nature of the book, and to the circumstance that it was a term of the agreement that the publishers should publish at their own risk and pay the royalty, I think the contract, so long as it existed, must be taken to be an exclusive contract; that is to say, that so long as Messrs. Warne & Co. were allowed to publish, so long no one else could publish, — neither the lady herself, nor an assign from her. That being established, what is the next right it gives to either party? On the determination of the partnership adventure, or whatever you choose to call it, what right had Messrs. Warne & Co. in the book? There is authority upon the subject; but I do not think it wants authority. I think it is plain that no termination of the agreement could deprive them of the right of selling the copies which they have themselves printed under this arrangement. Whether the arrangement was at will or for a term, the publishers must retain the right of selling for their own benefit (subject to the royalty) the copies which they have printed at their own expense, in reliance upon that agreement. So far I go with the plaintiffs; but the plaintiffs then want me to import something else, — not only that the publishers should have the right to sell any copies they might have printed before the disagreement, but that the owner of the copyright should not have the right to publish at all so long as any copies remain unsold. I cannot find that in the agreement, and it does not seem to be reasonable to import it; because it would come to this, that, if the publishers printed a very large number of copies, it would deprive the authoress of the copyright altogether. I cannot import such an unreasonable term into the agreement.

"Then it is said, that, if you give the publisher no protection, the result may be that the author may publish another edition a day or two after the publishing of the first edition, and so destroy the value of the remaining copies of the first edition remaining unsold. That may be. And it is said that that is so unreasonable that you must infer some stipulation to prevent it. Why? No doubt, partnerships at will have their inconveniences as well as their conveniences. There is no reason why I should make persons take up a totally different position from that which they have agreed to take up, because it might be convenient to one of the parties after the termination of

Above Decision Questioned. — The correctness of the rule laid down in this decision, that the author may publish at any time after notice of the termination of the agreement, and before the publisher has had an opportunity to sell the copies lawfully printed, is open to reasonable doubt. It had not been expressly agreed in this case that the publishers should have the right of exclusive publication. But the court held that such must be taken to be the understood or implied meaning of the contract; because otherwise the publishers, after incurring the cost and assuming the risk of publication, might be unjustly deprived of the profits to which they were entitled. The same reason applies with equal force in determining whether the publisher is to have the sole liberty of selling the copies which he was authorized to print. If the author is free, at any time after giving notice to end the agreement with the first publisher, to license another to publish and sell, the latter may issue a competing edition, and even sell at a lower price, immediately after the first publisher has brought out a large edition at great expense, and before he has had an opportunity to sell any considerable number of copies, or even before he has sold any copies. In this way, the first publisher may not only be prevented from realizing the profits to which he is entitled, but may also be subjected to heavy losses in consequence of the expenses of publication.[1] The Master of the Rolls replied to this argument by saying, that, if the publishers "want that protection," they "must contract for it." He might have said, with equal reason, that they could not successfully claim the exclusive right of publication during the existence of the agreement, unless they had contracted for it. But he held that they had acquired that right; and yet they had not agreed for it more clearly than they had for the right of exclusively selling the copies which they had been authorized to print.

the arrangement. If you do want that protection for a term of years, or for a definite term, you must contract for it. That is all. But I cannot import such a term into the contract. If I did, I should make partnerships at will involve consequences that the partners never dreamt of." Jessel, M. R., Ibid. 501.

[1] If Mrs. Cook could lawfully authorize the defendants to bring into the market a new edition, while two thousand copies printed by the plaintiffs remained unsold, she could grant a similar license when forty-two thousand copies, or even the entire number printed, were still in the plaintiffs' stock.

It was conceded in this case that the right both of printing and of selling was exclusive in the defendants during the existence of the contract. It has been seen that the author cannot end the agreement, as far as the printing is concerned, without giving due notice to the publisher; and that such notice, to be operative, must be given before any expense has been incurred on a future edition.[1] Does not the same principle govern in ending the agreement as far as the right of selling is concerned? It is not consistent to hold that the author is powerless to interfere with the printing of an edition when the publisher will thereby incur loss, but that he is free to subject the publisher to a much greater loss by defeating the sale of the edition as soon as it is published. The publisher prints with the understanding that his right to sell is to be exclusive; and, as has been seen, this right is conceded to be exclusive, while the agreement lasts. Is not the author bound, as in the case of printing, to give due notice before he can annul that right; and must not such notice, to be operative, be given before the copies are printed? In other words, is not the author powerless to end the agreement, as far as the selling is concerned, until the copies printed shall have been sold?

It may be objected that, if the author cannot publish while any copies printed under the agreement remain unsold, he may practically be deprived of his copyright, since there may be little or no demand for such copies; or it may be said, the publisher may neglect or refuse to sell them. It is clear that the latter has no right to neglect or refuse to sell. If there is no demand for the copies printed, or if the demand be insignificant, the first publisher would not sustain any material loss by the author's permitting another publisher to publish a new edition; and a court of equity might refuse to interfere with such publication. While there is a fair demand for the copies printed by the first publisher, the author is not deprived of his copyright nor the benefits for which he bargained; since he is entitled to the royalty on the copies sold, or other consideration, for which the agreement was made.

The question under consideration is not free from doubt and

[1] Reade *v.* Bentley, 3 Kay & J. 271, 4 Id. 656.

difficulty. The true doctrine would seem to be, that an agreement which is indefinite as to the time of its continuance, and as to the number of copies to be published, and which, while it continues, gives to the publisher the exclusive right of printing and of selling, cannot be ended until a reasonable time for selling the copies printed under it has passed. The publisher may at any time be prevented from printing a future edition on which he has incurred no expense; but it would seem that he is entitled to have a fair opportunity to sell exclusively the copies which he has printed on his faith in the agreement.[1]

Held in England that Buyer of Copyright for Limited Time may Sell all Copies Printed during that Time. — Where it had been agreed that the publisher should have "the copyright and sole right of sale for four years," Vice-Chancellor Wood held that the right of printing and selling reverted to the author at the end of the four years, but that the publisher was entitled to

[1] Willis *v.* Tibbals, 1 Jones & Sp. (N. Y.) 220, was an action in the New York Superior Court, growing out of the alleged breach of a contract for the publication of a book written by the plaintiff. The agreement, which appears to have been oral, was that the defendant should publish the book, and pay to the plaintiff a royalty on each copy sold. It was not specified how long the publication should continue, or how many copies should be published, nor whether the defendant was to be the exclusive publisher. When eight thousand copies had been printed, and before all of them had been sold, the author, without notifying the publisher of his intention to end the agreement, and without the knowledge of the latter, authorized another firm to publish the book. The action was brought by the author for the recovery of money alleged to be due under the contract; but the counter-claim, set up by the defendant for damages sustained in consequence of the publication and sale of the book by another publisher, raised the question whether the defendant had acquired the right to be the exclusive publisher during the existence of the contract, or whether during that time the author was at liberty to license another to publish. The fact that the plaintiff had granted such a license, without taking any steps to end his agreement with the defendant, raised, or should have raised, the vital question, which had been so elaborately discussed and decided in the two suits of Reade *v.* Bentley, whether an author is at liberty at any time, and without giving any notice, arbitrarily to end an indefinite contract which he has made with a publisher. This question, whose determination was essential to a right decision of the case, is not referred to in the reported opinion. The court held that, in the absence of an express agreement to that effect, the defendant had not acquired the right of exclusive publication; and, in effect, that the plaintiff, without taking any steps to end his contract with the defendant, was entitled at any time to authorize another to publish. This decision was rendered without any reference, as far as appears from the report of the case, to the leading authorities on the subject, and is entitled to little consideration.

sell after the expiration of that term the copies which he had printed in good faith during the term.[1]

And that, after Sale of Copyright, Seller may Sell Copies Printed before Sale. — It has also been held that, after he has assigned his copyright, the assignor is free to sell any copies of the book which he had printed before the assignment was made.[2] In this, as well as the case last referred to, there was no express agreement or mutual understanding as to the sale of the copies in dispute. Of course, if an express or an implied agreement had been proved, the rights of the parties would have been determined by it.

Law Claimed to be Different in United States. — The two cases under consideration were decided under the English statute. The soundness of the decisions has been questioned elsewhere in this work, and it is maintained that a different construction should be given to like agreements in this country: that the buyer of a copyright for a limited term is not entitled, without the consent of the owner, to sell copies after that term has ended; and that an assignment of the copyright divests the assignor of the right of sale.[3]

Negative Covenant by Author. — It has been seen that an author, in agreeing with a publisher for the exclusive publica-

[1] Howitt *v.* Hall, 6 L. T. N. S. 348. "The copyright acts," said the Vice-Chancellor, "were directed against printing (8 Anne, c. 19, and 5 & 6 Vict. c. 45, s. 15); and when, as in this case, the defendant had acquired the right of lawfully printing the work, he was at liberty to sell at any time what he had so printed. The words, 'sole right of sale,' might or might not have been superfluous; but after four years the right to print the work reverted to the author, who had taken care to secure himself in that respect. It had been suggested that the effect might be to destroy the copyright in the author altogether, as the publisher, who had purchased the copyright for a limited period only, might during that period print off copies enough to last for all time. Probably a nice question might have arisen as to the number of copies of which an edition might consist; but a publisher was not likely to incur the useless expense of printing copies enough to exhaust the demand for all time, and have them lying on his hands unprofitably. But the answer was palpable, that, if the author wished to guard against such a contingency, he might easily secure himself by stipulating what number of copies was to be printed. Should, however, a case of fraud be established against a publisher under such a state of circumstances, the court could deal with it. But no case of fraud was alleged in the present case. What the defendants had done, appeared to him (the V. C.) to have been done perfectly *bona fide*; and they were entitled under the contract to do what they had done." Ibid. 350.

[2] Taylor *v.* Pillow, Law Rep. 7 Eq. 418.

[3] See *ante*, pp. 338–342.

tion of a literary composition, binds himself not to publish, or permit a third person to publish, the same work while the first publisher's rights are exclusive. So also an author, in giving one person the right to publish a book, may covenant not to write another work on the same subject, or to take part in a rival publication, or to do any thing to defeat or prejudice the sale of the first composition. Lord Eldon held that a covenant made with his copartners by the dramatist Colman, not to write plays for any other theatre than the Haymarket, was not analogous to a contract in restraint of trade and against public policy.[1]

It may be regarded as settled that a Court of Chancery will restrain an author, or any person having notice, from violating an express negative covenant made by the author;[2] and it has been held that a third person, without notice of the covenant, may be enjoined from publishing or selling a book in violation of it.[3] The same principle would doubtless apply in the case of a negative covenant, not express, but clearly implied and understood by all the parties. It has been held that an actor may bind himself by an implied stipulation not to act in any other theatre than that for which he is regularly engaged; and a court of equity will enjoin him from violating such covenant.[4] There is no reason why literary contracts should not come within the same rule.[5]

Author may not Reproduce Work after Sale of Copyright. — After an author has sold the copyright in a book, he is not free to reproduce substantially the same matter in another work. Even in the absence of any special agreement, the

[1] Morris *v.* Colman, 18 Ves. 437. "I cannot therefore," said the Lord Chancellor, "see any thing unreasonable in this. On the contrary, it is a contract which all parties may consider as affording the most eligible, if not the only, means of making this theatre profitable to them all as proprietors, authors, or in any other character which they are by the contract to hold."

[2] Barfield *v.* Nicholson, 2 Sim. & St. 1; Brooke *v.* Chitty, 2 Coop. (*temp.* Cottenham) 216; Colburn *v.* Simms, 2 Hare, 543, 558; Warne *v.* Routledge, Law Rep. 18 Eq. 497; Ward *v.* Beeton, Law Rep. 19 Eq. 207.

[3] Colburn *v.* Simms, *supra;* and see Barfield *v.* Nicholson, *supra.*

[4] Montague *v.* Flockton, Law Rep. 16 Eq. 189. See also Webster *v.* Dillon, 3 Jur. N. S. 432; Fechter *v.* Montgomery, 33 Beav. 22; Daly *v.* Smith, 6 Jones & Sp. (38 N. Y. Superior Ct.) 158.

[5] For a further consideration of this subject and the authorities bearing on it, see latter part of Chap. XI.

second publication would be an infringement of the copyright in the first.[1]

May Publisher make Changes in Author's Manuscript? — The question has been raised, whether a person who has acquired the right to publish a manuscript is at liberty to make alterations in it without the consent of the author. In Cox *v.* Cox,[2] it appeared that the defendant, in preparing a book for the use of tenants and owners of property, had engaged the plaintiff, for a specified sum, to write the legal part, and also to revise or rewrite the part prepared by the defendant. In the agreement, nothing was said about the copyright, or in whose name the work should be published, or whether the plaintiff's name should appear as the author of that which he was to write. On receiving the manuscript, the defendant objected to the length and technical treatment of the part contributed by the plaintiff, which led to a controversy as to whether alterations and omissions should be made in this part, or whether it should be printed without change. But no definite agreement on this point seems to have been reached. The defendant proceeded with the printing; and, on reading the proof-sheets, the plaintiff learned that extensive omissions and changes in the legal part had been made without his knowledge or consent. The plaintiff now sought to enjoin the publication of the work, on the ground that such use of his manuscript would be injurious to his reputation, and also on the ground that he had not been paid for his services. The court finding that "the plaintiff was evidently in the subordinate position of assisting in the production of a work which was to come out in the name, and as the work of, the defendant," and that there had been proved no stipulation that the defendant should not make any alteration in the manuscript, refused to grant the injunction. It was further held, that the plaintiff's remedy for money due was at law.[3]

[1] Rooney *v.* Kelly, 14 Ir. Law Rep. N. s. 158; Colburn *v.* Simms, 2 Hare, 543. The 25 & 26 Vict. c. 68, s. 6, expressly prohibits the artist from reproducing a painting or photograph after he has sold the original.

[2] 11 Hare, 118.

[3] After the agreement had been made, the plaintiff obtained permission from the defendant to publish the legal part in separate form; but the Vice-Chancellor held that this was a voluntary arrangement that did not affect the original contract.

The special facts on which this decision was based should be distinctly borne in mind. The court intimated that a different rule would apply to different facts.[1] The case decides nothing as to the right of a person to make alterations in a manuscript which is to be published as the work and in the name of its author. Whatever liberties may be taken with a production with which the author's name is not connected, or whatever may be the rights of a publisher in making unimportant or harmless changes in a work for whose composition the author is to be held responsible, it cannot be successfully maintained that a publisher, whether he has bought the copyright or is merely licensed to publish, is at liberty, without the consent of the author, to make whatever changes he may please in a composition to be published in the name of the author. In the absence of an express understanding or special circumstances to that effect, such a privilege is not even impliedly given by a sale of the copyright, or a license to publish. The unauthorized exercise of such freedom with a manuscript might seriously hurt the reputation of the author; and there is no principle to defeat his right in equity to prevent such publication by injunction, or in law to recover damages for the injury sustained in consequence of the publication. A Court of Chancery has enjoined the publication of a book falsely represented to be the work of a well-known author;[2] and a court of law

[1] "A serious question," said Wood, V. C., "was then adverted to, — but it is one which does not arise in this case, — how far a party who had purchased a manuscript has a right to alter it, and produce it in a mutilated form? — how far, in a case in which the property has completely passed, it is to be assimilated to a case of goods sold and delivered, and thenceforward in the complete dominion of the purchaser? A qualified contract may be made: an essay may be supplied to a magazine or an encyclopædia on the understanding that it is to be published entire; and it may be accepted by the editor, and paid for as what it purports to be. In the instance of an essay which has been accepted in that shape, the question might arise, whether any curtailment could be allowed under that special contract. But here there is no such special contract. The contract is that the plaintiff shall supply the defendant with the matter which is required, in such a form as to enable the defendant to publish it as his own. I can find no circumstances from which any such special contract as I have mentioned can be inferred. The plaintiff has indeed sought to make it a stipulation that his contribution of the legal materials shall not be published otherwise than entire; but this stipulation has no foundation in the original contract upon which his case rests." 11 Hare, 124.

[2] Byron *v.* Johnston, 2 Meriv. 29; Harte *v.* De Witt, 1 Cent. Law Jour. 260.

has awarded damages for the injury done to the reputation of an author by the publication of an erroneous edition of a book, edited by another, but with a title-page tending to mislead the public to believe that the edition had been revised by the author.[1] In the latter case, the publisher charged with wrong was the owner of the copyright by purchase from the author; and in both cases the controlling principle was, that a person shall not be held up to the public as the author of that which he has not written. The general principle is the same when what is published is materially different from that written by the author.

Publisher Liable for Injury to Author by False Representations as to Authorship of Revised Edition. — When a publisher is the absolute owner of the copyright, he is entitled, without the consent of the author, to publish successive editions of the work, with additions and corrections; and, in bringing out new editions, may perhaps make such omissions and other changes in the original as will not injure the reputation of the author. But such revision, when done by another, cannot lawfully be represented as having been made by the author of the original. In Archbold *v.* Sweet,[2] the facts showed that the plaintiff, having prepared a second edition of his work on criminal law, had sold the copyright to the defendant, who published the book. Afterward, the defendant published a third edition, prepared by an editor whose name did not appear in the book. The title-page represented the work to be "A Summary of the Law relative to Pleading and Evidence in Criminal Cases, . . . by J. F. Archbold, Esq., Barrister at Law. Third edition, with very considerable additions." The plaintiff proved that there were numerous gross blunders in the third edition, and alleged that his reputation would thereby be injured, as the public would be led to believe that that edition had been prepared by him. Lord Tenterden instructed the jury, that if they found that buyers, using reasonable care, would be led to believe that the third edition had been revised by the plaintiff, the latter was entitled to damages. The verdict was against the defendant.

[1] Archbold *v.* Sweet, *infra*.

[2] 5 Car. & P. 219. See Seeley *v.* Fisher, 11 Sim. 581, treated in latter part of Chap. XI.; also, Wright *v.* Tallis, 1 C. B. 893, where it was held that there can be no copyright in a book falsely represented to be the work of a well-known author. See *ante*, p. 196.

Publisher Entitled to Damages when Author Refuses to Supply Rest of Manuscript after Part is Printed. — Where it had been agreed that the publishers should publish a manuscript at their own expense, and divide the profits with the author, and, after part of the book had been printed, the author refused to supply the rest of the manuscript, it was held, in an action for breach of contract, that the publishers were entitled to recover the amount which they had expended in printing, and of the profits which they would probably have realized by publication. In answer to the objection that the action was brought by one partner against another for the recovery of partnership profits, and therefore could not be maintained, Lord Ellenborough said: "The action is not brought against the defendant to recover partnership profits, but for not contributing his labor towards the attainment of profits to be subsequently divided between the parties." [1]

Copies Printed to Replace those Destroyed by Fire not a New Edition. — It has been held by the Scotch Court of Session that an editor, under an agreement that he should prepare every new edition of a work, and should receive a certain sum for his services, is not entitled to superintend, or to claim pay for, the reprinting of a part of the work to replace copies destroyed by fire. The copies reprinted under such circumstances do not form a new edition, but go to replace the part of the edition destroyed.[2]

Unlawful Publications. — A contract for the publication of a book which it is unlawful to publish is not valid.[3] But where

[1] Gale *v.* Leckie, 2 Stark. 108. In Brook *v.* Wentworth, decided in 1798, 3 Anstr. 881, it appeared that the plaintiff had agreed to publish a work written by the defendant, and that the former should have a part of the profits, and be reimbursed by the author for money advanced for publication. Having advanced a considerable sum, the publisher refused to go on with the printing until what was due him should be paid. The defendant then agreed with another bookseller for the publication of the book, when the plaintiff applied for an injunction to restrain such publication until he should be paid the amount of his claim. The court expressed the opinion that "the plaintiff was entitled to have an injunction on such an agreement, as well as if he had absolutely purchased the copyright." But a settlement was made by the parties.

As this was simply a claim for money by the plaintiff, who did not seek to enforce a right to publish the book, and did not allege any injury arising from publication by another, it may be doubted whether this was a case for an injunction. The plaintiff's remedy was an action at law for breach of contract as in Gale *v.* Leckie, *infra*, and Cox *v.* Cox, 11 Hare, 118.

[2] Blackwood *v.* Brewster, 23 Sc. Sess. Cas. 2d ser. 142.

[3] Gale *v.* Leckie, 2 Stark. 107; Poplett *v.* Stockdale, 1 Ryan & M. 337; Clay *v.* Yates, 1 Hurl. & N. 73.

this defence was set up, and the work itself was not produced, and no evidence of its character was offered, the court instructed the jury that they were not to presume that the book was obnoxious.[1]

It has been held that a printer cannot maintain an action against a publisher for money due for printing an obscene book.[2] But where a printer, after printing part of a book, received the manuscript of the other part, and found it to be libellous, it was held that he was not bound to print the libellous part, and was entitled to recover for what he had printed.[3]

Cyclopædias and Periodicals. — In England, there are statutory provisions concerning the respective rights of author and publisher in articles published in cyclopædias, magazines, reviews, and other periodicals.[4] In the absence of an express or implied agreement to the contrary, a license to use a composition in a named publication gives the publisher no right to publish it in a separate or other form not within the meaning of the contract.[5] And the same is true independently of the statutory regulations.[6]

[1] Gale *v.* Leckie, 2 Stark. 107.

[2] Poplett *v.* Stockdale, 1 Ryan & M. 337. Best, C. J., said that "no person who has contributed his assistance to the publication of such a work can recover in a court of justice any compensation for labor so bestowed. The person who lends himself to the violation of the public morals and laws of the country shall not have the assistance of those laws to carry into execution such a purpose."

[3] Clay *v.* Yates, 1 Hurl. & N. 73. "I told the jury," said Pollock, C. B., "that if the plaintiff agreed to print the dedication and the treatise, and so undertook to print that which he knew to be libellous, and afterwards said that he would not print both, in such case he could not recover. I think his right to recover rests entirely on this ground, that he had been furnished with the treatise without the dedication. The dedication was afterwards sent; but he had no opportunity of reading it until after it was printed. He then discovered that it was libellous, and refused to permit the defendant to have it. I think that if a contract is *bona fide* entered into by a printer to print a work consisting of two parts, and at the time he enters into the contract he has no means of knowing that one part is unlawful, and he executes both, but afterwards suppresses that which is unlawful, there is an implied undertaking on the part of the person employing him to pay for so much of the work as is lawful." Ibid. 78.

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

[5] Bishop of Hereford *v.* Griffin, 16 Sim. 190; Mayhew *v.* Maxwell, 1 Johns. & H. 312; Smith *v.* Johnson, 4 Giff. 632; Strahan *v.* Graham, 16 L. T. N. S. 87, on ap. 17 Id. 457. For a fuller consideration of the rights of the parties to an agreement governed by section 18 of 5 & 6 Vict. c. 45, see *ante*, p. 243.

[6] Stewart *v.* Black, 9 Sc. Sess. Cas. 2d ser. 1026. The rights of the respective parties in the United States

Where an author had been engaged to write an article for a periodical, and before the article was done, and before the publication or delivery of any part of it, the periodical was discontinued, it was held that the publishers were not entitled to claim the completion of the article for publication in a separate form, but were bound to pay a fair sum for the part that had been written.[1]

Title of Magazine Partnership Property. — Where an editor and publishers have formed a partnership for the publication of a magazine of which they are joint owners, the editor, having taken steps to dissolve the partnership with the view of establishing another periodical, is not at liberty to advertise the discontinuance of the first magazine. The title of the latter and the right to publish it are partnership property, and may be sold for the benefit of the partners. But the editor may advertise its discontinuance by him, or as far as he is concerned.[2]

Name of Editor not Part of Title. — In Crookes *v.* Petter,[3] it appeared that an agreement had been made that the plaintiff, for a sum to be determined by the number of copies sold, should be the editor of a periodical owned by the defendants, and to be published by them under a title to be agreed on. After it had been published for about a year with the title or heading, "The Photographic News, a Weekly Record of the Progress of Photography, Edited by W. Crookes, F. C. S.," and with a printed notice that all editorial communications should be addressed to the editor, the plaintiff sought to have the defendants enjoined from interfering with his editorial management, and from publishing the periodical without his name as editor appearing in the title, or in some other place, or without a printed notice that editorial communications should be addressed to him. The court refused to grant an injunction on the grounds that the title of the periodical had not been changed by the omission of the editor's name, which was not a

[1] Planché *v.* Colburn, 5 Car. & P. 58, on ap. 8 Bing. 14.

[2] Bradbury *v.* Dickens, 27 Beav. 53. See also Constable *v.* Brewster, 3 Sc. Sess. Cas. 214; Hogg *v.* Kirby, 8 Ves. 215.

[3] 3 L. T. N. S. 225.

part of the title, and that there was no stipulation, express or implied, in the agreement that the defendants should not do what the plaintiff sought to enjoin them from doing.

Joint Owners of Copyright. — Joint owners of the copyright may make any agreement between themselves with reference to the printing, publication, and sale of a book; and such contract will be binding on them, although it may not be valid as far as other persons are concerned.[1]

In Carter *v.* Bailey, it was held by the Supreme Court of Maine that one owner in common of a copyright, who at his own expense has published and sold the book copyrighted, is not liable, in the absence of an agreement *inter sese*, to account to his co-owner.[2]

Literary Contracts Governed by Statute of Frauds. — There appears to be no reason why the general principles of the Statute of Frauds should not apply to literary as well as to other contracts.[3] In Sweet *v.* Lee,[4] it appeared that the agreement for the publication of a dictionary of legal practice was contained in a memorandum which was signed with the initials

[1] Gould *v.* Banks, 8 Wend. (N. Y.) 562. "There is no principle or authority," said Nelson, J., "which will inhibit such a contract between parties, because they may be partners in the subject-matter of it. They may bind themselves by a private agreement concerning the partnership business; but, so far as third persons may be interested, it would be inoperative as to them." Ibid. 568.

[2] 64 Me. 458. "In the absence of any contract modifying their relations," said Virgin, J., "they are simply owners in common, as the plaintiff has alleged, each owning a distinct but undivided part, which, or any part of which, alone he can sell, as in the case of personal chattels. The statute confers upon all the owners full power, without exacting any obligation in return, to print, publish, and sell. It gives no superior right to either, — the only restriction being as to time. All others within that period, having no license from them or some one of them, are excluded. Each can exercise his own right alone, without using or receiving any aid or benefit whatever from the title or property of the others. But if none be allowed to enjoy his legal interest without the consent of all, then one, by withholding his consent, might practically destroy the value of the whole use. And a use only upon condition of accounting for profits would compel a disuse, or a risk of skill, capital, and time, with no right to call for a sharing of possible losses. When one owner, by exercising a right expressly conferred upon him, in no wise molests the right, title, possession, or estate of his co-owners, or hinders them from a full enjoyment, or sale and transfer, of their whole property, we fail to perceive any principle of equity which would require him to account therefor. If owners of such property would have the result otherwise, they must bring it about by contract." Ibid. 463.

[3] See Strahan *v.* Graham, 16 L. T. N. S. 87, on ap. 17 Id. 457.

[4] 3 Man. & Gr. 452.

of the publisher and of the author; and was to the effect that the latter should receive £80 a year for five years, and £60 a year for the rest of his life, if he should live longer than five years. This was held to be void under the Statute of Frauds;[1] because, being a memorandum of an agreement not to be performed within a year, no consideration was expressed on the face of it, and it was without any signature other than the initials of the parties. The plaintiff, therefore, was not entitled to damages claimed to have been sustained by the failure of the defendant to perform his agreement to prepare a new edition. Nor, although the contract was void, could the plaintiff, having paid for several years the sums mentioned in the memorandum, recover the money so paid on the ground of failure of consideration.

An agreement by a printer to find the paper and print a book has been held not to be a contract for the sale of goods within the Statute of Frauds.[2] The printer is entitled under a verbal agreement of this kind to recover for work done and materials supplied.[3]

[1] 29 Car. II. c. 3, s. 4.
[2] 29 Car. II. c. 3, s. 17, as extended by 9 Geo. IV. c. 14, s. 7.
[3] Clay *v.* Yates, 1 Hurl. & N. 73.

CHAPTER VIII.

PIRACY.

Piracy Defined, and Distinguished from Plagiarism. — In the law of copyright, piracy is the use of literary property in violation of the legal rights of the owner. The meaning of infringement is the same. Neither word is properly used where no legal rights are invaded. Hence, strictly speaking, it is not piracy to take without authority either a part or the whole of what another has written, if neither a statute nor the common law is thereby violated. Such act may be plagiarism, which is a moral but not necessarily a legal wrong; but, to constitute piracy, there must be an act against the law. Plagiarism further differs from piracy in that the plagiarist falsely offers as his own what he has taken from the writings of another. The pirate may or may not do this. Hence, there may be an unauthorized appropriation of literary property which is neither piracy nor plagiarism, as the republication in the United States of the work of a foreign author. This is not piracy, because no law is violated; and, without misrepresentation as to authorship, it is not plagiarism. So, also, the same act may be at once plagiarism and piracy.

The word piracy is applied to the unlawful taking of any kind of intellectual property, whether literary, dramatic, or art. Nor is its use restricted to productions published and protected by statute. The violation of common-law rights by publicly reading a literary composition, representing a manuscript drama, making or exhibiting copies of a work of art, may properly be called piracy.

Fundamental Principles by which Piracy is Determined. — The legislature has not defined piracy, or indicated how far a person may lawfully go in appropriating the results of another's labors. The English statute prohibits any one without au-

thority from printing, publishing, importing, or selling "any book in which there shall be subsisting copyright."[1] The law of the United States prohibits the printing, publication, sale, or importing of "any copy" of a book entitled to protection.[2] The language of the earlier statutes in both countries was substantially the same. "Book" in the English, and "copy" in the American, law are here used for the same purpose, and with the same meaning; but both acts are silent as to what that purpose and meaning are. A literal reprint of an entire work is obviously a copy. But is the republication of a part of a book within the statutory prohibition? Is the meaning of the word copy, as here used, limited to *verbatim* transcripts, or does it extend to paraphrases and servile imitations? Is the unlicensed translation, dramatization, or abridgment of a copyrighted work piratical? Did the legislature intend to protect the substance of a literary composition, or merely its verbal form? These and kindred questions have been left to the courts. They are to be determined by adjudicated principles.

The declared object of the copyright laws is to encourage learning, and to secure authors in the enjoyment of the fruits of their labors. As a means to this end, the legislature has guaranteed protection to literary property, and has declared the unlicensed use of that property to be piracy. We must first understand what that is for which protection is given, before we can determine what is an unlawful use of it. It has been shown elsewhere that literary property is not limited to the precise form of words, the identical language, in which a composition is expressed, but that it is in the intellectual creation of which language is but a means of expression and communication.[3] The same production may be expressed and communicated in various languages, without affecting its identity. The means of communication are changed; but the thing communicated remains the same. So, in the same language, the words may be varied; but the substantial identity of the composition is preserved. It is this intellectual produc-

[1] 5 & 6 Vict. c. 45, s. 15.
[2] U. S. Rev. St. s. 4964.
[3] See *ante*, p. 97.

tion, and not merely one form of language in which it may be expressed, which is the fruit of the author's genius or mental labor. It is this which is his property, and to which the law guarantees protection. It is this whose unlawful appropriation is piracy. Property cannot exist in simple ideas and thoughts; but only in their arrangement and combination. It is this association that forms a literary composition; and, unless this or a substantial part of it be taken, there is no appropriation of property. Hence ideas, thoughts, sentiments, &c., wherever found, may be appropriated by any one. But, to take them in their association is to take the production itself. To reproduce the whole or a large part of the composition, even though the language of the original be paraphrased or translated, is to appropriate what another has produced, and what rightly belongs to him.

True Test of Piracy. — As the owner of material possessions may assert his rights wherever or in whatever disguise his property is found, so the author of a literary composition may claim it as his own, in whatever language or form of words it can be identified as his production. The true test of piracy, then, is not whether a composition is copied in the same language or the exact words of the original, but whether in substance it is reproduced; not whether the whole, but whether a material part, is taken. In this view of the subject, it is no defence of piracy that the work entitled to protection has not been copied literally; that it has been translated into another language; that it has been dramatized; that the whole has not been taken; that it has been abridged; that it is reproduced in a new and more useful form. The controlling question always is, whether the substance of the work is taken without authority.

If the provision of the English statute which declares that no one without license shall publish "any book" protected by copyright, or that of the American act which prohibits the unauthorized republication of "any copy" of a copyrighted work, were construed to mean, that the law is violated only when a literal copy of the work is reprinted, it is obvious that there would be practically little protection for literary property; and the purpose of the legislature would be almost wholly defeated.

To escape the penalty of piracy, it would only be necessary to paraphrase or translate the language of the original, or reproduce the work in another form. In this way, all that is valuable in a literary production might be appropriated by any one with impunity. I have endeavored to explain the true fundamental principles which govern piracy, and to point out those by whose application alone effect can be given to the intent of the legislature, and the protection guaranteed to literary property by the copyright statutes be secured. On these principles rest the great body of the judgments relating to piracy. In some cases, they have been overlooked or disregarded, and judicial opinions and *dicta* marked with inconsistency and injustice have been expressed. But, in general, the courts have liberally and soundly expounded the law, and established principles broad enough to protect the substantial fruits of literary labor. Mr. Justice Story affirmed a fundamental principle of the law of copyright when he held that a work, to be free from piracy, must be the result of the author's "own labor, skill, and use of common materials and common sources of knowledge open to all men."[1] And Vice-Chancellor Wood, afterward Lord Chancellor Hatherley, following a long line of English decisions, gave expression to the same principle, when he said, "No man is entitled to avail himself of the previous labors of another, for the purpose of conveying to the public the same information, although he may append additional information to that already published."[2]

Lawful Uses of Copyrighted Works. — I. Fair Use by Quotation.

It is a recognized principle that every author, compiler, or publisher may make certain uses of a copyrighted work, in the preparation of a rival or other publication. The recognition of this doctrine is essential to the growth of knowledge; as it would obviously be a hindrance to learning if every work were a sealed book to all subsequent authors. The law, therefore, wisely allows a "fair use" to be made of every copy-

[1] Emerson *v.* Davies, 8 Story, 798.
[2] Scott *v.* Stanford, Law Rep. 8 Eq. 724.

righted production; and this liberty is consistent with the true purpose of the law to give to the earlier author adequate protection for the results of his labor. But to determine the extent of this license, and to draw the line between a fair and an unlawful use, is often one of the most difficult problems in the law of copyright. The question must generally be determined by the special facts in each case. What will be considered a fair use in one case may amount to piracy in another. The question of fair use will be considered under two heads: First, when *verbatim* extracts have been taken from the copyrighted work, either with or without acknowledgment; second, when the copyrighted work has been otherwise used in the preparation of another publication.

Extracts for Criticism. — Of the former class, the most common instances arise when extracts are taken for purposes of criticism or review. The critic or reviewer may make liberal quotations from the original work, with or without acknowledgment of the source, and either for favorable or unfavorable comment. The criticism and extracts may be published in a newspaper, magazine, book, or other form. But, in the exercise of this privilege, no person will be allowed to republish in the form of quotations a valuable part of a copyrighted work, and thus to an injurious extent to supersede the original.[1]

[1] **Br.** Roworth *v.* Wilkes, 1 Camp. 94; Wilkins *v.* Aikin, 17 Ves. 422; Whittingham *v.* Wooler, 2 Swans. 428; Mawman *v.* Tegg, 2 Russ. 385; Bell *v.* Whitehead, 3 Jur. 68; Campbell *v.* Scott, 11 Sim. 31; Bohn *v.* Bogue, 10 Jur. 420; Black *v.* Murray, 9 Sc. Sess. Cas. 3d ser. 341; Bradbury *v.* Hotten, Law Rep. 8 Exch. 1; Smith *v.* Chatto, 31 L. T. N. S. 775. **Am.** Folsom *v.* Marsh, 2 Story, 100; Story's Executors *v.* Holcombe, 4 McLean, 306; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402.

"A Review will not in general serve as a substitute for the book reviewed; and even there, if so much is extracted that it communicates the same knowledge with the original, it is an actionable violation of literary property." Lord Ellenborough, Roworth *v.* Wilkes, 1 Camp. 98.

"Reviewers may make extracts sufficient to show the merits or demerits of the work; but they cannot so exercise the privilege as to supersede the original book. Sufficient may be taken to give a correct view of the whole; but the privilege of making extracts is limited to those objects, and cannot be exercised to such an extent that the review shall become a substitute for the book reviewed." Clifford, J., Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 428.

"Acknowledged quotations, even from copyright works, if they are quotations fairly made, either for the purposes of criticism or of illustration, are not infringements of copyright. To hold any thing else would be to sentence to death all our reviews, and the greater part of our works in philosophy. If indeed the quotation is colorable, and made for the mere pur-

Test of Fair Use in Case of Criticism. — Whether the limits of lawful quotation have been exceeded is a question governed by the circumstances of each case. It is to be determined not by the intention of the critic or reviewer, but by the character of his publication and the purpose which it serves. The controlling inquiries will be, whether the extracts are of such extent, importance, or value that the publication complained of will supersede to an injurious extent the original work. Is a material and valuable part of the contents of the original communicated by the compilation? Will the latter tend to diminish the sale of the former, by reason of being wholly or partly a substitute? If so, the results of the original author's labors are appropriated to his injury, and his rights are invaded.[1]

Unfavorable Criticism. — An important consideration in these cases is the injury done to the author entitled to protection. But this injury must arise from the tendency of the publication containing the extracts to supersede the work from which they are taken. Damage done to a work by unfavorable criticism of its contents does not enter into the question of infringement.

Extracts for Other Purposes than Criticism. — The principle

pose of inserting a large portion of the copyright work, the result would be different. In the present case, I see nothing in the quotations colorable or improper. Though they are of some length, they are a very small portion of the entire work. They are fairly and legitimately applied to the illustration of the ballads to which they are appended. They may have fittingly applied to them the test which is often referred to in questions of copyright; namely, whether they are likely to injure the sale of the alleged copyright work. I am of opinion that they are likely to do the very reverse of this. I think no one can read these quotations, and rest content till he has acquired and read the whole of that exquisite novel, at whatever cost within his means." Lord Kinloch, Black *v.* Murray, 9 Sc. Sess. Cas. 3d ser. 356.

[1] "We must often," said Mr. Justice Story, "in deciding questions of this sort, look to the nature and object of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." Folsom *v.* Marsh, 2 Story, 116. Referring to this language as cited by Vice-Chancellor Wood in Scott *v.* Stanford, Law Rep. 3 Eq. 722, Vice-Chancellor Hall said: "But I do not understand the Vice-Chancellor to say that we must find all these things concurring, in order to entitle a plaintiff to relief in this court." Smith *v.* Chatto, 31 L. T. N. S. 776.

"The inquiry is," said Mr. Justice McLean, "what effect must the extracts have upon the original work? If they render it less valuable, by superseding its use in any degree, the right of the author is infringed; and it can be of no importance to know with what intent this was done." Story's Executors *v.* Holcombe, 4 McLean, 310.

on which these privileges are accorded to reviewers will justly claim recognition in the case of other works whose purpose is not strictly that of criticism, but in which fair quotation may be used for the advancement of knowledge and without harm to the original author. Thus, in the case of two or more treatises on the same subject, it is not uncommon for the later author to quote the language of his predecessor, either to corroborate his own statements or to show the diversity of views held by other writers. Especially among writers of law books does this custom prevail; and its lawfulness, when kept within reasonable bounds, should be judicially recognized. When quotations are thus made to serve a legitimate purpose, good rather than harm may be done to the earlier author. But when it appears that the purpose of the later author is to save himself labor by taking the fruits of another's industry and learning, and the extracts are of such extent and character as to give a material value to the subsequent treatise, to the substantial injury of the earlier one, a case of infringement may be made out. For obvious reasons, the test of piracy will be applied with more stringency in the case of rival works than when the extracts are used simply for purposes of criticism or illustration.

So the law may be somewhat liberally construed in the case of an author who has taken copyrighted selections to a moderate extent, and fairly used them for illustration or other legitimate purpose in a history of philosophy, literature, poetry, &c.; in a treatise whose purpose is to give a biography of the author from whose publications the quotations are made, an explanation of his theories, an analysis of his character, works, &c.; or in other productions whose object is different from that of the protected publication, and whose tendency is not to supersede the original. Here, also, the freedom of making quotations will generally be more restricted than in the case of works of criticism, for the reason that publications of the former kind have a greater tendency to supersede the original than have those of the latter. But when this tendency is not manifest, and the extracts are fairly used simply for purposes of illustration or corroboration, there seems to be no ground for a case of piracy.

Selections to Illustrate Work on Poetry. — In Campbell *v.* Scott, it appeared that the defendant had published a Book of the Poets, the alleged purpose of which was to illustrate the characteristics of various poets, and the progress of English poetry during the nineteenth century. It was claimed that the selections were made with this view alone, and that the tendency of the book was not to supersede the original works, or to injure their authors. But in the Book of the Poets four hundred and twenty-five selections and extracts, from forty-three poets, were used to illustrate an original essay, twenty-four pages long, on English poetry of the period covered, twenty-three biographical sketches of one page each, and twenty shorter notices of authors. Besides extracts, six poems entire were taken from Campbell's works. The chief value of the compilation was obviously in the selections, and not in the original matter; and the court rightly held that the limits of lawful quotation had been exceeded.[1]

For Biography. — A recent English case brought into controversy a book entitled "Thackerayana: Notes and Anecdotes, Illustrated by nearly Six Hundred Sketches, by William Makepeace Thackeray." It purported to be a kind of biography of that novelist, proceeding on the assumption that his own experiences were narrated in certain of his novels. Besides some previously unpublished sketches and caricatures by Thackeray, the publication contained extensive selections from his published works, the copyright of which belonged to the plaintiff.

[1] 11 Sim. 31. Vice-Chancellor Shadwell said: "Then is the work complained of any thing like an abridgment of the plaintiff's work, or a critique upon it? Some of the poems are given entire; and large extracts are given from other poems; and I cannot think that it can be considered as a book of criticism, when you observe the way in which it is composed. It contains seven hundred and ninety pages, thirty-four of which are taken up by a general disquisition upon the nature of the poetry of the nineteenth century; then, without any particular observation being appended to the particular poems and extracts from poems which follow there are seven hundred and fifty-eight pages of selections from the works of other authors; and therefore I cannot think that the work complained of can, in any way, be said to be a book of criticism. If there were critical notes appended to each separate passage, or to several of the passages in succession, which might illustrate them, and show from whence Mr. Campbell had borrowed an idea, or what idea he had communicated to others, I could understand that to be a fair criticism. But there is, first of all, a general essay; then there follows a mass of pirated matter, which in fact constitutes the value of the volume." Ibid. 88.

The extracts were prefaced by, and interspersed with, original comments by the compiler. It was maintained in defence that the object of the book was to show that Thackeray had given his own biography in his principal novels, and that the extracts were made to establish that proposition. But the court found that the effect of the book was to supersede, to a damaging extent, the works from which the selections had been made, and held it to be a case of piracy.[1]

To Illustrate Career of Person. — In a recent English case, the publication complained of was The Man of his Time, the object of which was to illustrate the career of Napoleon III. by caricatures taken from leading English and foreign illustrated papers. Nine caricatures, with their original headings and references, but much reduced in size, were copied from nine numbers of Punch, comprised within the period extending from 1849 to 1867. It was declared that the selections had been taken for the sole purpose of illustrating the career of Napoleon. While admitting that limited extracts might be taken from copyrighted works for a fair purpose of this kind, the court found that the defendant had republished the caricatures in Punch "for the same purpose as they were originally published, namely, to excite the amusement of his readers." It was

[1] Smith *v.* Chatto, 31 L. T. N. S. 775. See also Folsom *v.* Marsh, 2 Story, 100. Lord Eldon suggested a possible case of fair use as follows: "There is no doubt that a man cannot, under the pretence of quotation, publish either the whole or part of another's work; though he may use, what it is in all cases very difficult to define, a fair quotation. Difficulties have arisen in cases that have occurred, upon which I should have taken the same course by sending them to the consideration of a court of law. In the case of maps, for instance: one man publishes the map of a county; another man with the same design, if he has equal skill and opportunity, will by his own labor produce almost a *fac simile*, and has a right to do so; but, from his right through that medium, was it ever contended that he might copy the other map? Suppose a publication, professing to be an account of the improvement of maps of the county of Middlesex, compiling the history of all the maps of it ever published; pointing out the peculiarities belonging to them, and giving copies of them all; as well those the copyright of which has expired as those of which it was subsisting, — it is not easy to say with certainty what would be the decision upon such a case. If it was a fair history of the maps of the county which had been published, and the publication of the individual map was merely an illustration of that history, that is one way of stating it; but if the jury could perceive the object to make a profit by publishing the map of another man, that would require a different consideration. The slightest circumstances, therefore, in these cases, makes the most important distinction." Wilkins *v.* Aikin, 17 Ves. 424.

held that the defendant had gone beyond the privilege of fair quotation, and therefore a case of piracy was made out.[1]

[1] Hotten *v.* Arthur, Law Rep. 8 Exch. 1. Kelly, C. B., said: "I am of opinion that the plaintiffs are entitled to retain their verdict. The questions raised are of interest and importance; but it is difficult to lay down any fixed principle with regard to them. No doubt the matter is, to a great extent, one of degree. It may well be that an author might copy into his book a portion of some books previously published, and yet that a jury might be justified in finding there had been no infringement of copyright; whilst, on the other hand, the copying might take place under such circumstances as clearly to amount to an infringement. . . . Nine of these pictures the defendant has copied, — in some instances [illegible] in others with the addition of [illegible] printed words underneath them. If they have been so copied as to amount to a copy of a material part of the plaintiffs' publication, and the defendant has thus obtained a profit which would or might otherwise have been the plaintiffs', then there has been a piracy, for which the defendant is responsible.

"It is said that to copy a single picture, at all events could not be an infringement of the plaintiffs' copyright; but it is impossible to lay that down as a general rule. I can easily conceive a case where such an act would not be piracy. For example, where a picture is reproduced amongst a large collection, published for an entirely different object from that which the first publisher had in view. We must consider in such a case the intent of the copyist, and the nature of his work. To turn for a moment from pictures to printed matter, the illustration put during the argument by my Brother Bramwell will explain my meaning. A traveller publishes a book of travels about some distant country, like China. Amongst other things, he describes some mode of preparing food in use there. Then the compiler of a cookery-book republishes the description. No one would say that was piracy. So, again, an author publishes a history illustrated with woodcuts of the heads of kings, and another person, writing another history of some other country, finds occasion to copy one of these woodcuts. That, again, would not be a piracy. Yet, on the other hand, the copying of a single picture may, under some circumstances, be an infringement. For example, take the case of a work illustrated by one engraving of the likeness of some distinguished man, where no other likeness is extant, no one would have a right to copy that into a book upon any subject whatever, and a jury would in such a case rightly find that there had been an infringement of the copyright.

"To return to the facts of the present case, the defendant has introduced nine pictures of the plaintiffs' into what I may call his comic life of Napoleon III.: is he by so doing applying to his own use and for his own profit what otherwise the plaintiffs might have turned, and possibly still may turn, to a profitable account? The pictures are of great merit, and no doubt were largely paid for, and by inserting these copies the defendant has unquestionably added to the value of his publication. Why should this not be an infringement? It was said by my Brother Parry, in his able argument, that the plaintiffs will never make such a use of these pictures as the defendant has made. But suppose, as my Brother Pigott suggested, that after the catastrophe which ended in the fall of Napoleon III., the proprietors of Punch had chosen to republish all their caricatures of him, or that even now they should choose to do so, one cannot help seeing that the defendant's publication might cause many, who would otherwise have bought, to refrain from buying such a work. I need not refer at length to the authorities cited. The principle of them is, that where one man, for his own profit, puts into his work an essential part of another man's

Objection not to Plan, but Manner of Execution. — In the three cases which have been reviewed, the legal objection was not to the professed plan of the work complained of, but to the manner in which the plan had been executed. In a work prepared for the purposes above indicated, there is little doubt that a court would sanction the use of quotations to a much greater extent than in one having a common object with the original. But, in the cases cited, the selections had been made too extensively; and, instead of being what it purported to be, the result was little more than a compilation of selections, serving in part at least as a substitute for the original.

When Plan is Unlawful. — But suppose that the publication complained of serves two distinct purposes; that, while the extracts are honestly used for criticism or illustration, and fairly serve that purpose, yet at the same time they are of such extent and character as to be capable of materially superseding the original work. On the principles above set forth, such a publication must be regarded as piratical. When the extracts as republished produce this effect, the later author must change the plan of his work, or get permission to use the selections.

work, from which that other may still derive profit, or from which, but for the act of the first, he might have derived profit, there is evidence of a piracy upon which a jury should act."

"I am of the same opinion," said Bramwell, B., "though not without some doubt, — doubt which it is natural to feel in a case like this, which is on the border-land between piracy and no piracy. But I think the plaintiffs are entitled to succeed. They are the proprietors of a sheet of letterpress within the meaning of the act of Parliament. Now, it is quite true that, when a man publishes any thing, he professes to add to the common stock of knowledge, and everybody may avail himself of what is published. This may be illustrated by the case put, of the compiler of a cookery-book taking from some traveller's account of his travels a receipt for a new dish. But, applying that principle here, it does not exonerate the defendant. If he had said, 'I propose to illustrate my history by extracts from the satirists of the day,' and had then gone on to quote to a reasonable extent the opinions, or even the very words, of satirical writers, no one would call that piracy. Suppose, for instance, he had said, 'At this period of his career, Napoleon was unpopular, and the subject of ridicule in England. This may be seen by examining the sort of pictures of him which appeared in Punch. Later on, he became more popular, and the pictures published represented him more favorably.' That could not have been complained of. Then the defendant would simply have been using the knowledge acquired from Punch for his benefit, as he would have a right to do. But here he has done more. He has not availed himself of the knowledge acquired from Punch; but he has actually reproduced the very pictures published in Punch, and for the same purpose as they were originally published, namely, to excite the amusement of his readers." Ibid. 6.

II. Fair Use Otherwise than by Quotation.

General Principles. — The fair uses, other than those of legitimate quotation, which an author is privileged to make of a copyrighted work in the preparation of a rival or other publication, are restricted by recent English decisions to very narrow limits. The later compiler of a rival publication may learn from a copyrighted work where to find and how to use materials of which he might otherwise be ignorant. He may derive from it information, hints, suggestions, &c., which otherwise would have escaped his notice. He may use it as a guide in the preparation of his own work, to verify the accuracy and completeness of his own, or to detect errors, omissions, and other faults in his own. But, while he may thus use the copyrighted work as a guide or instructor, he must go to the common sources for materials, and his composition must be the product of his own labor. If, to a material extent, he copies from the protected work, or appropriates the results there found, it is piracy.[1] Speaking of a bookseller's catalogue, Vice-Chancellor Wood said: "The only fair use you can make of the work of another of this kind is where you take a number of such works, — catalogues, dictionaries, digests, &c., — and look over them all, and then compile an original work of your own, founded on the information you have extracted from each and all of them; but it is of vital importance that such new work should have no mere copying, no merely colorable alterations, no blind repetitions of obvious errors. I find all these things

[1] Br. Lewis *v.* Fullarton, 2 Beav. 6; Murray *v.* Bogue, 1 Drew. 353; Jarrold *v.* Houlston, 3 Kay & J. 708; Spiers *v.* Brown, 6 W. R. 352; Kelly *v.* Morris, Law Rep. 1 Eq. 697; Scott *v.* Stanford, 3 Id. 718; Morris *v.* Ashbee, 7 Id. 34; Pike *v.* Nicholas, Law Rep. 5 Ch. 251; Morris *v.* Wright, Ibid. 279; Jarrold *v.* Heywood, 18 W. R. 279; Hogg *v.* Scott, Law Rep. 18 Eq. 444; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402; Banks *v.* McDivitt, 18 Blatchf. 103.

"I do not understand that the rule prohibits an examination of previous works by the compiler before he has finished his own book, or the mere obtaining of ideas from such previous works; but it does prohibit a use of any part of the previous book *animo furandi*, with an intention to take for the purpose of saving himself labor." Shipman, J., Banks *v.* McDivitt, *supra*, 166.

The two works in controversy in Jarrold *v.* Houlston were written on the same plan, and presented in the form of question and answer popular information on a variety of scientific subjects. The earlier book, Dr.

here."[1] "Examined as a question of strict law, apart from exceptional cases," said Mr. Justice Clifford, "the privilege of

Brewer's Guide to Science, had evidently been used to a considerable extent in the preparation of the later one, although copying was denied. Vice-Chancellor Wood said:—

"In publishing a work, in the form of question and answer, on a variety of scientific subjects, he [the later author] had a right to look to all those books which were unprotected by copyright, and to make such use of them as he thought fit, by turning them into questions and answers. He had also a further right, if he found a work like Dr. Brewer's, and, perusing it, was struck by seeing — as I think has been the case in the present instance — that the author had been led up to particular questions and answers by the perusal of some other work, to have recourse himself to the same work, although possibly he would not have thought of doing so but for the perusal of the plaintiff's book. But these, I apprehend, would be perfectly fair and legitimate modes of using the plaintiff's book; and neither would be inconsistent with Mr. Philp's affidavit, that he has not copied or taken any idea or language from Dr. Brewer's book.

"There is another sort of legitimate use which might fairly be made by Mr. Philp, although it is scarcely so consistent with what he has deposed to in his affidavit. It would be a legitimate use of a work of this description, if the author of a subsequent work, after getting his own work with great pains and labor into a shape approximating to what he considered a perfect shape, should look through the earlier work to see whether it contained any heads which he had forgotten. For instance, it was said — whether accurately or not I have not thought it material to inquire — that, in reference to the several modes by which heat diffuses itself, the books to which the defendant refers as common sources mention only 'radiation, conduction, and absorption,' and make no mention of 'convection,' — a term found only in the plaintiff's book until taken thence by Mr. Philp. He might say he had forgotten 'convection,' and therefore add it to his book. But surely no one would say, with regard to a subject of so general a description, that this would be an unfair use of the plaintiff's book; provided, upon adding the word to his own book, he used his own mind to explain what 'convection' is, and explained it in his own language. So far there could be no difficulty, if the case rested there.

"The question I really have to try is, whether the use that in this case has been made of the plaintiffs' book, has gone beyond a fair use. Now, for trying that question, several tests have been laid down. One which was originally expressed, I think, by a common law judge, and was adopted by Lord Langdale in Lewis *v.* Fullarton, 2 Beav. 6, is whether you find on the part of the defendant an *animus furandi*, — an intention to take for the purpose of saving himself labor. I take the illegitimate use, as opposed to the legitimate use, of another man's work on subject-matters of this description to be this: If, knowing that a person whose work is protected by copyright has, with considerable labor, compiled from various sources a work in itself not original, but which he has digested and arranged, you, being minded to compile a work of a like description, instead of taking the pains of searching into all the common sources, and obtaining your subject-matter from them, avail yourself of the labor of your predecessor, adopt his arrangements, adopt moreover the very questions he has asked, or adopt them with but a slight degree of colorable variation, and thus save yourself pains and labor by availing yourself of the pains

[1] Hotten *v.* Arthur, 1 Hem. & M. 609.

fair use accorded to a subsequent writer must be such, and such only, as will not cause substantial injury to the proprietor of the first publication." [1]

Directories. — In the recent English directory cases, the law was forcibly and clearly expounded to the effect that the compiler of a directory may use a copyrighted rival work as a means of learning the names and places of residence of the persons to be canvassed, of avoiding omissions and errors in his own publication, and generally as a guide in the preparation of his own. But in no case may he save himself the labor and expense of canvassing, by copying or otherwise appropriating the results of his predecessor's labor. He cannot cut slips from a protected directory, and use them in printing his own, although he verifies the accuracy of the information, or corrects it if erroneous, by personal application to the persons whose names are given. In all cases, he must obtain the information at his own expense and by his own labor, independently of the copyrighted work, which may be used only as a guide.[2]

Descriptive Catalogue. — And so, in the case of a descriptive catalogue of fruit and trees, the court was of opinion that the later compiler might use the work of his predecessor as a guide or instructor; but might not copy the descriptions from it, although he should verify and correct them from specimens of fruit before him. Though he cannot be prevented from getting much aid in the way of information, suggestions, &c., from the copyrighted work open before him, he must write his own descriptions from actual specimens or common sources of information.[3]

Work on Ethnology. — The same rule was followed in Pike *v.* Nicholas, where two rival works on the same subject were in controversy. The same arguments, illustrations, quotations, citations, &c., were found in both; and it was evident that, for much contained in his own publication, the defendant was

and labor which he has employed, that I take to be an illegitimate use. That Mr. Philp has made this use of the plaintiffs' book to a certain extent, I find to be clear." 3 Kay & J. 715. See also Jarrold *v.* Heywood, 18 W. R. 279.

[1] Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 428.

[2] Kelly *v.* Morris, Law Rep. 1 Eq. 697; Morris *v.* Ashbee, 7 Id. 34; Morris *v.* Wright, Law Rep. 5 Ch. 279.

[3] Hogg *v.* Scott, Law Rep. 18 Eq. 444.

indebted to that of the plaintiff. The Court of Appeal found that, while the defendant had been led by perusing the earlier work to cite authorities, make quotations, &c., which otherwise would have escaped his notice, he had not, with two unimportant exceptions, copied directly from the plaintiff's production; but, using it as a guide, had obtained the materials from the original sources, and worked them up by his own labor. This was held to be a fair use.[1]

Dictionary. — In Spiers *v.* Brown, Vice-Chancellor Wood had great difficulty in determining whether, in the preparation of a dictionary, M. Contanseau had made an unlawful use of the French-English Dictionary of Dr. Spiers. The extent of the use in this case cannot be satisfactorily determined from the report. It was admitted that Dr. Spiers's work had been

[1] Law Rep. 5 Ch. 251. Lord Chancellor Hatherley said: "The result, therefore, of the whole case was this: The defendant was led to look into the particular portions of Prichard by some of the quotations of the plaintiff. Being directed to that part of Prichard, he did go to Prichard's book; for there is in his book a passage omitted by the plaintiff. He was directed by a passage in the plaintiff's book, which referred to Gildas, to inquire into Gildas, which possibly he never might have done if the plaintiff had not led the way by pointing to that author and to the work of Sir T. D. Hardy. Upon perusing Sir T. D. Hardy's work, the defendant found an account of Gildas, and a reference to Nennius, and certain remarks of Gibbon; and then he followed out those remarks by such remarks as he himself made upon the whole subject. . . . If the defendant had been disposed to do what common fairness and justice required him to do, to say nothing of the oath which he took when he put in his answer, and had fairly said, 'I acknowledge my obligation to this gentleman in putting me on a course of thorough critical investigation of Gildas, to begin with; I beg to express my obligations to him in giving me the idea, through the medium of the tables to which I have had resort, of investigating the population of London, and the number of persons brought up from the country, and I beg also to express my obligations to him for pointing out that passage in Retzius which escaped my attention,' nobody could have blamed him as being a pirate, or have said that what he had done amounted to piracy. That course, unfortunately, was not taken." Ibid. 265.

In Morris *v.* Wright, Giffard, L. J., said: "In the late case of Pike *v.* Nicholas, we had this: Two rival works were published with reference to the same subject-matter, and we thought certainly that the defendant had been guided by the plaintiff's book, more or less, to the authorities which the plaintiff had cited; but it was a perfectly legitimate course for the defendant to refer to the plaintiff's book, and if, taking that book as his guide, he went to the original authorities and compiled his book from them, he made no unfair or improper use of the plaintiff's book; and so here, if the fact be that Mr. Wright used the plaintiff's book in order to guide himself to the persons on whom it would be worth his while to call, and for no other purpose, he made a perfectly legitimate use of the plaintiff's book." Law Rep. 5 Ch. 287.

used in common with other dictionaries, but to a greater extent; but there was no evidence of servile copying, "no colorable alteration proved, nor any thing tending to show a fraudulent design to make an unfair use of the work of another." "Though a good deal has been here taken from the plaintiff," said the court, "yet a good deal of labor has been bestowed upon what has been taken;" and "the result is, in fact, a different work from that of the plaintiff." Applying the test laid down by Lord Eldon, whether there had been made "a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work,"[1] the court was of opinion that M. Contanseau had not gone beyond the use allowed by law; but considering the extent to which he had availed himself of the results of Dr. Spiers's labors, the bill was dismissed without costs.[2]

Statistics. — Where the question related to statistical tables, which the defendant had taken from the plaintiff's publication, Vice-Chancellor Wood remarked that "the defendant, after collecting the information for himself, might have checked his results by the plaintiff's tables."[3] This, doubtless, means that the defendant was free to compare his own tables with those of the plaintiff to ascertain whether there were errors in his own, and to correct them, if any were found, by independent means. The authorities are clear to the effect that he would have no right to make corrections in his own by servilely copying the plaintiff's figures.

General Test of Fair Use. — The general test for determining whether a fair or a piratical use has been made of one work in the preparation of another will be, whether the later one or the part in question is the result of independent labor, or is substantially copied from the earlier one. The aim of the law is to encourage learning by allowing a fair use to be made of a copyrighted work, but at the same time to prevent the subsequent author from saving himself labor by appropriating without consideration the fruits of another's skill and industry. It is true that a subsequent author, keeping within the letter of the law defining a fair use, will often avail himself to no small

[1] Wilkins *v.* Aikin, 17 Ves. 426.
[2] 31 L. T. R. 16; s. c. 6 W. R. 352.
[3] Scott *v.* Stanford, Law Rep. 3 Eq. 724.

extent of the learning and industry of another, and give to his own book a value which properly belongs elsewhere. In other words, a fair use in law may in ethics amount to plagiarism. But this cannot well be avoided.

General Principles Relating to Piracy.

Copying from Protected Work Essential to Piracy. — Without regard to its size, its character, or the form in which it is published, every production which is a subject of copyright is an object of piracy. Copying or borrowing from a protected work is an essential element of piracy. It is a fundamental principle of the law of copyright that two or more works may be similar or identical, and each will be entitled to protection; provided it is the result of independent labor, and not of unlawful copying. Hence, even when the publication complained of is identical with that for which protection is claimed, the charge of piracy may be met by showing that one has not been copied or borrowed from the other.[1]

But it is no defence of piracy that a piratical copy of a protected work has been copied. Thus, in an English case, where it appeared that the defendant had taken from a foreign publication matter which had been copied without authority from the plaintiff's book, the court rightly held that such copying,

[1] See the consideration of this point and the authorities cited under the head of Originality, *ante*, pp. 205–208.

"It is obvious," said the Vice-Chancellor, in Nichols *v.* Loder, "if two persons of equal skill set to work to prepare such a map as this, the scale being the same, that the maps will be almost *fac similes*. The affidavits must satisfactorily show that the defendant's map is not produced by his own labor employed upon materials, and aided by information, common to him as well as to the plaintiff; but that it has been actually copied from the plaintiff's map, with perhaps some colorable or evasive alterations. Now, in order to make this out, something more is requisite than the fact of there being in appearance no difference between the two maps. The maps may in all respects resemble each other, and yet there may have been no piracy." 2 Coop. (*temp.* Cottenham) 217.

"But he is not liable, unless the musical composition caused to be engraved or printed for sale by him is the same with that of Russell in the main design and in its material and important parts, altered as above mentioned to evade the law; nor is he liable to this action, although it is the same in these respects, provided it was not taken from Russell's, but was the effort of his own mind, or taken from an air composed by another person, who was not a plagiarist from that of Russell." Taney, C. J., Reed *v.* Carusi, Tan. Dec. 74. See also remarks of Vice-Chancellor Leach, in Barfield *v.* Nicholson, 2 L. J. (Ch.) 98.

to a material extent by the defendant, would amount to piracy.[1] In this case, the unauthorized sale in England of the foreign work itself would have been piratical, if it contained a material part of an English copyrighted book.

The principle that copying from a protected publication is an essential element of piracy must hold good when an author has published substantially the same work in two forms, of which but one is copyrighted. The one unprotected is common property; hence its use cannot be a violation of the copyright in the other. It is true that to copy one may be but an indirect copying of the other. But the answer to this objection is that copyright does not prevent any person from using a work which he has obtained from a source open to all.[2] Thus, if an author publish and copyright a novel, and then publish substantially the same production in the form of a play, without copyrighting it, the latter becomes common property; and its unlicensed publication cannot be an invasion of the copyright in the novel. This principle may be illustrated by supposing a case which may arise under the statute of the United States. Section 4962 makes the printing of the notice of entry in each copy of every edition of a book published essential to copyright. Suppose the first edition is printed with and the second without a notice, the latter edition is not entitled to protection; and, even if the copyright in the first edition continue valid, it cannot prevent any person from reprinting any copy of the second edition.

Similarity Creates Presumption of Copying. — Substantial identity, or a striking resemblance, between the work complained of and that for which protection is claimed, creates a presumption of unlawful copying, which must be overcome by the defendant.[3]

[1] Murray *v.* Bogue, 1 Drew. 353.

[2] This principle has been overlooked or disregarded in two or three important English decisions. See the criticism of the judgments in Reade *v.* Conquest, *post*, p. 458; Boosey *v.* Fairlie, Chap. XV.; *Ex parte* Beal, Chap. X.

[3] Mawman *v.* Tegg, 2 Russ. 385; Jarrold *v.* Houlston, 3 Kay & J. 708; Spiers *v.* Brown, 6 W. R. 352; Hotten *v.* Arthur, 1 Hem. & M. 603; Pike *v.* Nicholas, Law Rep. 5 Ch. 251; Blunt *v.* Patten, 2 Paine, 393.

"If the similitude can be supposed to have arisen from accident; or necessarily from the nature of the subject; or from the artist having sketched designs merely from reading the letter-press of the plaintiff's work, — the defendant is not answerable. It is

Intention to Pirate not Essential. — To constitute piracy, it is not necessary that there shall have been on the part of the wrong-doer an intention to pirate. His motives in taking the whole or a part of the copyrighted work may have been unobjectionable, or even commendable; the purpose for which such matter is used may, in his view, be harmless. In applying the law, the thing done and its effect, and not the intention with which it is done, are the controlling considerations.[1]

In some cases, as where extracts are taken from a copyrighted work for criticism or other lawful purpose, it will be necessary to inquire for what purpose such quotations are used. But the point to be determined here is, not what object the subsequent writer had in view in using the matter, nor what his belief may be as to whether that object is a harmless one or not, but what purpose the publication complained of actually serves.[2] Thus, a person may publish copious extracts from a copyrighted work for the *bona fide* purpose of legitimate criti-

remarkable, however, that he has given no evidence to explain the similitude, or to repel the presumption which that necessarily causes." Lord Ellenborough, Roworth *v.* Wilkes, 1 Camp. 99.

"Copying is essential to constitute an infringement of copyright, but identity of contents, arrangement, and combination is strong evidence that the second book was borrowed from the first, as it is highly improbable that two authors would express their thoughts and sentiments in the same language throughout a book or treatise of any considerable size, or adopt the same arrangement or combination in their publication." Clifford, J., Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 427.

[1] **Br.** Roworth *v.* Wilkes, 1 Camp. 94; Campbell *v.* Scott, 11 Sim. 31; Clement *v.* Maddick, 1 Giff. 98; Reade *v.* Lacy, 1 Johns. & H. 524; Scott *v.* Stanford, Law Rep. 3 Eq. 718. **Am.** Millett *v.* Snowden, 1 West. Law Jour. 240; Story's Executors *v.* Holcombe, 4 McLean, 306; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 427, 428.

"It is urged that this is a case in which no *animus furandi* can be found on the part of Mr. Hunt, who has taken these statistics in perfect good faith, and with the fullest acknowledgment in his book of the source from which they are derived. But if, in effect, the great bulk of the plaintiff's production — a large and vital portion of his work and labor — has been appropriated and published in a form which will materially injure his copyright, mere honest intention on the part of the appropriator will not suffice; as the court can only look at the result, and not at the intention in the man's mind at the time of doing the act complained of, and he must be presumed to intend all that the publication of his work effects." Wood, V. C., Scott *v.* Stanford, *supra*, 723.

In Campbell *v.* Scott, Shadwell, V. C., said: "Then, it is said that there is no *animus furandi;* but, if A takes the property of B, the *animus furandi* is inferred from the act." 11 Sim. 38. But it is now settled that the inference or presumption of a dishonest intention is not essential.

[2] Campbell *v.* Scott, 11 Sim. 31; Bradbury *v.* Hotten, Law Rep. 8 Exch. 1; Smith *v.* Chatto, 31 L. T. N. S. 775.

cism; yet such quotations may in reality serve a purpose not intended by the critic, and amount to piracy.[1]

Intention may Aid in Determining whether there has been Copying. — There are cases, however, in which the *animus furandi* will be taken into consideration in determining whether one publication infringes another. Where it can be readily shown that there has been material copying, it matters not with what intent the copying was done; but where it is difficult to ascertain the extent of the copying, in order to determine whether the use made of a protected work by a subsequent author is "fair" or unlawful, the *animus furandi* may aid in the solution of the question. Thus, in Spiers *v.* Brown, where

[1] In Cary *v.* Kearsley, Lord Ellenborough seems to have laid some stress on the existence of the *animus furandi*. "A man," he said, "may fairly adopt part of the work of another; he may so make use of another's labors, for the promotion of science and the benefit of the public; but, having done so, the question will be, Was the matter so taken used fairly with that view, and without what I may term the *animus furandi*?" 4 Esp. 170. Doubtless what Lord Ellenborough meant was, not that a dishonest intention is essential to piracy, but that, when such intention is shown to have existed, the question whether there has been an unfair use may be more readily determined. The same judge held, in the subsequent case of Roworth *v.* Wilkes, that "the intention to pirate is not necessary in an action of this sort: it is enough that the publication complained of is in substance a copy whereby a work vested in another is prejudiced." 1 Camp. 98.

In Folsom *v.* Marsh, Mr. Justice Story said: "No one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passage for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view not to criticise, but to supersede, the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy." 2 Story, 106.

The true doctrine is not accurately expressed here, because the question of piracy is made to depend on the intention of the reviewer, whereas the proper test is the purpose which the publication complained of serves; in other words, how far it may take the place of the original work. The law on this point has been correctly expounded by Mr. Justice McLean, who, after quoting the above language of Judge Story, said: "This doctrine seems to consider the intention with which the citations are made as necessary to an infringement. In Cary *v.* Kearsley, 4 Esp. 170, Lord Ellenborough takes the same view. But I cannot perceive how the intention with which extracts were made can bear upon the question. The inquiry is, What effect must the extracts have upon the original work? If they render it less valuable, by superseding its use in any degree, the right of the author is infringed; and it can be of no importance to know with what intent this was done. Extracts made for the purpose of a review or compilation are governed by the same rule. In neither case can they be extended so as to convey the same knowledge as the original work." Story's Executors *v.* Holcombe, 4 McLean, 310.

the defendant admitted that he had used the plaintiff's dictionary in preparing his own, Vice-Chancellor Wood was perplexed in finding whether there had been piratical copying, and said: "If the defendant had absolutely denied having received any assistance from the plaintiff's work, the court would have had a plain course, the *animus furandi* being made out."[1] But not even in these cases is the intention to pirate essential to constitute infringement. The existence of such intention is material only as far as it may aid in determining to what extent the earlier work has been adopted in the later one; for, when the *animus furandi* is apparent, the presumption is, in the absence of strong evidence to the contrary, that the likeness between the two works is due to copying; whereas, without the *animus furandi*, many of the resemblances may be regarded as natural and the result of honest labor.[2]

Ignorance no Defence of Piracy. — Ignorance will not avail as a defence of piracy. Whether he who appropriates the whole or a part of another's work was aware that it was protected by copyright, or whether he knew what would be the legal consequences of his act, is wholly immaterial. The theory of the law in this respect is, that whoever avails himself of the labors of another must do so at his own risk, and must be held responsible for his acts without regard to the extent of his knowledge or ignorance.[3] "The plaintiff's rights," said Chief Justice Wilde, "do not depend upon the innocence or guilt of the defendant. . . . The statute would altogether fail to effect its

[1] 31 L. T. R. 18; s. c. 6 W. R. 352. See also Jarrold *v.* Houlston, 3 Kay & J. 712; Reade *v.* Lacy, 1 Johns. & H. 524.

[2] "Evidence of innocent intention may have a bearing upon the question of 'fair use;' and, where it appeared that the amount taken was small, it would doubtless have some probative force in a court of equity in determining whether an application for an injunction should be granted or refused: but it cannot be admitted that it is a legal defence where it appears that the party setting it up has invaded a copyright." Clifford, J., Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 427.

[3] **Br.** West *v.* Francis, 5 Barn. & Ald. 737; Lewis *v.* Chapman, 3 Beav. 133; Colburn *v.* Simms, 2 Hare, 543, 557; Lee *v.* Simpson, 8 C. B. 871, 883; Prince Albert *v.* Strange, 2 De G. & Sm. 652, on ap. 1 Mac. & G. 25; Leader *v.* Strange, 2 Car. & Kir. 10[illegible] Murray *v.* Bogue, 1 Drew. 353, 367; Novello *v.* Sudlow, 12 C. B. 177; Gambart *v.* Sumner, 5 Hurl. & N. 5; Reade *v.* Lacy, 1 Johns. & H. 524; Reade *v.* Conquest, 11 C. B. N. S. 479; Rock *v.* Lazarus, Law Rep. 15 Eq. 104. **Am.** Millett *v.* Snowden, 1 West. Law Jour. 240.

object if it were necessary to show that the defendant had a knowledge of the plaintiff's right of property."[1]

The question of guilty knowledge on the part of the seller or importer of a piratical work is often affected by statutory provisions.[2]

The principle which eliminates from consideration, in cases of piracy, the intention on the part of the wrong-doer and the question of his ignorance, is reasonable and proper. If innocent motives or ignorance could be successfully pleaded as a defence to a charge of infringement, the protection intended for literary property would be wholly inadequate. The injury done to an author by an unlicensed use of his work is none the less when the appropriation has been made without a bad intention, or through ignorance. Hence, the remedy should be not less complete. Moreover, if such defences were allowed to prevail, the facilities for fraudulent escape from the penalty of piracy would be largely multiplied.

General Forms and Tests of Piracy.

Piracy may be committed by publishing a literal copy of the whole or of a part of a copyrighted work, or by publishing a whole or a part in a form which is not a *verbatim* copy of the original, but is in substance identical with it.

Reprint of Entire Work. — The simplest and the least common form of infringement is the unauthorized republication of an entire work. In such case, it is immaterial in what form, with what intention, or for what purpose the original is reproduced. Whether a book be republished in the same or in another form, whether a copyrighted article in a magazine be reprinted in another magazine or in a newspaper,[3] or in a book, does not affect the question of infringement. The unlicensed republication of a literary composition as part of a larger work is piracy. Thus, in making a selection of pieces or preparing a compilation, the compiler is not at liberty to use a copyrighted production without authority, though such production be but a small part of the compilation.[4] Nor is it lawful to reprint

[1] Lee *v.* Simpson, 3 C. B. 883.
[2] See Chap. X.
[3] Maxwell *v.* Somerton, 30 L. T. N. S. 11; Cox *v.* Land & Water Journal Co., Law Rep. 9 Eq. 324.
[4] Folsom *v.* Marsh, 2 Story, 100;

without license a copyrighted article in a cyclopædia, though such article be but one of a thousand in the cyclopædia.[1]

Purpose for which Work is Taken Immaterial. — In several early cases, *dicta* are to be found recognizing the right of any person without authority to republish a copyrighted work, provided he revise or improve it, or use it as a basis for annotation.[2] But this theory is contrary to a fundamental principle

Campbell *v.* Scott, 11 Sim. 81; Bradbury *v.* Hotten, Law Rep. 8 Exch. 1; Smith *v.* Chatto, 31 L. T. N. S. 775.

[1] Roworth *v.* Wilkes, 1 Camp. 94; Mawman *v.* Tegg, 2 Russ. 385.

"Neither is it of any consequence in what form the works of another are used; whether it be by a simple reprint, or by incorporating the whole or a large portion thereof in some larger work. Thus, for example, if in one of the large encyclopædias of the present day, the whole or a large portion of a scientific treatise of another author — as, for example, one of Dr. Lardner's, or Sir John Herschell's, or Mrs. Somerville's treatises — should be incorporated, it would be just as much a piracy upon the copyright as if it were published in a single volume." Story, J., Gray *v.* Russell, 1 Story, 19.

[2] In Sayre *v.* Moore, where it appeared that the defendant had republished the plaintiff's chart, but with corrections and improvements of his own, Lord Mansfield said: "If an erroneous chart be made, God forbid it should not be corrected even in a small degree, if it thereby become more serviceable and useful for the purposes to which it is applied. But here you are told that there are various and very material alterations. This chart of the plaintiff's is upon a wrong principle, inapplicable to navigation. The defendant therefore has been correcting errors, and not servilely copying. If you think so, you will find for the defendant; if you think it is a mere servile imitation, and pirated from the other, you will find for the plaintiffs." 1 East, 361, note. In Cary *v.* Kearsley, Mr. Erskine said: "Suppose a man took Paley's Philo[illegible]y, and copied a whole essay, with observations and notes or additions at the end of it, would that be piracy?" "That would depend," replied Lord Ellenborough, "on the facts of, whether the publication of that essay was to convey to the public the notes and observations fairly, or only to color the publication of the original essay, and make that a pretext for pirating it; if the latter, it could not be sustained." 4 Esp. 170. So in Matthewson *v.* Stockdale, Lord Chancellor Erskine said: "I admit no man can monopolize such subjects as the English Channel, the island of St. Domingo, or the events of the world; and every man may take what is useful from the original work, improve, add, and give to the public the whole, comprising the original work, with the additions and improvements; and in such a case there is no invasion of any right." 12 Ves. 275. But the most extravagant language on this subject is that of Vice-Chancellor Shadwell, in Martin *v.* Wright, where the point under consideration was not even remotely in issue. He said: "Any person may copy and publish the whole of a literary composition, provided he writes notes upon it, so as to present it to the public connected with matter of his own." 6 Sim. 298.

The question under consideration was raised, but not decided, in Saunders *v.* Smith, 3 My. & Cr. 711. It appeared that in Smith's Leading Cases the defendant had copied many cases from the plaintiff's copyrighted reports, but had added numerous notes prepared by himself. Lord Cottenham thought that, under the circumstances, it was not necessary to determine whether

of the law of copyright. It is obvious that there would be little protection for literary property if this plea were a valid defence of piracy. However much a work may be improved by revision, or its usefulness and value be increased by annotation, however extensive or important may be the new matter added, no one without the consent of the owner of the copyright has a right to take it for such purpose. "No man," said Mr. Justice Clifford, repeating the language of Vice-Chancellor Wood,[1] "is entitled to avail himself of the previous labors of another, for the purpose of conveying to the public the same information, even though he may append additional information to that already published."[2] And so Mr. Justice Leavitt rightly said, "The decision of this question is in no way affected by the fact — if conceded to be the fact — that the guide is in some respects an improvement of and of superior utility to the chart of the complainants. This would confer no right to appropriate and use the prior invention or discovery of Mrs. Drury."[3]

So the unlicensed republication of an entire literary composition cannot in general be justified on the ground that the

this was an infringement of the plaintiff's copyright. He assumed the existence of that right, but refused to grant the injunction, on the ground that the plaintiff had apparently acquiesced in the publication made by the defendant.

[1] Scott *v.* Stanford, Law Rep. 3 Eq. 724.

[2] Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 431.

[3] Drury *v.* Ewing, 1 Bond, 549.

In Alexander *v.* Mackenzie, where it appeared that statutory forms or "styles" had been copied from the complainant's book, one of the defences was that useful improvements in the forms had been made by the defendant. In considering this point, Lord Jeffrey said: —

"But, then, what is the argument pressed on us here? Why, it is this. The respondents say, 'These styles, though good on the whole, require some correction, and we have therefore corrected and reprinted them; and we were entitled to do so, because it would be inconvenient to have two books, — one containing the styles, the other the corrections on them.' Now, I do not see any weight in this argument. The law of patents affords a good example of the converse of the respondents' plea. Thus, if a man obtains a patent for a particular machine, and another man invents an additional improvement on the original machine, for which he obtains a separate patent, the second inventor can only make use of his patent by procuring a license for the use of the original machine; and if a third party, in constructing a more complex machine, copies both inventions, then he must pay both the inventors for the use of both their patents. In short, in the construction of a single machine we often find a great variety of patent inventions employed; and these of course are all paid for to the respective patentees. To say that additions have been made to Mr. Alexander's work will of itself never serve as an answer." 9 Sc. Sess. Cas. 2d ser. 759.

object of reproducing it was criticism. If it could be satisfactorily shown that the whole had been fairly quoted for legitimate purposes of criticism, the critic might claim immunity under the recognized privilege of fair quotation. But cases of this kind, where it is necessary to quote the entire original for purposes of comment or illustration, are exceptionally rare. On the same principle, the unlicensed appropriation of music cannot be justified on the ground that the person charged with wrong has made a new arrangement of it, or used it for a different purpose from that of the original.[1]

Substantial Copy of Protected Work. — It is uniformly conceded that a republication need not be a literal copy of the original, in order to amount to piracy. As early as 1789, Lord Kenyon, Chief Justice of the King's Bench, declared, "The main question here was whether in substance the one work is a copy and imitation of the other."[2] In the long line of subsequent English and American decisions, this general doctrine has been followed, with steady progress, especially marked in recent cases, toward liberality in favor of the author entitled to protection.

When the production complained of is a servile imitation, in which the language of the original appears with merely colorable variations, the legal question of piracy becomes a comparatively simple one. The act of infringement is then as complete, and the law is as easily determined, as when the publication in fault is a *verbatim* reprint. But the question becomes more difficult when there is a resemblance, more or less striking, between the substance and the general form of the two works in controversy, while the language of the one is considerably different from that of the other. Then is presented the inquiry as to what degree of resemblance between two works is necessary to constitute an infringement of copyright. Every book which is like another cannot rightly be declared piratical, although in some respects the likeness may be close, and may be due to the fact that the author of the later has followed the earlier work. The law of

[1] See *post*, pp. 410, 411.

[2] Trusler *v.* Murray, 1 East, 362, note. Four years before, Lord Mansfield said: "The question of fact to come before a jury is, whether the alteration be colorable or not. . . . The jury will decide whether it be a servile imitation or not." Sayre *v.* Moore, Ibid. 361, note.

copyright cannot justly prohibit one author from imitating the production of another, provided the subsequent work is the result of independent labor. To constitute infringement, there must be a bodily appropriation of the contents of a work, — a borrowing of the substantial results contained in it.

Substantial Identity Test of Piracy. — Where complaint is made of the resemblance between two publications, one of which is not a literal transcript of the other, the general test applied to determine piracy is that of substantial identity. Is the similarity between the substance or the contents of the two works such as to justify the conclusion that the later one is in substance identical with the other, and mainly taken from it? Has the subsequent author produced a substantially original work by his own independent labor, or has he appropriated the substantial fruits of another's industry? What amounts to a substantial identity is a question of fact, to be determined in each case by a comparison of the two works. This is a task of great difficulty, and one whose performance will be attended with results varied by circumstances. Different judges — for the determination of this question of fact frequently becomes a duty of the courts — or different juries may reach different conclusions in the same case;[1] and the tests adopted in one case may not be satisfactory in another. But when it is found that a substantial identity exists, and that the earlier work is substantially embodied in the later, the legal requisites of piracy are made out.[2]

[1] A noteworthy instance of this is afforded by the case of Pike *v.* Nicholas, where the judgment of the lower court was reversed on appeal, simply because the judges of the latter tribunal were led to a different conclusion as to the facts from that reached by the Vice-Chancellor. Law Rep. 5 Ch. 251.

[2] **Br.** Matthewson *v.* Stockdale, 12 Ves. 270; Roworth *v.* Wilkes, 1 Camp. 94; Barfield *v.* Nicholson, 2 Sim. & St. 1; Lewis *v.* Fullarton, 2 Beav. 6; Alexander *v.* Mackenzie, 9 Sc. Sess. Cas. 2d ser. 748; Murray *v.* Bogue, 1 Drew. 353; Jarrold *v.* Houlston, 3 Kay & J. 708; Spiers *v.* Brown, 6 W. R. 352; Scott *v.* Stanford, Law Rep. 3 Eq. 718; Pike *v.* Nicholas, Law Rep. 5 Ch. 251. **Am.** Emerson *v.* Davies, 3 Story, 768; Webb *v.* Powers, 2 Woodb. & M. 497; Greene *v.* Bishop, 1 Cliff. 186; Drury *v.* Ewing, 1 Bond, 540; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402. To the same effect are the authorities cited *post*, p. 412, note 2. For an illustration of what is substantial identity in the case of a dramatic composition, see Daly *v.* Palmer, 6 Blatchf. 256, considered in Chap. XVI.

"It is enough that the publication complained of is in substance a copy whereby a work vested in another is prejudiced." Lord Ellenborough, Roworth *v.* Wilkes, 1 Camp. 98.

"Absolute *verbatim* identity is not

Same Rule Applies to Maps, Engravings, Paintings, Music, &c. — This rule is equally applicable to maps, charts, pictorial productions, musical compositions, and in short all things which are the subjects of copyright. The test is not whether one production is a *fac simile* of the other, but whether it is substantially a copy. Where it appeared that the defendant had copied, besides a part of the text of an article on Fencing, three engravings representing persons in the same attitudes as those in the plaintiff's work, but disguised by different costumes, Lord Ellenborough, in holding this to be a case of

required to constitute piracy; nor would occasional quotation, fairly made out, amount to that offence. The question is, whether the new work be substantially the same with the old, having merely colorable changes, or pretexts of change, or be a new and different work or compilation." The Lord Ordinary, Alexander *v.* Mackenzie, 9 Sc. Sess. Cas. 2d ser. 754, note.

"The case, therefore, comes back at last to the naked consideration, whether the book of Davies, in the parts complained of, has been copied substantially from that of Emerson, or not. It is not sufficient to show that it may have been suggested by Emerson's, or that some parts and pages of it have resemblances in method and details and illustrations to Emerson's. It must be further shown that the resemblances in those parts and pages are so close, so full, so uniform, so striking, as fairly to lead to the conclusion that the one is a substantial copy of the other, or mainly borrowed from it. In short, that there is substantial identity between them. A copy is one thing, an imitation or resemblance another. There are many imitations of Homer in the Æneid; but no one would say that the one was a copy from the other. There may be a strong likeness without an identity; and, as was aptly said by the learned counsel for the plaintiff in the close of his argument, *Facies non omnibus una, nec diversa tamen; qualem decet esse sororum.* The question is therefore in many cases a very nice one, what degree of imitation constitutes an infringement of the copyright in a particular work." Story, J., Emerson *v.* Davies, 3 Story, 787.

"The leading inquiry then arises, which is decisive of the general equities between these parties, whether the book of the defendants, taken as a whole, is substantially a copy of the plaintiffs'; whether it has virtually the same plan and character throughout, and is intended to supersede the other in the market with the same class of readers and purchasers, by introducing no considerable new matter, or little or nothing new, except colorable deviations." Woodbury, J., Webb *v.* Powers, 2 Woodb. & M. 514.

"Copying is not confined to literal repetition, but includes also the various modes in which the matter of any publication may be adopted, imitated, or transferred, with more or less colorable alterations to disguise the source from which the material was derived; nor is it necessary that the whole, or even the larger portion, of a work should be taken in order to constitute an invasion of copyright." Clifford, J., Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 426.

"And here the true inquiry undoubtedly is, not whether the one is a *fac simile* of the other, but whether there is such a substantial identity as fairly to justify the inference, that, in getting up the guide, Mrs. Ewing has availed herself of Mrs. Drury's chart, and has borrowed from it its essential characteristics." Leavitt, J., Drury *v.* Ewing, 1 Bond, 548, 549.

piracy, said: "It is still to be considered whether there be such a similitude and conformity between the prints that the person who executed the one set must have used the others as a model. In that case, he is a copyist of the main design."[1] It matters not that the copy of a painting or engraving is larger or smaller than the original;[2] nor by what mechanical process the copy may be made.[3]

In the case of music, Lord Abinger held that the question of infringement "must depend on whether the air taken is substantially the same with the original," and that, "substantially, the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear. The adding variations makes no difference in the principle."[4] And so Chief Justice Taney said that the

[1] Roworth *v.* Wilkes, 1 Camp. 99. In West *v.* Francis, Bailey, J., speaking of prints, said: "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." 5 Barn. & Ald. 743. See also: **Br.** Barfield *v.* Nicholson, 2 Sim. & St. 1; Moore *v.* Clarke, 9 Mees. & W. 692; Turner *v.* Robinson, 10 Ir. Ch. 121, 510; Gambart *v.* Ball, 14 C. B. N. S. 306; Graves *v.* Ashford, Law Rep. 2 C. P. 410. **Am.** Blunt *v.* Patten, 2 Paine, 393, 397; Drury *v.* Ewing, 1 Bond, 540; Farmer *v.* Calvert Lithographic, Engraving, & Map-Publishing Co., 5 Am. L. T. R. 168; Richardson *v.* Miller, 3 L. & Eq. Reporter, 614.

[2] Gambart *v.* Ball, Graves *v.* Ashford, *supra;* Bradbury *v.* Hotten, Law Rep. 8 Exch. 1.

[3] Gambart *v.* Ball, Graves *v.* Ashford, Turner *v.* Robinson, *supra;* Rossiter *v.* Hall, 5 Blatchf. 362.

[4] D'Almaine *v.* Boosey, 1 Y. & C. Exch. 302. "It is admitted," said Lord Abinger, "that the defendant has published portions of the opera, containing the melodious parts of it; that he has also published entire airs; and that in one of his waltzes he has introduced seventeen bars in succession, containing the whole of the original air, although he adds fifteen other bars which are not to be found in it. Now, it is said that this is not a piracy: first, because the whole of each air has not been taken; and, secondly, because what the plaintiffs purchased was the entire opera; and the opera consists, not merely of certain airs and melodies, but of the whole score. But, in the first place, piracy may be of part of an air as well as of the whole; and, in the second place, admitting that the opera consists of the whole score, yet if the plaintiffs were entitled to the whole, *a fortiori* they were entitled to publish the melodies which form a part. . . . It is the air or melody which is the invention of the author, and which may in such case be the subject of piracy; and you commit a piracy if, by taking not a single bar, but several, you incorporate in the new work that in which the whole meritorious part of the invention consists. I remember in a case of copyright, at *nisi prius*, a question arising as to how many bars were necessary for the constitution of a subject or phrase. Sir George Smart, who was a witness in the case, said, that a mere bar did not constitute a phrase, though three or four bars might do so. Now, it appears to me that if you take from the composition of an author all those bars consecutively which form

musical composition complained of is piratical when it is the same as that for which protection is claimed "in the main design and in its material and important parts, altered as above mentioned to evade the law."[1] To select music from an opera, and arrange it for dancing purposes, or to make a piano-forte arrangement of an opera, may amount to piracy.[2]

When Material Part is Taken.—It is not necessary that the whole or the greater part of a work, either in form or substance, shall be taken, in order to constitute an invasion of copyright. The copyright protects the whole and all the parts and contents of

the entire air or melody, without any material alteration, it is a piracy; though, on the other hand, you might take them in a different order or broken by the intersection of others, like words, in such a manner as should not be a piracy. It must depend on whether the air taken is substantially the same with the original. Now, the most unlettered in music can distinguish one song from another; and the mere adaptation of the air, either by changing it to a dance, or by transferring it from one instrument to another, does not, even to common apprehensions, alter the original subject. The ear tells you that it is the same. The original air requires the aid of genius for its construction; but a mere mechanic in music can make the adaptation or accompaniment. Substantially, the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear. The adding variations makes no difference in the principle." Ibid. 301, 302.

[1] Reed *v.* Carusi, Tan. Dec. 74. See also Boosey *v.* Fairlie, 7 Ch. D. 301, 307; Daly *v.* Palmer, 6 Blatchf. 269.

[2] D'Almaine *v.* Boosey, 1 Y. & C. Exch. 288. "The composition of a new air or melody is entitled to protection; and the appropriation of the whole, or of any substantial part, of it, without the license of the author, is a piracy. How far the appropriation might be carried in the arrangement and composition of a new piece of music, without an infringement, is a question that must be left to the facts in each particular case. If the new air be substantially the same as the old, it is no doubt a piracy; and the adaptation of it, either by changing it to a dance, or by transferring it from one instrument to another, if the ear detects the same air in the new arrangement, will not relieve it from the penalty; and the addition of variations makes no difference. The original air requires genius for its construction; but a mere mechanic in music, it is said, can make the adaptation or accompaniment." Nelson, J., Jollie *v.* Jaques, 1 Blatchf. 625.

"Now, in reference to the case that was decided in the Court of Exchequer, D'Almaine *v.* Boosey, 1 Y. & C. Exch. 288, I have no hesitation in saying, that if Brissler had published this arrangement for the piano-forte during Nicolai's lifetime without his authority, or since his death without the authority of Bote and Bock, his representatives, he would have pirated the work; or, if there had been a copyright act in force in Berlin, such as there is in this country, no doubt Nicolai or his representatives might have maintained an action for the infringement of the copyright against Brisler." Kelly, C. B., Wood *v.* Boosey, Law Rep. 3 Q. B. 228.

a work;[1] and whoever appropriates a material part, to the injury of the owner, commits an act of piracy. The offence is the same whether a part is taken by copying literally the language of the original, or by paraphrasing it. In the latter case, it is enough to show substantial identity between the original and the part complained of, and that one has been taken from the other.[2]

To take one of several articles, or any illustration or cut, in a copyrighted publication, may amount to piracy; since the copyright protects each distinct composition in a book, and all the engravings, illustrations, figures, &c. But, when any part of a book is not entitled to copyright, it is not unlawful to copy that part.

Publication Complained of Need not Serve as Substitute. — In Roworth *v.* Wilkes, Lord Ellenborough said: "The question is whether the defendants' publication would serve as a substitute for" the plaintiff's work.[3] The theory suggested by this

[1] See *ante*, p. 144; also Rooney *v.* Kelly, 14 Ir. Law Rep. N. S. 158.

[2] **Br.** Wilkins *v.* Aikin, 17 Ves. 422; Mawman *v.* Tegg, 2 Russ. 385; Bramwell *v.* Halcomb, 3 My. & Cr. 737; Lewis *v.* Fullarton, 2 Beav. 6; Kelly *v.* Hooper, 4 Jur. 21; Sweet *v.* Maugham, 11 Sim. 51; Sweet *v.* Cater, Ibid. 572; Campbell *v.* Scott, Ibid. 31; Bohn *v.* Bogue, 10 Jur. 420; Stevens *v.* Wildy, 19 L. J. N. S. (Ch.) 190; Murray *v.* Bogue, 1 Drew. 353; Sweet *v.* Benning, 16 C. B. 459; Jarrold *v.* Houlston, 3 Kay & J. 708; Rooney *v.* Kelly, *supra*; Tinsley *v.* Lacy, 1 Hem. & M. 747; Kelly *v.* Morris, Law Rep. 1 Eq. 697; Scott *v.* Stanford, 3 Id. 718; Pike *v.* Nicholas, Law Rep. 5 Ch. 251; Jarrold *v.* Heywood, 18 W. R. 279; Cobbett *v.* Woodward, Law Rep. 14 Eq. 407; Bradbury *v.* Hotten, Law Rep. 8 Exch. 1; Smith *v.* Chatto, 31 L. T. N. S. 775; Hogg *v.* Scott, Law Rep. 18 Eq. 444; Chatterton *v.* Cave, Law Rep. 10 C. P. 572, 1st ap. 2 C. P. D. 42, 2d ap. 3 App. Cas. 483. **Am.** Gray *v.* Russell, 1 Story, 11; Folsom *v.* Marsh, 2 Id. 100; Story's Executors *v.* Holcombe, 4 McLean, 306; Jollie *v.* Jaques, 1 Blatchf. 618; Greene *v.* Bishop, 1 Cliff. 186; Daly *v.* Palmer, 6 Blatchf. 256; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402; Banks *v.* McDivitt, 13 Blatchf. 163. Other cases to the same effect are cited in considering Lawful Uses of Copyrighted Works, *ante*, p. 386 *et seq.*, and Piracy in the case of Compilations, *post*, p. 416 *et seq.*

"It is certainly not necessary to constitute an invasion of copyright that the whole of a work should be copied, or even a large portion of it, in form or substance. If so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy *pro tanto*. The entirety of the copyright is the property of the author; and it is no defence, that another person has appropriated a part, and not the whole, of any property. Neither does it necessarily depend upon the quantity taken, whether it is an infringement of the copyright or not. It is often affected by other considerations, — the value of the materials taken, and the importance of it to the sale of the original work." Story, J., Folsom *v.* Marsh, 2 Story, 115.

[3] 1 Camp. 98.

dictum, that a work to be piratical must be a substitute for the one copied, has no foundation in reason or principle, and is opposed to the current of authorities, which establish the doctrine that a case of piracy is made out when it is shown that a material part of a work has been taken without authority.[1] When the defence of fair use is set up, it may be material to inquire whether the publication complained of will supersede that for which protection is claimed. But, when this privilege is not pleaded, the fact that one work will not serve as a substitute for the other is no defence of piracy.

What Amount is Material. — When part of a copyrighted production has been reproduced in another publication, and especially when literal extracts have been made, one of the first questions to be determined is, whether the person charged with piracy has acted within the privilege of fair use. Then arise the inquiries, whether the part taken is material, and whether the author entitled to protection is thereby injured.

No fixed rule can be given for determining what amount of copied or borrowed matter is essential to constitute infringement; or, in other words, how small may be the quantity taken, and still amount to piracy. The authorities agree that when the quantity taken is material, and enough to cause substantial injury to the author entitled to protection, a case of infringement may be made out. The determination of this question of fact is often one of extreme difficulty, and the finding will vary with the circumstances in each case, and with the judgment of the person or persons whose duty it may be to ascertain the fact. The ratio which the part bears to the whole from which it is taken will often be a material consideration; but it is obvious that no relative or fractional part of either production in controversy can be fixed as a standard measure of materiality. An amount material in one case will be unimportant in another. "If so much is taken," said Mr. Justice Story, "that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient in point of law to constitute a piracy *pro tanto*."[2]

[1] See Bohn *v.* Bogue, 10 Jur. 420; Sweet *v.* Shaw, 3 Jur. 217.

[2] Folsom *v.* Marsh, 2 Story, 115.

In determining whether the part taken is material in extent and importance, a variety of circumstances must be considered: the absolute amount and value of the part; its ratio to the whole from which it is taken, and to the whole in which it is afterward incorporated; its relative value to each of the works in controversy; the purpose which it serves in each; how far the later work may tend to supersede the original, or interfere with its sale; to what extent the original author may be injured, actually or potentially, by the unlicensed use made of his production; and many other special considerations, which need not here be mentioned.[1]

It should be remembered, however, that when the fact of copying or borrowing has been established, and cannot be defended on the principle of fair use, the original author is usually in the right, and the other in the wrong. The former is entitled to the full enjoyment of the fruits of his labor; the latter in seeking gain is bound to depend on his own honest resources. Hence, in determining what amount or what value is sufficient to constitute infringement in cases of this kind, the utmost rigor consistent with right and justice should find place against him charged with wrong.

Value to be Considered. — The value of the part taken is also to be considered, in connection with the quantity; and often the question of piracy will be determined by the value of the extract, irrespective of its extent. Lord Chancellor Cottenham well said: "When it comes to a question of quantity, it must be very vague. One writer might take all the vital part of another's book, though it might be but a small proportion

[1] In Cobbett *v.* Woodward, Law Rep. 14 Eq. 407, the court was willing to grant an injunction against about eight lines copied from the plaintiff's publication. In Sweet *v.* Benning, 16 C. B. 459, copied matter forming about one-twentieth part of the defendant's work, was held to amount to piracy. A case of infringement was made out where it appeared that, in a work on caricatures, nine caricatures had been taken from nine numbers of Punch, extending from 1849 to 1867. Bradbury *v.* Hotten, Law Rep. 8 Exch. 1; see *ante*, p. 391. In Webb *v.* Powers, 2 Wood. & M. 497, 520, an injunction was refused where it appeared that only about twenty or thirty lines had been copied from nearly seven thousand in the plaintiff's work. In a recent English case, two scenes or situations taken from a drama were held not to be material enough to amount to piracy. Chatterton *v.* Cave, Law Rep. 10 C. P. 572, 1st ap. 2 C. P. D. 42, 2d ap. 3 App. Cas. 483. For other illustrations as to quantity, see cases given in Chap. XI.

of the book in quantity. It is not only quantity, but value, that is looked to. It is useless to refer to any particular cases as to quantity." [1]

And so, in the language of Mr. Justice Story: "In many cases, the question may naturally turn upon the point, not so much of the quantity as of the value of the selected materials. As was significantly said on another occasion, *Non numerantur, ponderantur.* The quintessence of a work may be piratically extracted, so as to leave a mere *caput mortuum*, by a selection of all the important passages in a comparatively moderate space." [2]

[1] Bramwell *v.* Halcomb, 3 My. & Cr. 738.

[2] Gray *v.* Russell, 1 Story, 20. See also Bell *v.* Whitehead, 3 Jur. 68; Kelly *v.* Hooper, 4 Id. 21; Campbell *v.* Scott, 11 Sim. 31; Bradbury *v.* Hotten, Law Rep. 8 Exch. 1; Farmer *v.* Calvert Lithographing, Engraving, & Map-Publishing Co., 5 Am. L. T. R. 168, 174.

"The infringement of a copyright does not depend so much upon the length of the extracts as upon their value. If they embody the spirit and the force of the work in a few pages, they take from it that in which its chief value consists. This may be done to a reasonable extent by a reviewer, whose object is to show the merit or demerit of the work. But this privilege cannot be so exercised as to supersede the original book." McLean, J., Story's Executors *v.* Holcombe, 4 McLean, 309.

"The question of the extent of appropriation which is necessary to establish an infringement of copyright is often one of extreme difficulty; but in cases of this description the quality of the piracy is more important than the proportion which the borrowed passages may bear to the whole work. Here it is enough to say that the defendant admits that one-fourth of the dramas is composed of matter taken from the novels." Wood, V. C., Tinsley *v.* Lacy, 1 Hem. & M. 752.

"I shall not trouble your lordships by discussing, in detail, the many authorities which have been cited as to the interpretation to be put upon the acts which regulate copyright in books. They seem one and all to assume, or to affirm expressly, that to render a writer liable for literary piracy, he must be shown to have taken a material portion of the publication of another: the question as to its materiality being left to be decided by the consideration of its quantity and value, which must vary indefinitely in various circumstances. As Lord Chancellor Cottenham said in Bramwell *v.* Halcomb, 3 My. & C. 738: 'It is useless to refer to any particular cases as to quantity.' The quantity taken may be great or small; but, if it comprise a material portion of the book, it is taken illegally. The question is as to the substance of the thing; and, if there be no abstraction of that which may be substantially appreciated, no penalty is incurred. In all the cases, the matter is dealt with as one of degree. In all, quantity and value are both the subjects of consideration; and in none of them has an infringement been established without satisfactory evidence of an appropriation, possibly involving a substantial loss to one person and a substantial gain to another." Lord O'Hagan, Chatterton *v.* Cave, 3 App. Cas. 497.

PIRACY IN THE CASE OF COMPILATIONS. — I. COMPILATIONS OF COMMON FACTS.

It is necessary to consider more particularly the question of piracy in the case of that class of productions which do not consist of original matter in the ordinary meaning of that word, but are simply compilations of materials, plain facts, information, &c., gathered from common sources. Works of this kind may be divided into two general classes: 1, Statements or collections of common facts, which admit of little variation in their description; 2, compilations of materials gathered from other publications.

Of the former class are directories, road-books, maps, charts, mathematical tables, and analogous works. Between two rival publications of this kind, there will necessarily be a striking resemblance, amounting in many instances to substantial identity. In different directories of the same city, the names and addresses of persons, order of arrangement, &c., will be substantially alike. In rival road-books, the location and direction of highways will be similarly described. In maps and charts of the same region, the boundaries of geographical divisions, location of natural objects, distances, latitude, longitude, &c., when accurately described, will be represented by different persons without substantial variation. In mathematical tables, the same figures will result from the same calculations. In all such cases, the materials are equally open to all; and the results prepared by two laborers in the same field will present little variation. May a subsequent compiler take advantage of this circumstance, and say: "These facts are common property; they can be truthfully given in but one form; the results worked out by my own independent labor must be in substance the same as those published by my predecessor. Therefore I do not injure him or invade his rights by copying from his publication"?

Test of Piracy. — Here the general test of piracy is the same as in the case of compositions wholly original. The principle is well established, that the later compiler can escape the penalty of piracy only by going to the common sources for mate-

rials and information, and producing a work by his own labor. He cannot lawfully save himself labor and expense by taking the results of another's industry and skill, except as far as he may be able to do so under the privilege of fair use. He must himself examine the highways and places to be described in an original road-book; must himself make the surveys and other calculations necessary for constructing a map or chart; must himself perform the operations essential to produce mathematical tables; must himself canvass for the names to make a directory. Of course, he is entitled to use any information or materials which may be obtained from common sources, either published or unpublished. But copying to a material extent from a protected work, or appropriating the materials or results there found, is *piracy*.[1]

[1] **Br.** Cary *v.* Longman, 1 East, 358; Matthewson *v.* Stockdale, 12 Ves. 270; Longman *v.* Winchester, 16 Id. 269; Baily *v.* Taylor, 3 L. J. (Ch.) 66, 1 Russ. & My. 73; Kelly *v.* Hooper, 4 Jur. 21; M'Neill *v.* Williams, 11 Id. 344; Murray *v.* Bogue, 1 Drew. 353; Jarrold *v.* Houlston, 3 Kay & J. 708; Kelly *v.* Morris, Law Rep. 1 Eq. 697; Scott *v.* Stanford, 3 Id. 718; Morris *v.* Ashbee, 7 Id. 34; Cox *v.* Land & Water Journal Co., 9 Id. 324; Pike *v.* Nicholas, Law Rep. 5 Ch. 251; Morris *v.* Wright, Ibid. 279; Jarrold *v.* Heywood, 18 W. R. 279; Hogg *v.* Scott, Law Rep. 18 Eq. 444; Grace *v.* Newman, 19 Id. 623. **Am.** Blunt *v.* Patten, 2 Paine, 393, 397; Farmer *v.* Calvert Lithographing, Engraving, & Map-Publishing Co., 5 Am. L. T. R. 168.

"Take the instance of a map describing a particular county, and a map of the same county afterwards published by another person; if the description is accurate in both, they must be pretty much the same. But it is clear the latter publisher cannot on that account be justified in sparing himself the labor and expense of actual survey, and copying the map previously published by another. So, as to Patterson's Road Book, it is certainly competent to any other man to publish a book of roads; and if the same skill, intelligence, and diligence are applied in the second instance, the public would receive nearly the same information from both works; but there is no doubt that this court would interpose to prevent a mere republication of a work which the labor and skill of another person had supplied to the world. So, in the instance mentioned by Sir Samuel Romilly, a work consisting of a selection from various authors, two men, perhaps, might make the same selection; but that must be by resorting to the original authors, not by taking advantage of the selection already made by another. In the case of Hogg *v.* Kirby, 8 Ves. 215, there was no doubt that any person might publish a work of the description which was the subject of that injunction. Each party might publish his own collection, and the articles might happen to be the same; but one could not excite the public curiosity by copying into his work from that of the other." Lord Eldon, Longman *v.* Winchester, 16 Ves. 271.

"There is no foundation in law for the argument, that, because the same sources of information are open to all persons, and by the exercise of their own industry and talents and skill, they could, from all these sources, have produced a similar work, one

Law Construed in Case of Directories. — This doctrine was forcibly expressed in the first of the recent English directory cases, by Vice-Chancellor Wood, afterward Lord Chancellor Hatherley: "The defendant has been most completely mistaken in what he assumes to be his right to deal with the labor and property of others. In the case of a dictionary, map, guide-book, or directory, when there are certain common objects of information which must, if described correctly, be described in the same words, a subsequent compiler is bound to set about doing for himself that which the first compiler has done. In case of a road-book, he must count the milestones for himself. In the case of a map of a newly-discovered island, — the illustration put by Mr. Daniel, — he must go through the whole process of triangulation, just as if he had never seen any former maps; and, generally, he is not entitled to take one word of the information previously published, without independently working out the matter for himself, so as to arrive at the same result from the same common sources of information; and the only use he can legitimately make of a previous publication is to verify his own calculations and results when obtained. So, in the present case, the defendant could not take a single line of the plaintiff's directory, for the purpose of saving himself labor and trouble in getting his information. . . . The work of the defendant has clearly not been compiled by the legitimate application of independent personal labor." [1]

party may at second hand, without any exercise of industry, talents, or skill, borrow from another all the materials which have been accumulated and combined together by him. Take the case of a map of a county, or of a State, or an empire; it is plain, that in proportion to the accuracy of every such map must be its similarity to, or even its identity with, every other. Now, suppose a person has bestowed his time and skill and attention, and made a large series of topographical surveys, in order to perfect such a map, and has thereby produced one far excelling every existing map of the same sort. It is clear that, notwithstanding this production, he cannot supersede the right of any other person to use the same means by similar surveys and labors to accomplish the same end. But it is just as clear that he has no right, without any such surveys and labors, to sit down and copy the whole of the map already produced by the skill and labors of the first party, and thus to rob him of all the fruit of his industry, skill, and expenditures. It would be a downright piracy." Story, J., Gray *v.* Russell, 1 Story, 18.

[1] Kelly *v.* Morris, Law Rep. 1 Eq. 701, 703. "This language," said Lord Justice Giffard, "does not mean that he may not look into the book for the purpose of ascertaining where a par-

The soundness of these views was expressly recognized in the following directory cases of Morris *v.* Ashbee [1] and Morris *v.* Wright,[2] as well as in other decisions.[3] In the two cases named, the law was construed with marked unanimity against the right of a subsequent compiler to make of a copyrighted directory any other use than that of a guide in the preparation of a rival publication. Copying in any manner from the earlier directory, or in any wise appropriating the results there found, is strictly prohibited. The later directory must be the result of independent labor. All names, addresses, &c., in it must be got by actual application to the persons. If such persons cannot be found, their names may not be copied from a protected work. The location and description of streets, buildings, parks, squares, and other objects of interest, must be obtained from personal observation, or common sources of information. It was expressly held to be piracy for the subse-

ticular person lived, and for the purpose of ascertaining whether it was worth his while to call upon that person or not; but it means that he may not take that particular slip and show that to the person, and get his authority as to *putting that particular slip in.*" Morris *v.* Wright, Law Rep. 5 Ch. 285.

"No doubt," continued Vice-Chancellor Wood, in Kelly *v.* Morris, "the expense of procuring information in a legitimate way is very great. The defendant himself has told us so, and also that it was [illegible] for some years that he was able to [illegible] pay. But the defendant goes [illegible] his affidavit to propound a most [illegible]dinary doctrine as to the right or [illegible]ity in the names of private resid[illegible]hood, as he expressed it, 'given [illegible]es for public use.' What he [illegible] been just to copy the pla[illegible]ol[illegible] and then to send out canvasser[illegible] if the information so copied wa[illegible] rect. If the canvassers did not fin[illegible] occupier of the house at home, or c[illegible] get no answer from him, then the [illegible] formation copied from the plaintiff's [illegible] book was reprinted bodily, as if it was a question for the occupier of the house merely, and not for the compiler of the previous directory. Further than this, the defendant tells us that he had a number of new agents, and that one of them had performed his part of the work carelessly; thus at once showing how easy it would be, on the system adopted by the defendant, for any negligent agent to send back his list all ticked as if correct, without having taken the trouble to make a single inquiry." Law Rep. 1 Eq. 70[illegible]

[1] Law Rep. 7 Eq. 34. Vice-Chancellor Giffard, citing Kelly *v.* [illegible] said: "In a case such as this [illegible] one has a right to take the result of the labor and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labor of working out and arriving at these results by some independent road. If this were so, there would be practically no copyright in such a work as a directory." Ib. Law Rep. 5 Ch. 279.

Scott *v.* Stanford, Law [illegible]; Cox *v.* Land & Water [illegible]; Pike *v.* Nicholas, [illegible]; Hogg *v.* Scott, [illegible]

quent compiler to print from slips cut from a protected directory; although in every instance he had verified the accuracy of the information, or corrected it, if erroneous, by personal application to the persons whose names were given.[1]

In Morris *v.* Ashbee, it appeared that many of the names in the plaintiff's directory had been printed in capital letters, while after others "extra lines" were inserted, the object of which was to advertise the business of those persons who were willing to pay for this advantage. The defendant alleged that he had used slips only of these parts of the plaintiff's directory; and contended that, as the names printed in capitals and the extra lines were advertisements, which had been paid for by the persons for whose special benefit they were inserted, the plaintiff was not entitled to copyright in them. It was further claimed by the defendant that the authority given by the persons themselves vested in him a right so to use their names in his directory. The court, however, held that such persons could not authorize the defendant to copy their names from a copyrighted work, and refused to recognize any legal distinction between the matter so paid for and other parts of the directory.[2]

[1] In Kelly *v.* Morris and Morris *v.* Ashbee, it appeared that the defendant had cut slips from the plaintiff's directory, and, having verified them by application to the persons whose names were given, printed them in his own book. In the former suit, it was admitted that in the case of persons not found by the canvassers the slips containing their names had been copied without verification. "It is plain," said Giffard, V. C., in Morris *v.* Ashbee, "that it could not be lawful for the defendants simply to cut the slips which they have cut from the plaintiff's directory and insert them in theirs. Can it, then, be lawful to do so because, in addition to doing this, they sent persons with the slips to ascertain their correctness? I say, clearly not. Then, again, would their acts be rendered more lawful because they got payment and authority for the insertion of the names from each individual whose name appeared on the slips? And to this I again answer, clearly not. The simple upshot of the whole case is, that the plaintiff's directory was the source from which they compiled very material parts of theirs, and they had no right so to resort to that source. They had no right to make the results arrived at by the plaintiff the foundation of their work, or any material part of it; and this they have done." Law Rep. 7 Eq. 41.

[2] Ibid. 34. "I am of opinion," said Giffard, V. C., "that the application by the plaintiff for payment, and the payment by the several persons whose names were inserted with capital letters or with added lines, had not the effect of making these names, when so inserted, common property. The plaintiff incurred the labor and expense, first of getting the necessary information for the arrangement and compilation of the names as they stood in his directory, and then of making the actual compilation and arrangement; and though each individual who paid might no doubt have

Descriptive Catalogues. — The same principle was applied in determining the question of piracy in the case of a descriptive catalogue of fruit and fruit-trees. The defendant said that, in preparing his work, he had taken the plaintiff's descriptions, and, after verifying them by comparison with specimens of fruit, had published them in his own book. It was held that this use of an existing work was unlawful, and that the subsequent author was bound to write his own descriptions. "The true principle in all these cases," said Vice-Chancellor Hall, after citing the directory decisions, "is that the defendant is not at liberty to use or avail himself of the labor which the plaintiff has been at for the purpose of producing his work; that is, in fact, merely to take away the result of another man's labor, or, in other words, his property." [1]

And so, where the defendant was charged with piracy, for having published facts and information concerning the hunting season, taken from the plaintiff's publication, Vice-Chancellor Malins said: "I also assume the law to be perfectly clear and settled, as laid down by the present Lord Chancellor [2] in Kelly *v.* Morris; as also by that other case of Morris *v.* Ashbee. It is clear that in this case the getting the names of masters of hunts, the numbers of hounds, the huntsmen and whips, and so forth, is information open to all those who seek to obtain it; but it is information they must get at their own expense, as the result of their own labor, and they are not to be entitled to the results of the labors undergone by others." [3]

Maps. — And so, where the defendant contended that it was not piracy to copy boundaries of townships from the plaintiff's map, because such boundaries had been fixed by statute, and hence no one could acquire exclusive property in them, the court said: "What is claimed in this regard is true in regard to all original materials from which maps are made, and that is, that none of them are subjects of copyright: they are open

his own name printed in capital letters, or with the same superadded lines wherever he chose, neither one nor all of them could authorize the cutting of a series of slips, or the taking of the names as arranged, from the plaintiff's directory, and the use of them in the printing of a rival work." Ibid. 40.

[1] Hogg *v.* Scott, Law Rep. 18 Eq. 458.

[2] Hatherley.

[3] Cox *v.* Land & Water Journal Co., Law Rep. 9 Eq. 332.

to all. But no one has the right to avail himself of the enterprise, labor, and expense in the ascertainment of those materials, and the combining and arrangement of them, and the representing them on paper. The defendant, no doubt, had the right to go to the common source of information; and, having ascertained those boundaries, to have drawn them upon its map, notwithstanding that, in this respect, it would have been precisely like complainant's map (which, of course, it would have been, if they were both correct). But he had no right to avail himself of this very labor on the part of complainant, in order to avoid it himself."[1]

II. Compilations of Published Materials.

The law governing piracy in the case of compilations consisting of common materials selected from other publications will be considered under three heads: 1. When the entire compilation, the matter and its arrangement, is taken. 2. When the materials, but not the mode of their combination, are copied. 3. When the arrangement, but not the materials, is adopted.

When Materials and Arrangement are Taken.—It has been shown elsewhere that the copyright in a compilation vests not in the component parts independently of their combination, nor in the arrangement apart from the matter; but in the materials as arranged and combined.[2] The law governing cases wherein both the materials and their arrangement are taken is well settled. Whether the compilation in which copyright is claimed consists of original and selected matter combined, or is made up wholly of selections from common sources, whether or not the materials have been elaborated by the compiler, it is a work entitled to protection; and, when both the substance and the form are copied without authority, it is a clear invasion of copyright. It is true that the component parts of the compilation may be found in sources open and accessible to all persons; and that any one may use the same materials for

[1] Farmer *v.* Calvert Lithographing, Engraving, & Map-Publishing Co., 5 Am. L. T. R. 174. See also Blunt *v.* Patten, 2 Paine, 393, 397.

[2] *Ante*, p. 156.

the same purpose. But every compiler is bound to go to the common sources for his materials, and arrange them on a plan original with himself. He must himself do the work, and depend on his own skill; and not save himself labor and expense by appropriating the fruits of another's industry and learning.[1] To constitute piracy in cases of this kind, it is not necessary that the whole of the compilation shall be taken, or that *verbatim* copying shall be shown. The same general tests apply here as in the case of an original work. A case of infringement may be made out when the substance of the whole or of a material part of the compilation has been appropriated.[2]

[1] **Br.** Matthewson *v.* Stockdale, 12 Ves. 270; Longman *v.* Winchester, 16 Id. 269; Lewis *v.* Fullarton, 2 Beav. 6; Kelly *v.* Hooper, 4 Jur. 21; Murray *v.* Bogue, 1 Drew. 353; Maclean *v.* Moody, 20 Sc. Sess. Cas. 2d ser. 1154; Spiers *v.* Brown, 6 W. R. 352; Jarrold *v.* Houlston, 3 Kay & J. 708; Scott *v.* Stanford, Law Rep. 3 Eq. 718; Pike *v.* Nicholas, Law Rep. 5 Ch. 251; Black *v.* Murray, 9 Sc. Sess. Cas. 3d ser. 341. **Am.** Gray *v.* Russell, 1 Story, 11; Emerson *v.* Davies, 3 Id. 768; Webb *v.* Powers, 2 Woodb. & M. 497; Story's Executors *v.* Holcombe, 4 McLean, 306; Greene *v.* Bishop, 1 Cliff. 186; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402; Farmer *v.* Calvert Lithographing, Engraving, and Map-Publishing Co., 5 Am. L. T. R. 168; Banks *v.* McDivitt, 18 Blatchf. 163.

"Any man is entitled to write and publish a topographical dictionary, and to avail himself of the labors of all former writers whose works are not subject to copyright, and of all public sources of information; but, whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves, for their own profit, of other men's works still subject to copyright and entitled to protection." Lord Langdale, M. R., Lewis *v.* Fullarton, 2 Beav. 8.

[2] Emerson *v.* Davies, Webb *v.* Powers, Story's Executors *v.* Holcombe, Lawrence *v.* Dana, Pike *v.* Nicholas, *supra*.

"I think it may be laid down as the clear result of the authorities in cases of this nature, that the true test of piracy or not is to ascertain whether the defendant has, in fact, used the plan, arrangements, and illustrations of the plaintiff as the model of his own book, with colorable alterations and variations only to disguise the use thereof; or whether his work is the result of his own labor, skill, and use of common materials and common sources of knowledge, open to all men, and the resemblances are either accidental, or arising from the nature of the subject. In other words, whether the defendant's book is, *quoad hoc*, a servile or evasive imitation of the plaintiff's work, or a *bona fide* original compilation from other common or independent sources." Story, J., Emerson *v.* Davies, 3 Story, 793.

In Pike *v.* Nicholas, it was held in the lower court that "the plaintiff has a right to say that no one is to be permitted, whether with or without acknowledgment, to take a material and substantial portion of his work, of his argument, his illustrations, his authorities, for the purpose of making or improving a rival publication," Law Rep. 5 Ch. 260. This principle was expressly approved on appeal; but the judgment was reversed on the ground that copying had not been satisfactorily

When Materials, without Arrangement, are Taken. — Will it amount to piracy in any case to appropriate the matter of a compilation without adopting the arrangement; or to copy the plan without taking the materials?

There is no recognized principle which will prevent a subsequent compiler from copying common materials from an existing compilation, and arranging and combining them in a new form, or using them for a different purpose. It is true that, in this case, he avails himself to some extent of the labor and research of his predecessor, instead of obtaining the materials from the original sources. But the first compiler has no exclusive property in that of which he is not the author, and which may be used by any one. His copyright protects only his own arrangement of the materials which he has selected.[1]

The principle is different, however, when the first compiler has translated, abridged, or elaborated the common materials. In such case, his claim is founded not alone on arrangement, but he has acquired a title by authorship; and to appropriate the results of that authorship, with or without the arrangement

proved. Lord Chancellor Hatherley, referring to common quotations found in both books, said that the defendant "must not simply copy the passage from the plaintiff's book," but must "really and *bona fide* look at that common source," Law Rep. 5 Ch. 263. The court of appeal held that the taking of a single quotation from the plaintiff's compilation was not, under the special circumstances of the case, a sufficient ground for an injunction.

[1] In Barfield *v.* Nicholson, where it appeared that common figures or drawings in architecture were used in the plaintiff's book, The Architectural Dictionary, and in the defendant's work, The Practical Builder, though their arrangement in the former was not new, and the arrangement adopted by the defendant was different from that in plaintiff's book, Sir John Leach, Vice-Chancellor, said: "If therefore the figures furnished by Nicholson for The Practical Builder had in fact been copied from The Architectural Dictionary, this would have been no piracy, because the author of The Architectural Dictionary had no property in these figures. But the Nicholsons, both father and son, positively swear that these figures were not copied from The Architectural Dictionary, nor from any materials collected for The Architectural Dictionary." 2 Sim. & St. 8.

In Folsom *v.* Marsh, 2 Story, 100, where it appeared that three hundred and fifty-three pages of Washington's letters and writings in the defendant's work had been copied from that of the plaintiff, the injunction granted by Judge Story extended only to the three hundred and nineteen pages which were first published in the plaintiff's work, and not to the thirty-four pages which had been previously published, and which were common property.

of the materials, is the same in principle as copying original matter.[1]

When Arrangement, but not Materials, is Copied. — The question, whether a person is barred from copying the plan and arrangement of a compilation, though he takes no materials from it, involves two inquiries: 1. Whether, in adopting the mode of combination, he uses different materials from those in the earlier work; 2. Whether he uses the same selections, but obtains them from the original authorities. In the former case, it is difficult to see how any piracy can be committed. In the mere plan or arrangement of a compilation, independently of the materials themselves, there can be no copyright to the extent that the compiler may rightfully prevent another from using the same arrangement for materials not found in the earlier publication, or for a different purpose. In such case, the later compilation will be substantially new, and different from the earlier one.[2]

But the case is different when the same materials are found in the same order in both books. There is then a substantial identity between the two; and, if the subsequent compiler has

[1] "But the respondent contends that, even if it be true that matters of fact, citations, and authorities have been borrowed to a considerable extent, he had a right to take them, as the use he made of them was substantially new, and different from that made by the complainant in the two prior annotated editions of the work, because they were used by him in illustrations of new and original propositions. . . . The doctrine of new and different use in the law of copyright applies more particularly to the old materials, and not to the materials of a work like that of the last annotated edition of the complainant, where the materials collected are much abridged, and sometimes paraphrased and newly arranged, and combined with the text of the original work. Beyond all doubt, he might take the old materials as found in the sources from which the matters of fact, citations, and authorities of the complainant were drawn, and use them as he pleased in illustration of new and original propositions, or for any other purpose not substantially the same as that to which they are applied in the annotated editions edited by the complainant: but he could not borrow the materials as therein collected and furnished, nor could he rightfully use the plan and arrangement, or the mode by which they are combined with the text, beyond the extent falling within the definition of fair use; which rule is only applicable to the materials, and not to the plan, arrangement, and mode of operation." Clifford, J., Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 124. See also Grace *v.* Newman, Law Rep. 19 Eq. 623.

[2] Murray *v.* Bogue, 1 Drew. 353; Spiers *v.* Brown, 6 W. R. 352; Pike *v.* Nicholas, Law Rep. 5 Ch. 251; Mack *v.* Petter, Law Rep. 14 Eq. 431; Lawrence *v.* Cupples, 9 U. S. Pat. Off. Gaz. 254; Banks *v.* McDivitt, 13 Blatchf. 168.

servilely copied the arrangement and combination from the earlier publication, the question arises, whether he can escape the penalty of piracy by showing that he has obtained the materials from the common sources. The chief value of a compilation is in the choice and arrangement of its contents. To make apt selections, and arrange effectively, to collect valuable illustrations and citations for purposes of annotation, and combine them properly with another's text, often require great research, judgment, scholarship, and literary knowledge. When such a compilation is made, any one, with little labor and no literary knowledge or skill, may be able to duplicate it; and the injury done to the original compiler is not less when the selections are copied from the original sources.[1] The subsequent compiler may not be prevented from arranging different materials on the same plan, or from making a new arrangement of the same common selections. But, in adopting both the arrangement and the materials of an existing compilation, though the materials are obtained from the original sources, he avails himself of the labor, judgment, and learning of his predecessor, to publish a rival work identical with that of the latter. I am not aware that a case of this kind has been decided, or that the law on this point has been judicially expounded. But the courts have frequently declared, and the principle is well grounded, that no one shall appropriate the substantial fruits of the industry and learning of another, to the injury of the latter; and, when this is done by a subsequent

[1] This is well illustrated by Lockhart's annotated edition of Scott's Minstrelsy of the Scottish Border, which was brought into controversy in the recent Scotch case of Black *v.* Murray. Of the two hundred notes added by the editor, it appeared that all but fifteen were quotations from common sources. The ballads also were common property. "To a considerable extent," said Lord Kinloch, "the notes borrowed (to use a euphemism) from Messrs. Black's edition, consist of quotations from various authors, employed by Mr. Lockhart to illustrate ballads in the Minstrelsy. It was perhaps thought that to repeat quotations from well-known authors was not piracy. If so, I think a great mistake was committed. In the adaptation of the quotation to the ballad which it illustrates, the literary research which discovered it, the critical skill which applied it, — there was, I think, an act of authorship performed, of which no one was entitled to take the benefit for his own publication, and thereby to save the labor, the learning, and the expenditure necessary even for this part of the annotation." 9 Sc. Sess. Cas. 3d ser. 355.

compiler in the manner above described, he should, in my judgment, be held to have committed piracy.[1]

But there is nothing in the law of copyright to prevent any person who has obtained common materials from the original sources from using them in substantially the same manner, and for the same purpose, as they have been previously used; provided the arrangement is his own, and is not servilely copied from the work of another. Two authors, writing on the same subject, citing the same authorities, and taking the same illustrations and quotations from common sources, will naturally use such common materials for like purposes and in a similar manner. As far as citations of authorities, quotations, &c., are concerned, there may be a striking resemblance, amounting in some instances to substantial identity. This, however, does not amount to piracy, unless it appears that there has been servile copying from the preceding work.[2] In Pike *v.* Nicholas, a substantial identity was shown between the two works in controversy, both as to common materials used and their arrangement and mode of treatment. The Vice-Chancellor was satisfied that the later work was the result of piratical copying, and not of independent labor. But the court of appeal, finding that the subsequent writer had obtained his materials from the original sources, and that the resemblance in the use of the materials of the two works was natural under the circumstances, held that it was not a case of piracy.[3] Hence, in determining the question of piracy in cases of this kind, much allowance should be made for the natural resemblance between the two productions. In the case of two compilations on the same subject, the author of the later one should not be

[1] In Story's Executors *v.* Holcombe, Mr. Justice McLean said: "So far as citations are made in the Commentaries, Mr. Holcombe had a right to go to the original works and copy from them; but he could not avail himself of the labor of Judge Story, by copying the extracts as compiled by him. This is a well-established principle. Nor could he copy the plan or arrangement of the subjects in the Commentaries. It is said there can be no copyright in a plan, distinct from the work itself, any more than there can be a copyright in an idea. This is admitted; but the words in which an idea is expressed is a subject of property, and so is the classification." 4 McLean, 316.

[2] Murray *v.* Bogue, 1 Drew. 353; Spiers *v.* Brown, 6 W. R. 352; Webb *v.* Powers, 2 Woodb. & M. 497; Banks *v.* McDivitt, 13 Blatchf. 163.

[3] Law Rep. 5 Ch. 251.

held too strictly accountable for similarity in arrangement and combination between his and the earlier work. So a person should not be held too rigidly to the penalty of piracy for having followed a preceding plan and arrangement, which have little or no material originality or merit. But, in general, a subsequent compiler should not be allowed servilely to copy, to a material extent and to the injury of his predecessor, the arrangement and combination which give value to a pre-existing work.

Ascertaining the Fact of Copying.

Before the question of piracy can be determined, it will be necessary to ascertain what use the defendant has made of the plaintiff's work. In the case of literal copying, this can usually be done with little difficulty and with certainty. But, when the matter alleged to have been taken is more or less disguised in the later publication by change of language, form, arrangement, &c., the determination of the question of copying will often be attended with great difficulties. When the defendant frankly admits the extent to which the plaintiff's work has been used, and his evidence is accepted as conclusive, the fact will thereby be established, and the law determined accordingly. More frequently, however, copying is denied, or only a fair use of the protected work is admitted to have been made; but this evidence is often inconsistent with the likeness between the two publications, and will be insufficient to rebut the charge of copying. A comparison of the two works will then be made with the aid of such direct or circumstantial evidence as may be available; and not unfrequently the question will have to be determined solely or chiefly by the internal evidence afforded by such comparison.

Common Errors Test of Copying. — The occurrence of the same errors in the two publications in controversy affords one of the surest tests of copying, especially in the case of compilations where a close resemblance is a natural consequence of the use of common materials. In some instances, it may be made apparent that both writers have naturally made the same mistakes; but, in general, this result is so improbable that the

presence in both works of common inaccuracies creates a presumption of copying so well grounded that it can be overcome only by the strongest evidence. Hence, in the absence of conclusive proof to the contrary, the courts have uniformly accepted the evidence afforded by such errors, when sufficiently numerous or peculiar, as adequate to sustain the charge of copying.[1] And Lord Eldon laid down the rule, that, when parts of a book have been proved by this test to have been pirated, other identical passages in which common blunders do not appear must be presumed to have been copied.[2]

Things against Presumption of Copying. — Due weight should be given to those circumstances which indicate that certain common peculiarities may be fairly attributed to other agencies than copying. Thus, punctuation, spelling, the use of capitals, and kindred matters, are often regulated, not by the author, but by the proof-reader. Hence, peculiarities of this kind may appear in a publication without the author's agency. Especially are the probabilities in favor of copying afforded by such resemblances greatly lessened when it appears, as in Lawrence *v.* Dana,[3] that both works were printed in the same office, where

[1] Longman *v.* Winchester, 16 Ves. 269; Mawman *v.* Tegg, 2 Russ. 385; Murray *v.* Bogue, 1 Drew. 353; Spiers *v.* Brown, 31 L. T. R. 16; s. c. 6 W. R. 352; Kelly *v.* Morris, Law Rep. 1 Eq. 697, 702; Pike *v.* Nicholas, Law Rep. 5 Ch. 251; Cox *v.* Land & Water Journal Co., Law Rep. 9 Eq. 324; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402.

"From the identity of the inaccuracies, it is impossible to deny that the one was copied from the other *verbatim et literatim*." Lord Eldon, Longman *v.* Winchester, *supra*, 272.

"Some instances are stated in the bill, and others were stated at the bar, to show that Mr. Bogue has the plaintiff's errors, which is the ordinary and familiar mode of trying the fact whether the defendant has used the plaintiff's book. Now, the use of showing the same errors in both is, that where the defendant says he has got his information not from the plaintiff, but from other sources, if the evidence is unsatisfactory on the question whether the defendant did use the plaintiff's work or not, to show the same errors in the subsequent work that are contained in the original is a strong argument to show copying." Kindersley, V. C., Murray *v.* Bogue, 1 Drew. 366.

[2] "It is necessary to ascertain how much of the one book has been copied from the other; and many cases have established, that you cannot have better evidence of such copying than the circumstance which occurs in several of the passages here complained of, — namely, the fact of blunders in the original book being transferred into the book which is accused of piracy. And I may add, that, when a considerable number of passages are proved to have been copied, by the copying of the blunders in them, other passages which are the same with passages in the original book must be presumed, *prima facie*, to be likewise copied, though no blunders occur in them." Mawman *v.* Tegg, 2 Russ. 393–394.

[3] 2 Am. L. T. R. N. S. 402.

the proof-reading is governed by uniform rules, or that both were corrected by the same proof-reader.

So, in Pike *v.* Nicholas, it appeared that both plaintiff and defendant had made the same quotation from Prichard, in which that author had cited a passage from Livy, relating to the color of the hair of the Gauls, and that both had pointed out that the correct reading of the Latin text was *rutilatæ comæ*, "reddened heir," and not, as given by Prichard, *rutilæ comæ*, "red hair." This was cited as evidence of copying. But the Lord Justices of appeal gave much weight to the consideration that the defendant was a fair Latin scholar, and might naturally have made the same criticism as did the plaintiff on Prichard's reading. And this view was strengthened by the fact that the form *rutilatæ* was to be found in a German and in a French translation of the passage in question.[1]

So, also, it will be in the defendant's favor if the erroneous passage alleged to have been copied in his book is free from some of the inaccuracies which are found in the same passage in the plaintiff's publication.[2] Still, it is to be remembered that the errors may have been corrected in copying.

Circumstances such as the above are not necessarily conclusive; but they will be entitled to due consideration in weighing the probabilities.

Presumption of Copying Created by Likeness must be Overcome by Defendant. — When the publication complained of contains resemblances striking enough to warrant the inference of piracy, it is for the defendant to show that the likeness is not the result of copying from the complainant's work.[3] He may establish the fact that his own work was prepared without any recourse whatever to that of the plaintiff; or, admitting that he had seen or used the latter, he may show that the parts complained of in his own work were taken by him from a source other than the publication alleged to have been pirated. It

[1] Law Rep. 5 Ch. 251.

[2] In M'Neill *v.* Williams, 11 Jur. 344, it appeared that seven errors in the plaintiff's mathematical tables were also found in those of the defendant. The latter declared that this was accidental, and that the plaintiff's book contained seventy errors not to be found in his own. It does not appear what importance the court attached to this circumstance; but the injunction was refused.

[3] See *ante*, p. 400.

will not be enough for the defendant simply to show that the passages in question are to be found in other books than the plaintiff's, and that such books were accessible to him, or even were used by him in the preparation of his own. This evidence may lessen the probabilities that there was unlawful copying. But it must be proved that the defendant actually got the matter in dispute from the common source without copying from the protected work. It is obvious that there would be little protection for compilations and other works containing selections, quotations, citations, &c., gathered from common sources, if the charge of piracy could be successfully met by showing that the defendant might have obtained the matter complained of from the original authorities. The pivotal question is not what he might have done, but what he has done.

So, when coincidence of errors is brought forward as evidence of copying, it will doubtless be in the defendant's favor to show that the same inaccuracies are found in the work of another author. But it by no means follows from this that the erroneous passages in the defendant's work were not copied from that of the plaintiff.

When the defendant is charged with having copied quotations from the plaintiff's work, instead of going to the original authorities, it will be a circumstance of much weight if the quoted matter in the later compilation is more extensive than in the earlier one.[1]

Intention to pirate on the part of the person charged with wrong will have much weight in determining the question of copying.[2] And so it will often be important for the defendant to produce his manuscript, or satisfactorily account for its non-production.[3] He may also be called upon to explain such matters relating to the preparation of his work as may throw light on the question of unlawful copying. In a recent English

[1] "On the other hand, the defendant had quoted an author taken from Prichard, Calpurnius Flaccus, who was not quoted by the plaintiff, and had added to his quotation a passage from Tertullian, which was not in apt to the subject. These circumstances showed clearly that the defendant went to the original source, namely, Prichard, and that he got those quotations from Prichard which the plaintiff got from Prichard." Lord Hatherley, Pike *v.* Nicholas, Law Rep. 5 Ch. 262.

[2] See *ante*, p. 402.

[3] Hotten *v.* Arthur, 1 Hem. & M. 609; Jarrold *v.* Houlston, 3 Kay & J. 708; Spiers *v.* Brown, 6 W. R. 352. See this point considered in Chap. XI.

case, where the defendant denied that he had copied from the plaintiff's book quotations from Retzius and from Pouchét, his evidence was not credited, because he could not say where he had seen the original works of those authors, which were so rare that copies were not in the British Museum. The defendant was further charged with having copied an argument based on the physical characteristics of ten thousand persons which he claimed to have observed at public meetings; but it was a significant fact against him that he could not give the time or place of such meetings.[1]

[1] Pike *v.* Nicholas, Law Rep. 5 Ch. 251. See also Kelly *v.* Wyman, 17 W. R. 399; s. c. 20 L. T. N. S. 300.

CHAPTER IX.

ABRIDGMENTS, TRANSLATIONS, AND DRAMATIZATIONS, CONSIDERED WITH REFERENCE TO PIRACY.

General Principles. — In considering the question of piracy in the case of these productions, certain fundamental principles, which apply equally to all of them, should be borne in mind. Any person, or any number of persons, may abridge, translate, or dramatize any publication not protected by copyright. The original being common property, no legal rights are secured to its author; therefore, none are violated by the uses above mentioned. Hence, there may be numerous abridgments, translations, or dramatizations of the same original, and copyright will vest in each.[1] This copyright will prevent any person without license from copying the abridgment, translation, or dramatization, but not from using the original for the same purpose. Whether one abridgment, translation, or dramatization infringes another is determined by the fact, whether the alleged wrong-doer has produced his own from the original by independent labor, or has copied that of another. So also a person with the consent of the author may secure a copyright for an abridgment, translation, or dramatization of a work protected by copyright.

Alterations, additions, improvements, &c., made without authority, however extensive or valuable they may be, confer no right to use a copyrighted work.[2] A person may acquire copyright in new matter added to a work of which he is not the author, or in changes, improvements, &c., made in such work; but he must show that the original is common property, or, if protected by copyright, that he has authority so to use it. Hence, it is no defence of piracy that the

[1] See *ante*, p. 158.

[2] See *ante*, pp. 405–407.

unauthorized abridgment, translation, or dramatization of a copyrighted work presents the original in a new and improved, a more useful, or a less expensive form. It is a fundamental principle of the law of copyright that to take a material part, *verbatim* or in substance, of a protected work, except under the recognized privilege of fair use, is piracy. This principle is universally recognized. It was affirmed by Lord Langdale, when he said, "Whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves, for their own profit, of other men's works still subject to copyright and entitled to protection;"[1] and by Mr. Justice Story, when he said that if "the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient in point of law to constitute a piracy *pro tanto*."[2] This principle is not less applicable to the productions now under consideration than it is to any other kind.

The question of piracy, then, in the case of an abridgment, translation, or dramatization of a work protected by copyright, is to be determined by two inquiries: 1. Whether the whole or a material part of the original has been substantially reproduced; 2. Whether the original has been used with the consent of the owner.[3]

Abridgments.

The judicial history of copyright is fertile in examples showing how false doctrines become firmly rooted in jurisprudence by the practice of blindly following precedents without examining the grounds on which they are based. No subject presents a more striking illustration of the evils of this custom than that of abridgments. In 1847, Mr. Justice McLean, after emphatically declaring that the doctrine held by the courts in relation to abridgments was contrary to right and established principles, said that he was "bound by precedent;"[4] and as lately as 1869 Mr. Justice Clifford declared that the prevailing doctrine on this subject "has been too long

[1] Lewis *v.* Fullarton, 2 Beav. 8.

[2] Folsom *v.* Marsh, 2 Story, 115.

[3] Dramatizations for performance are further governed by the question whether the work dramatized is a dramatic composition.

[4] Story's Executors *v.* Holcombe, 4 McLean, 308, 309.

established to be considered at the present time as open to controversy."[1] Let us consider what authorities there are in favor of this latter conclusion, and to what weight they are entitled. For the true spirit of inquiry is, that a doctrine in jurisprudence is never beyond pertinent question until it rests firmly on reason and sound principles.

English Authorities. — The theory that an abridgment of a copyrighted work is not an invasion of literary property is traced to a *dictum* expressed by Lord Hardwicke in 1740, when Sir Matthew Hale's Pleas of the Crown was alleged to have been infringed. The book complained of was found to be not an abridgment, but a reprint, of the original, "colorably shortened." Lord Hardwicke said: "Where books are colorably shortened only, they are undoubtedly within the meaning of the act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment. But this must not be carried so far as to restrain persons from making a real and fair abridgment, for abridgments may with great propriety be called a new book; because not only the paper and print, but the invention, learning, and judgment, of the author is shown in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of the author. If I should extend the rule so far as to restrain all abridgments, it would be of mischievous consequence."[2] Brief *dicta*, or admissions of like import, are to be found in the opinions in Tonson *v.* Walker,[3] decided in 1752; Dodsley *v.* Kinnersley,[4] in 1761; Millar *v.* Taylor,[5] in 1769; Bell *v.* Walker,[6] in 1785; D'Almaine *v.* Boosey,[7] in 1835; and Prince Albert *v.* Strange,[8] in 1849. In none of these cases was

[1] Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 425.

[2] Gyles *v.* Wilcox, 2 Atk. 141.

[3] 3 Swans. 678.

[4] Amb. 403.

[5] 4 Burr. 2310.

[6] 1 Bro. C. C. 451.

[7] 1 Y. & C. Exch. 301.

[8] 2 De G. & Sm. 693. Vice-Chancellor Knight Bruce also seems to have thought that an abridgment was not necessarily piratical. But his views are not expressed with precision. "I am not aware," he said, "that one man has a right to abridge the works of another. On the other hand, I do not mean to say that there may not be an abridgment which may be lawful, which may be protected; but, to say that one man has the right to abridge, and so publish in an abridged form, the work of another without more, is going much beyond my notion of what the law of this country is." The language following in the opinion indicates that the question of piracy is to be determined by the character of the abridgment. The work complained of was

the publication complained of an abridgment, and in none was the law governing piracy in the case of abridgments fully considered or discussed. Hence, these decisions afford no direct test of the question now under consideration, and have no binding force as precedents.

The only English case wherein the decision turned directly on this point was one against Newbery, in 1774. It was there found that the defendant had made a *bona fide* abridgment of Dr. Hawkesworth's Voyages; and Lord Chancellor Apsley, after consultation with Sir William Blackstone, held that "an abridgment, where the understanding is employed in retrenching unnecessary and uninteresting circumstances, which rather deaden the narration, is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work." The injunction was, therefore, refused.[1]

All the English decisions in favor of the doctrine that a *bona fide* abridgment of a protected work is no infringement of the copyright in the original have now been cited. It will be seen that, with two unimportant exceptions, they all belong to the last century. Age does not necessarily weaken the force of an authority. Fundamental principles remain unchanged by time, though new conditions may be imposed by the legislature, and precedents may be overruled by the courts. But when, in the growth of jurisprudence, are developed sound principles wholly antagonistic to those on which earlier decisions rest, such decisions properly lose the weight of authority. Tried by this test, the cases just cited must be considered obsolete as far as they bear on the question now under consideration. While they have not been formally overruled, the doctrine which they

found to be a republication of Dickens's Christmas Carol, with merely colorable alterations, and therefore not a *bona fide* abridgment. Dickens *v.* Lee, 8 Jur. 184.

In Butterworth *v.* Robinson, 5 Ves. 709, it was held that the plaintiff was entitled to an injunction to restrain the publication of An Abridgment of Cases. But it was alleged that "this work was by no means a fair abridgment; that, except by colorably leaving out some parts of the cases, such as the arguments of counsel, it was a mere copy *verbatim* of several of the reports of cases in the courts of law, and among them the Term Reports, of which plaintiff is proprietor." Lord Chancellor Loughborough said, "It appears to me an extremely illiberal publication."

[1] Lofft, 775.

sanction cannot be reconciled with those principles which have repeatedly governed the courts in determining questions of piracy in more recent cases.[1]

American Authorities. — It is not surprising that a doctrine unquestioned for a century in England should have found a place in American jurisprudence. It has been apparently recognized, in part at least, by Mr. Justice Story, in Gray *v.* Russell,[2] and Folsom *v.* Marsh;[3] by Mr. Justice Woodbury, in Webb *v.* Powers;[4] and by Mr. Justice Clifford, in Lawrence *v.* Dana.[5] It has been applied by Mr. Justice McLean, in Story's Executors *v.* Holcombe.[6] In the four cases first cited, the works complained of were not abridgments. Hence, these decisions are not binding as precedents on this question. Nevertheless the opinions of the distinguished jurists who pronounced them, when they are the result of their own reasoning, are entitled to careful consideration. But in the cases referred to they seem simply to have repeated the views found in the English reports. Moreover, the English doctrine was accepted with a qualification which amounts to its practical rejection. Mr. Justice Story was of opinion that, if the abridgment will "prejudice or supersede the original work," it is piratical;[7] and Mr. Justice Clifford declared that an abridgment "which is of ample protection to copyright than those of an earlier date, and they also restrict the privilege of the subsequent writer or compiler in respect to the use of the matter protected by the copyright within narrower limits." Clifford, J., Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 428.

[1] "Recent decisions afford more under the pretence of a review, by giving its substance in a fugitive form. The same difficulty may arise in relation to an abridgment of an original work. The question in such a case must be compounded of various considerations, whether it be a *bona fide* abridgment, or only an invasion by the omission of some unimportant parts; whether it will, in its present form, prejudice or supersede the original work; whether it will be adapted to the same class of readers; and many other considerations of the same sort, which may enter as elements in ascertaining whether there has been a piracy or not. Although the doctrine is often laid down in the books, that an abridgment is not a piracy of the original copyright, yet this proposition must be received with many qualifications." Gray *v.* Russell, 1 Story, 19. See also 2 Eq. Jur. § 939.

[2] 1 Story, 19.

[3] 2 Id. 106.

[4] 2 Woodb. & M. 520.

[5] 2 Am. L. T. R. N. S. 425, 426.

[6] 4 McLean, 306.

[7] "In some cases, indeed," said Mr. Justice Story, "it may be a very nice question what amounts to a piracy of a work, or not. Thus, if large extracts are made therefrom in a review, it might be a question whether those extracts were designed *bona fide* for the mere purpose of criticism, or were designed to supersede the original work,

the character to supersede the original" is "an infringement of the franchise secured by the copyright."[1] This proviso nearly, if not quite, annuls the doctrine to which it is applied. For, excepting perhaps in rare cases, the effect of the abridgment must be to prejudice or to supersede the original, to a material extent.

The complaint in Story's Executors *v.* Holcombe was that the copyright in Story's Commentaries on Equity Jurisprudence had been infringed by the publication of an Introduction to Equity Jurisprudence, prepared by the defendant. The defence was set up that the latter was a *bona fide* abridgment of the former. The Master reported that Story's work had been fairly

[1] "Courts have sometimes supposed," said Mr. Justice Clifford, "that the same rule of decision should be applied to a copyright as to a patent for a machine, and consequently that an abridgment of an original work, made and condensed by another person without the consent of the author of the original work, ought to be regarded as an infringement; but the language of the respective acts of Congress, making provision for the protection of such rights, is different; and the opposite doctrine has been too long established to be considered at the present time as open to controversy. Story *v.* Holcombe, 4 McLean, 309. Whatever might be thought if the question was an open one, it is too late to agitate it at the present time, as the rule is settled that the publication of an unauthorized but *bona fide* abridgment or digest of a published literary copyright, in a certain class of cases at least, is no infringement on the original. Phillips on Copyright, 171; Newbery's Case, Lofft, 775; Dodsley *v.* Kinnersley, Amb. 403; Whittingham *v.* Wooler, 2 Swans. 428; Gyles *v.* Wilcox, 2 Atk. 141.

"Strong doubts are expressed by Mr. Curtis, whether the definition of an allowable abridgment, as given in the earlier cases, can be sustained, except as applied to such works as histories, or works composed of translations, and others of like kind; but it was decided in this court, in the case of Folsom *v.* Marsh, 2 Story, 105, that an abridgment in which there is a substantial condensation of the materials of the original work, and which required intellectual labor and judgment to make the same, does not constitute an infringement of the copyright of the original author; and the court, as now constituted, is inclined to adopt that rule in cases where it also appears that the abridgment was made *bona fide* as such, and that it is not of a character to supersede the copyrighted publication. Unless it be denied that a legal copyright secures to the author 'the sole right and liberty of printing, republishing, and vending the book' copyrighted, it cannot be held that an abridgment or digest of any kind of the contents of the copyrighted publication, which is of a character to supersede the original work, is not an infringement of the franchise secured by the copyright. What constitutes a fair and *bona fide* abridgment in the sense of the law is, or may be under particular circumstances, one of the most difficult questions which can well arise for judicial consideration; but it is well settled that a mere selection or different arrangement of parts of the original work into a smaller compass will not be held to be such an abridgment." Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 425.

abridged, and hence that there was no infringement. Against this conclusion, the court found that the first third of the defendant's book, including one hundred pages, was not a fair abridgment, and granted an injunction against that part. The rest was regarded as an abridgment, and its publication was not enjoined.[1] In considering the principles which govern piracy in the case of abridgments, Mr. Justice McLean said: "This controversy has caused me great anxiety and embarrassment. On the subject of copyright, there is a painful uncertainty in the authorities; and, indeed, there is an inconsistency in some of them. That the complainants are entitled to the copyright which they assert in their bill is not controverted by the defendants. The decision must turn on the question of abridgment. If this were an open question, I should feel little difficulty in determining it. An abridgment should contain an epitome of the work abridged, — the principles, in a condensed form, of the original book. Now, it would be difficult to maintain that such a work did not affect the sale of the book abridged. The argument that the abridgment is suited to a different class of readers, by its cheapness, and will be purchased on that account by persons unable and unwilling to purchase the work at large, is not satisfactory. This, to some extent, may be true; but are there not many who are able to buy the original work, that will be satisfied with the abridgment? What law library does not contain abridgments and digests, from Viners and Comyns down to the latest publications? The multiplication of law reports and elementary treatises creates a demand for abridgments and digests; and these being obtained, if they do not generally, they do frequently, prevent the purchase of the works at large. The reasoning on which the right to abridge is founded, therefore, seems to me to be false in fact. It does, to some extent in all cases, and not unfrequently to a great extent, impair the rights of the author, — a right secured by law.

"The same rule of decision should be applied to a copyright as to a patent for a machine. The construction of any other machine which acts upon the same principle, however its

[1] 4 McLean, 306.

structure may be varied, is an infringement on the patent. The second machine may be recommended by its simplicity and cheapness; still, if it act upon the same principle of the one first patented, the patent is violated. Now, an abridgment, if fairly made, contains the principle of the original work; and this constitutes its value. Why, then, in reason and justice, should not the same principle be applied in a case of copyright as in that of a patented machine? With the assent of the patentee, a machine acting upon the same principle, but of less expensive structure than the one patented, may be built; and so a book may be abridged by the author, or with his consent, should a cheaper work be wanted by the public. This, in my judgment, is the ground on which the rights of the author should be considered.

"But a contrary doctrine has long been established in England, under the statute of Anne, which, in this respect, is similar to our own statute; and in this country the same doctrine has prevailed. I am therefore bound by precedent; and I yield to it in this instance more as a principle of law than a rule of reason or justice."[1]

The only American case, then, which directly supports the doctrine that a *bona fide* abridgment of a copyright book is not piratical is Story's Executors *v.* Holcombe. The authority of this will readily be set aside, when it is remembered that the decision was rendered under protest, so to speak, was contrary to the opinion of the judge who pronounced it, and was based on no other ground than that of supposed precedents, which have been shown to have had no force.

The Doctrine Maintained that an Unauthorized Abridgment is Piratical.

The above review of all the decisions that can be cited in support of the prevailing doctrine concerning abridgments, and the absence of express authorities on the other side, show that the question whether the copyright in a work is violated by an unauthorized abridgment of the original must be deter-

[1] 4 McLean, 308.

mined by the application of those general principles which are uniformly recognized as governing the subject of piracy.

The word abridgment has been loosely applied to publications widely different in character. We may here dismiss from consideration those so-called abridgments which are made by merely colorably shortening the originals, or by simply selecting some parts and omitting others. Such productions are compilations or servile imitations, and, when copyrighted originals are used without authority, are conceded to be piratical, even by those who maintain that a *bona fide* abridgment is not an invasion of copyright. So, also, a biographical sketch of a page or so, written from an elaborate biography in one or more volumes, will doubtless not be considered an abridgment of the larger work.

What will be here regarded as a genuine abridgment is a production in which the substance of the whole, or of a material part, of a work is condensed into a much smaller compass, and is given in language substantially different from that of the original.[1] That labor, skill, and judgment may be required

[1] "What constitutes a fair and *bona fide* abridgment, in the sense of the law, is one of the most difficult points, under particular circumstances, which can well arise for judicial discussion. It is clear that a mere selection, or different arrangement, of parts of the original work, so as to bring the work into a smaller compass, will not be held to be such an abridgment. There must be real, substantial condensation of the materials, and intellectual labor bestowed thereon; and not merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work." Story, J., Folsom *v.* Marsh, 2 Story, 107.

"A fair abridgment of any book is considered a new work, as to write it requires labor and exercise of judgment. It is only new in the sense that the view of the author is given in a condensed form. Such a work must not only contain the arrangement of the book abridged, but the ideas must be taken from its pages.

"It must be in good faith an abridgment, and not a treatise interlarded with citations. To copy certain passages from a book, omitting others, is in no just sense an abridgment of it. It makes the work shorter, but it does not abridge it. The judgment is not exercised in condensing the views of the author. His language is copied, not condensed; and the views of the writer, in this mode, can be but partially given. To abridge is to preserve the substance, the essence, of the work, in language suited to such a purpose. Gould's Abridgment of Alison's History of Europe gives all the material facts of the original work, covering the whole line of the narrative; and this, in a legal sense, may be called an abridgment. . . .

"All the authorities agree that to abridge requires the exercise of the mind, and that it is not copying. To compile is to copy from various authors into one work. In this, the judgment may be said to be exercised to some extent in selecting and combining the

to produce this result; that such an abridgment may be a new work in outward form, of great merit, and highly useful by presenting the essence of the original in a less expensive, more convenient, and perhaps better shape, is wholly true. On these grounds was founded the doctrine that the rights of an author are not invaded by an unlicensed abridgment of his literary production; and they are the only ones to be found in the reported opinions to support that theory.[1] The qualities above mentioned are ample to sustain copyright in the abridgment of an unprotected work, or of a copyrighted work abridged with the consent of the author. But they confer no right on any

extracts. Such a work entitles the compiler, under the statute, to a right of property. This right may be compared to that of a patentee, who, by a combination of known mechanical structures, has produced a new result.

"Between a compilation and an abridgment there is a clear distinction; and yet it does not seem to have been drawn in any opinion cited. A compilation consists of selected extracts from different authors; an abridgment is a condensation of the views of the author. The former cannot be extended so as to convey the same knowledge as the original work; the latter contains an epitome of the work abridged, and consequently conveys substantially the same knowledge. The former cannot adopt the arrangement of the works cited; the latter must adopt the arrangement of the work abridged. The former infringes the copyright, if matter transcribed when published shall impair the value of the original book; a fair abridgment, though it may injure the original, is lawful. [Bell *v.* Walker] 1 Bro. C. C. 451; Gyles *v.* Wilcox, 2 Atk. 141." McLean, J., Story's Executors *v.* Holcombe, 4 McLean, 311–314.

[1] These grounds are most fully given in the case against Newbery, reported by Lofft, 775. Lord Chancellor Apsley "was of opinion that this abridgment of the work was not any violation of the author's property whereon to ground an injunction. That, to constitute a true and proper abridgment of a work, the whole must be preserved in its sense; and then the act of abridgment is an act of understanding, employed in carrying a large work into a smaller compass, and rendering it less expensive and more convenient both to the time and use of the reader, which made an abridgment in the nature of a new and meritorious work.

"That this had been done by Mr. Newbery, whose edition might be read in the fourth part of the time, and all the substance preserved, and conveyed in language as good or better than in the original, and in a more agreeable and useful manner. That he had consulted Mr. Justice Blackstone, whose knowledge and skill in his profession was universally known, and who as an author himself had done honor to his country. That they had spent some hours together, and were agreed that an abridgment, where the understanding is employed in retrenching unnecessary and uninteresting circumstances, which rather deaden the narration, is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work. And that this abridgment of Mr. Newbery falls within these reasons and descriptions."

one to abridge without authority a work protected by copyright. If a person is entitled to republish any literary production which does not belong to him, simply because he may change it by labor and skill into a better, more useful, or less expensive form, there is obviously little protection for literary property. To defend piracy by such reasoning is the same in principle as to justify the unlicensed taking of material possessions on the sole ground of their conversion into useful products. The rights of property cannot justly be undermined by such fictions. A dramatization of a novel, or an arrangement for the piano of an opera, is a reproduction of an existing work in a new and useful form; but it has been properly held that no one without authority may dramatize for publication a copyrighted novel,[1] or arrange for the piano an opera protected by copyright.[2] The principle is the same in the case of an abridgment. The maker must show a clear title to that which he has taken, — a title derived from the owner of the original. The failure to recognize the vital distinction between the abridgment of a work which is and of one which is not protected by copyright doubtless led to the adoption of the erroneous doctrine which has been criticised.

The question whether a protected work is infringed by the publication of an unauthorized abridgment is one easily determined. We have but to ascertain whether the person charged with wrong has availed himself of the labor and learning of another to a material extent, and to the injury of the author entitled to protection. That the maker of an abridgment does this must be evident to most minds. The very plan of an abridgment and the purpose of its author require that it shall embody what is most valuable in the work abridged. Between the abridged and the unabridged, the difference is alone in form and size; the substance remains the same. A production which is the creation of rare genius, the fruit of great learning, or of years of toil, may be condensed, in a comparatively short time and with comparatively little labor, by a literary workman of ordinary skill. But that which is the essence

[1] Tinsley *v.* Lacy, 1 Hem. & M. 747. See also Reade *v.* Lacy, 1 Johns. & H. 524.

[2] See *ante*, pp. 410, 411.

of the abridgment, and constitutes its chief value, is due to the genius, learning, or industry of the original author. What would be an abridgment of Bancroft's History of the United States, but a reproduction of the substantial fruits of forty years' patient toil, and of the great learning of that historian? What would be an abridgment of the American Cyclopædia, but an appropriation of the wealth of information there garnered at a cost of half a million dollars for literary labor alone? It would seem to be needless, even thus briefly, to indicate that he who abridges a work takes the substantial results contained in the original.

It must be not less apparent that the publication of the abridgment will tend to supersede the unabridged, to lessen its sale, and thereby to injure its owner. Doubtless many buyers of the abridged would not have bought the unabridged; but, on the other hand, not a few will abstain from buying the larger work, simply because the smaller one is to be had. But it is not necessary to show that the sale of the original is prejudiced by the publication of the condensed edition. The rights of the author extend to the whole and all the parts of a literary composition, and to all the forms in which the whole or a material part may be published. It is for him to say whether an abridgment shall be published; to him belongs whatever profit or credit may attend such publication. Whether he has or has not issued an abridgment, he may be injured by the publication of an unauthorized one. In one case, the injury is actual; in the other, potential. Moreover, the reputation of the original author may be hurt by the publication of an unauthorized abridgment which fails to reproduce the original with accuracy and fidelity; and, in some cases, by any condensation of the original, however faithfully and skilfully done.

The conclusion of fact, then, to which we are brought is, that a genuine abridgment embodies the substantial results contained in the work abridged; and, if unauthorized, is damaging to the author of the original. The question of piracy is determined by the application of the established principle that no one without authority shall take a material part of another's work, to the injury of the person entitled to protection. It is

settled that piracy may be committed by taking a few pages from a copyrighted book; to hold that the substance of the whole may be lawfully appropriated, if published in the form of an abridgment, is as absurd as it is inconsistent and unjust. An unauthorized abridgment of a work entitled to protection must, therefore, be regarded as piratical.[1]

Translations.

Statutory Provision for Reserving Right of Translation and Dramatization. — Section 4952 of the Revised Statutes of the United States provides that "authors may reserve the right to dramatize or translate their own works." The manner of doing this is not prescribed or indicated. A notice to that effect, printed on the title-page or that following, would doubtless be enough. When the right of translation has thus been reserved by the author, it will be a clear violation of the statute for any person without authority to translate the book; and, when the right of dramatization is reserved, it is equally clear that all

[1] It has been shown that Justices Story and Clifford regarded an unauthorized abridgment as piratical, when its effect is to damage the author of the original; and that the views expressed by Mr. Justice McLean in Story's Executors *v.* Holcombe are in entire accord with the conclusion reached in the text.

Mr. Chancellor Kent, criticising the doctrine recognized *obiter* in Dodsley *v.* Kinnersley, said: "This latitudinary right of abridgment is liable to abuse and to trench upon the copyright of the author." 2 Com. 382, note *e*. After questioning the soundness of the views expressed by Lord Hardwicke in Gyles *v.* Wilcox, Lord Campbell says: "I confess I do not understand why an abridgment tending to injure the reputation and to lessen the profits of the author should not be an invasion of his property." 6 Lives of the Chancellors (10 vols, London, 5th ed.), 202, 203, note *e*.

In Tinsley *v.* Lacy, Vice-Chancellor Wood, afterward Lord Hatherley, said: "The authorities by which fair abridgments have been sanctioned have no application. The court has gone far enough in that direction; and it is difficult to acquiesce in the reason sometimes given, that the compiler of an abridgment is a benefactor to mankind by assisting in the diffusion of knowledge." 1 Hem. & M. 754.

"In the United States and in England, any man may make an abridgment of the work of another; that is, any man has a right to cut the ears of my corn, provided he leaves the stalks uncut; to drink my wine, provided he leaves me the casks." Lieber, 2 Political Ethics (Woolsey's ed., Phila., 1875), 122.

Unsuccessful attempts have been made to extend the current fallacious theory concerning abridgments to a diminutive photograph of a painting, and to reprints reduced in size of maps and illustrations. Gambart *v.* Ball, 14 C. B. N. S. 306; Bradbury *v.* Hotten, Law Rep. 8 Exch. 1; Farmer *v.* Calvert Lithographing, Engraving, & Map-Publishing Co., 5 Am. L. T. R. 168.

unauthorized persons are barred from dramatizing the work, either for publication in print or for representation on the stage. But because the statute gives to every author the privilege of reserving the right to dramatize and to translate his work, it does not follow that such right does not exist in the absence of express reservation. If the right is in harmony with the general purpose of the statute, and is properly within the grant made by Congress, it cannot be destroyed without language which is express or whose meaning is clearly implied to that effect. The provision in question simply directs how the right of translation and dramatization may be put beyond doubt and dispute. It neither creates nor destroys that right. The existence and limitations of the right are to be determined by a judicial construction of the entire statute in accordance with established principles.

Nor are the author's rights in his work, in the absence of an express reservation, affected by the question whether he has or has not himself dramatized or translated it. If he has made a dramatization or translation, and secured a copyright for it, this copyright will protect the production for which it was granted; but it cannot prevent any person from making a like use of the original. Whether the unlicensed translation or dramatization of the original is piratical must be determined by the nature and extent of the property in the original.

Unlicensed Translation in Absence of Reservation. — The inquiry now arises, whether, in the absence of any special reservation, the unauthorized translation of a book is a violation of the copyright in it. This question has been adjudicated in but the one case of Stowe *v.* Thomas. It was raised, but not decided, more than a century and a half ago, in Burnett *v.* Chetwood. In several other cases may be found *dicta* on the general subject of piracy in the case of translations. Let us see what light is thrown on the subject by the decisions.

English Authorities. — The first case relating to translations arose in 1720, when Lord-Chancellor Macclesfield granted an injunction against an English translation of Thomas Burnett's *Archæologia Philosophica*, — a work which had been published in Latin, and copyrighted by the author. The unauthorized publication of the book in English was enjoined, on the ground that

it "contained strange notions, intended by the author to be concealed from the vulgar, in the Latin Language; in which language it could not do much harm." The decision, therefore, did not turn on the question of the general rights of the translator; but the Lord Chancellor remarked *obiter*, that "a translation might not be the same with the reprinting the original, on account that the translator has bestowed his care and pains upon it, and so not within the prohibition of the act."[1]

In Wyatt *v.* Barnard, decided in 1814, it appeared that the complainant had copyrighted a periodical containing, besides selections and original articles, translations made expressly for him from foreign works not protected by copyright in England. Such selections and translations had been copied by the defendant, without authority, in a rival periodical. This was a clear case of piracy. In granting the injunction, Lord Eldon properly held that, "with respect to the translations, if original, whether made by the plaintiff or given to him, they could not be distinguished from other works."[2] This language clearly refers to the kind of translations before the court, and has no reference to those of copyrighted works which are not mentioned in the report of the case. This decision, therefore, though often cited, has no bearing on the question under consideration.

One aspect of the subject of piracy by translation was considered in Murray *v.* Bogue. The plaintiff complained that his Handbook for Travellers in Switzerland had been infringed by a guidebook issued by the defendant, under the title of Switzerland and Savoy. The latter publication had been made up from various sources, and in part was an abridged translation of Bædeker's German work, which appears not to have been copyrighted in England. It was claimed, however, on this point, that Bædeker's book was a translation of Murray's, and that its retranslation into English by Bogue was a violation of Murray's copyright. The law applicable in such a case was correctly laid down by Vice-Chancellor Kindersley, who said: "If Bædeker's were a translation of Murray's into German, and then the defendant had retranslated Bædeker's

[1] Burnett *v.* Chetwood, 2 Meriv. 441.

[2] 3 Ves. & B. 77.

into English, even if he did not know that Bædeker's was taken from Murray, I could not allow the plaintiff's book to be thus indirectly pirated."[1] But it was found that Bædeker's was substantially an original work, and not a reproduction in German of Murray's; and therefore its translation into English could not infringe the copyright in Murray's book.

Excepting Wood *v.* Chart,[2] which was governed by the provisions of the International Copyright Statute, the above are the only reported English cases in which the question relating to piracy in the case of translations has been raised. Two of these had sole reference to the translations of productions which were not protected by copyright in England; while the first was decided on grounds of public morals. They have therefore no direct bearing on the question whether a protected work is infringed by the publication of an unlicensed translation.

In Millar *v.* Taylor, decided in 1769, and Prince Albert *v.* Strange, in 1849, are found *dicta* relating to translations. But the issue was in no wise before the court; and the remarks were made by the judges merely for purposes of illustration.[3]

[1] 1 Drew. 367.

[2] Law Rep. 10 Eq. 193.

[3] In Millar *v.* Taylor. Lord Mansfield maintained that the King's claim to the translation of the Bible was based not on prerogative, but on principles of property, and said: "If any man should turn the Psalms, or the writings of Solomon or Job into verse, the King could not stop the printing or sale of such a work: it is the author's work." 4 Burr. 2405. That is good law; for such works are common property, and may be translated by any person. In the same case, Mr. Justice Willes said: "Certainly *bona fide* imitations, translations, and abridgments are different; and, in respect of the property, may be considered as new works." Ibid. 2310. And Mr. Justice Aston remarked that after publication "the right of the copy still remains in the author; and that no more passes to the public, from the free-will and consent of the author, than an unlimited use of every advantage that the purchaser can reap from the doctrine and sentiments which the work contains. He may improve upon it, imitate it, translate it, oppose its sentiments; but he buys no right to publish the identical work." Ibid. 2348.

To the same effect is the *dictum* of Vice-Chancellor Bruce in Prince Albert *v.* Strange. He was of opinion that the author's common-law rights in a manuscript work might be invaded by the publication of a translation, abridgment, or summary of the original; and remarked that a published work "may be liable to be translated, abridged, analyzed, exhibited in morsels, complemented, and otherwise treated in a manner that" a manuscript production is not. 2 De G. & Sm. 698.

The language of the three judges last quoted is too sweeping, and cannot be reconciled with the restrictions that have been drawn around piracy in more recent cases.

American Authorities. — There are but two American decisions relating expressly to the subject under consideration. In deciding Emerson *v.* Davies, in 1834, Mr. Justice Story said: "A man has a right to a copyright in a translation upon which he has bestowed his time and labor. To be sure, another man has an equal right to translate the original work, and to publish his translation; but then it must be his own translation by his own skill and labor, and not the mere use and publication of the translation already made by another."[1] This is a mere *obiter dictum;* for the subject of translations was entirely foreign to the issue before the court. As applied to originals not protected by copyright, the doctrine is sound. There is nothing to indicate that Judge Story intended the language to have a more extensive meaning. There is ground for believing that he referred to the translations of works that were common property.[2]

Unlicensed Translation Held to be Lawful. — In Stowe *v.* Thomas, decided in 1853, the Circuit Court of the United States held directly and unequivocally that an unauthorized translation of a copyrighted work is no infringement of the original, nor of a prior translation made and copyrighted by the author of the original in the same language as the translation complained of.[3] The book in controversy was Uncle Tom's Cabin. Besides copyrighting the English original, Mrs. Stowe had caused it to be translated into German, and had secured a copyright for the translation. Afterward, the defendant made a translation into German, when Mrs. Stowe promptly complained of piracy. Mr. Justice Grier decided that she was not entitled to the protection sought, and used this language: "By the publication of her book, the creations of the genius and imagination of the author have become as much public property as those of Homer or Cervantes. Uncle Tom and Topsy are as much *publici juris* as Don Quixote and Sancho Panza. All her conceptions and inventions may be used and abused by imitators, playwrights, and poetasters.

[1] 3 Story, 780.

[2] In support of his statement, Judge Story cited Wyatt *v.* Barnard, which goes only to the extent of recognizing copyright in translations of works not protected by statute.

[3] 2 Wall. Jr. 547; s. c. 2 Am. Law Reg. 210.

They are no longer her own: those who have purchased her book may clothe them in English doggerel, in German or Chinese prose. Her absolute dominion and property in the creations of her genius and imagination have been voluntarily relinquished; and all that now remains is the copyright of her book, — the exclusive right to print, reprint, and vend it; and those only can be called infringers of her rights, or pirates of her property, who are guilty of printing, publishing, importing, or vending without her license '*copies* of her *book*.' In tropical, but not very precise, phraseology, a translation may be called a transcript or copy of her thoughts or conceptions; but in no correct sense can it be called a copy of her book."[1]

The Doctrine Maintained that an Unauthorized Translation is Piratical.

It has now been shown that the question, whether the publication of an unauthorized translation of a protected work is a violation of the copyright therein, has been decided in but one case. All the other English and American decisions lend only *dicta* to the solution of this problem. Is the law laid down in Stowe *v.* Thomas right or wrong? To determine this question, we must first consider the nature of a translation, and its relation to the original work.

The object of copyright legislation is to encourage learning by securing to authors protection for the substantial fruits of their labor. The statute gives to every author the exclusive right to print and sell a book which he has produced, and prohibits any person without authority from publishing a "copy" of such book. If the language of the statute were properly construed to mean that only the publication of a *verbatim* copy of the whole of the book is unlawful, the protection intended for literary property would be swept away, and the act of the legislature practically annulled. The courts, therefore, have declared that the word book applies even to a few lines printed on a single sheet, and that it embraces not only the whole, but every part, of a literary production. An equally

[1] 2 Am. Law Reg. 231. The language of this passage is somewhat different in 2 Wall. Jr. 568; but the meaning is the same in both reports.

comprehensive meaning has been given to the word copy. The definition that a copy is a literal transcript of the language of the original finds no place in the jurisprudence with which we are concerned. Literary property, as has been shown, is not in the language alone; but in the matter of which language is merely a means of communication.[1] It is in the substance, and not in the form alone. That which constitutes the essence and value of a literary composition, which represents the results of the author's labor and learning, may be capable of expression in more than one form of language different from that of the original. A book may be copied by reproducing the substance of the whole or of a part, as well as by transcribing its language. In an abridgment the substance, but not the language, of the original is reproduced; yet this is an appropriation of literary property.

The author's rights, then, can be secured only by protecting, not merely the form of his production, but also its substance. Hence, the principle has been judicially recognized, and may be regarded as established, that the unauthorized appropriation of the substance, in whole or in part, of a copyrighted literary composition, to the injury of its owner, is piracy.

For the purposes of this discussion, a translation may be defined as the reproduction of a literary composition in a language foreign to that of the original. It is not a mere transcript of language; but so clearly is it a copy of a literary production in its essential attributes that the best translation is that which, without creating or destroying, most perfectly reproduces, the original in a foreign language. The translator may be regarded as the author of the new language or form of expression into which the original is rendered. In this sense, an authorized translation, or a translation of an original which is common property, is treated by the law as a new and distinct production, entitled to copyright.[2] But otherwise the translator creates nothing. He takes the entire creation of another, and simply clothes it in a new dress. Whether

[1] See *ante*, p. 97.

[2] Wyatt *v.* Barnard, 3 Ves. & B. 77; Rooney *v.* Kelly, 14 Ir. Law Rep. N. s. 158; Emerson *v.* Davies, 3 Story, 780; Shook *v.* Rankin, 6 Biss. 477; Shook *v.* Rankin, 3 Cent. Law Jour. 210.

it be reproduced in German, French, or Chinese language, in the characters of stenography, in the raised letters of the blind, or in whatever hieroglyphics, the original creation preserves its identity. The means of communication alone is changed. Was Mrs. Stowe's remarkable creation in any wise different when expressed in German language? This was simply a means of communication to the German reader; but the production was in no other essential respect different. The plot, the characters, the dialogue, the lessons, were the same to the German as to the American mind. Both saw the same Uncle Tom, the same Eva, the same Topsy. The scenes of slave-life were identical to both. To both, the moral of the fiction appealed with equal force. Are the productions of Homer, Dante, Goethe, Cervantes, Molière, Shakespeare, any less the creations of those great minds in translation than in the original? Such works are the fruits of rare genius; they may be translated by a linguist. The name of the author is for ever identified with his production; that of the translator is often unknown to fame.

The translator, then, simply transfers a literary production from one language to another. The translation is not in substance a new work. It is a reproduction in a new form of an existing one. The functions of a translator are here not disparaged, but defined. To translate from one language to another often requires learning, judgment, and industry. Some of the most valuable contributions to literature are translations. On the roll of translators are many immortal names. By this means, the wealth of ancient learning and of foreign tongues has been opened to millions of readers who would otherwise have been without this source of instruction and enjoyment. Rightly, therefore, does the law encourage this kind of intellectual labor, by protecting translations when no rights of property are thereby invaded. But a translation, whatever be its merit or the fame of the translator, cannot be produced independently of the work translated, any more than an engraving or photograph of a painting can be made independently of the original. The body and substance of the translation are the body and substance of another work.

It is a settled principle, that to take a material part of a work without the consent of the owner, except for a "fair use," is a violation of the right secured by the statute. It has been shown that a translation cannot be made without appropriating the entire substance of a literary composition. This brings us to the test by which the question of piracy in the case of a translation is determined. Has the translator any authority to take the production which he renders into another language? Can he show a good title to the original? On this simple point turns the whole question of infringement. If the original is not protected by copyright, the law makes it common property, and gives to every one the right to translate it. But the translator of a copyrighted work must show a title derived from the author of the original. If the translation has been made with authority, it will be free from the wrong of piracy. But an unauthorized translation of a work entitled to protection is an invasion of the copyright in the original, as clearly as is the unlicensed publication of a literal copy of the original.

A translation bears to the work translated a relation strikingly analogous to that which exists between a musical composition originally composed for voices or the orchestra, and an arrangement of it for the piano. In each case, the translator or arranger, by his own labor and skill, reproduces in a new and useful form a work of which he is not the author. The difference between the translation and its original is not greater than that between the arrangement and its original. The law governing arrangements of music has been clearly and soundly expounded. Any number of persons may arrange, for the piano-forte or any other instrument, an unprotected musical composition, and each will be entitled to copyright in his own arrangement; but no person, without the consent of the owner, can make such use of a copyrighted work without committing piracy.[1] Translations are governed by the same principle. If an unauthorized arrangement of a copyrighted musical composition is piratical, an unlicensed translation of a copyrighted literary composition must be. If the latter is not piratical, the former cannot be. The law has been construed rightly by

[1] See *ante*, pp. 410–411.

the courts in the case of arrangements, and wrongly in the case of translations.

Stowe v. Thomas Criticised. — The doctrine that an unlicensed translation of a protected work is no invasion of the copyright in the original, as was held in Stowe *v.* Thomas, is contrary to justice, recognized principles, and the copyright statutes of the United States as judicially construed. It proceeds on the ground that literary property is solely in the combination or arrangement of words; that language alone is protected by the statute; and that the word copy, as used in the act, means a literal transcript of the words, and not a reproduction of the substance or the contents of a work. All of these assumptions are wrong. "A copy of a book," said the court, in Stowe *v.* Thomas, "must, therefore, be a transcript of the *language* in which the conceptions of the author are clothed; of something printed and embodied in a tangible shape. The same conceptions clothed in another language cannot constitute the same composition; nor can it be called a transcript or copy of the same book."[1] This interpretation of the word copy, as used in the law of copyright, is opposed by the entire current of decisions in which the meaning of the word has been considered with reference to piracy. It is settled that a publication need not be a literal copy or "transcript of the language" of another, in order to be piratical. A substantial reproduction of the whole or of a material part of a work is a copy within the meaning of the law. In some cases, the difference between the language of the two works in controversy has been so great as to make it exceedingly doubtful whether one had been taken from the other; but, when this fact has been ascertained, the legal question of piracy has been determined accordingly. An arrangement for the piano of an opera is by no means a transcript or literal copy of the original score. But, as has been said, the unauthorized arrangement of a copyrighted musical composition has been judicially declared to be a piratical copy of the original. So there may be a wide difference in form between a dramatization and the novel dramatized. But the courts have not hesitated to declare that the unlicensed publi-

[1] 2 Am. Law Reg. 229; 2 Wall. Jr. 565.

cation of the dramatization is an infringement of the copyright in the novel.[1]

If it were lawful for any one without authority to translate a copyrighted work, a translation would be, in the language of Lord Ellenborough, "a recipe for completely breaking down literary property."[2] For not only does a published translation tend to supersede the original, and thereby lessen its sale; not only does it serve as a substitute for the translation which the rightful author has made, as in Mrs. Stowe's case, or is entitled to make,—but if the unauthorized translation does not infringe the copyright in the original, nor in the author's translation, as was held in Stowe *v.* Thomas, a retranslation of either the authorized or the unauthorized translation into the original language would be no infringement of any copyright in the work. So that in Mrs. Stowe's case any person might have retranslated into English either of the German translations of Uncle Tom's Cabin, without infringing the copyright in such translations or in the original work. In this way, any number of editions and copies of that great work of fiction might have been issued against the protest of the author entitled to protection, and one of the most valuable of American copyrights made worthless. If this is law, there is no protection for literary property; for any copyrighted work may be republished without authority through the medium of a translation. Such a theory is wrong in principle, and was rightly condemned in Murray *v.* Bogue.[3] It is contrary to the statute, which has been wisely construed to extend protection, not merely to the words, but the substance, of a literary production.[4]

[1] Tinsley *v.* Lacy, 1 Hem. & M. 747. See also Reade *v.* Lacy, 1 Johns. & H. 524.

[2] Roworth *v.* Wilkes, 1 Camp. 98.

[3] 1 Drew. 367.

[4] Of the reported copyright decisions of England and America, there is none which is more clearly wrong, unjust, and absurd than that in Stowe *v.* Thomas. The law has been expounded repeatedly and emphatically to the effect, that the object of copyright legislation is to protect the substantial fruits of genius, learning, and honest labor, and that he is guilty of piracy who without authority takes to a material extent the substance of a work entitled to protection. In this case, the question of piracy turned wholly on two simple issues: 1, whether there had been a material appropriation of the results of Mrs. Stowe's labors; 2, whether such appropriation had been with her consent. On the second point, there was no dispute. On the first, the counsel for the defendant boastingly asserted: "We have confessedly taken not a part, but

Dramatizations.

It has already been shown that the statute of the United States provides that authors may reserve the right to dramatize their works; but that this provision does not affect the question whether, in the absence of such reservation, a work protected by the statute may be dramatized by any person without the consent of the author.[1] The 5 & 6 Vict. c. 45, is silent on this point.

Publication of Unlicensed Dramatization not Lawful. — Whether the author has or has not expressly reserved the right to dramatize it, the publication in print of an unauthorized dramatization of a copyrighted work is a clear case of piracy.[2] For then a material part of a work entitled to protection is taken without license, and printed in violation of the statute and against principles judicially established. That extensive changes are made by the skill of the dramatist, that the original work may thus be brought into a changed and improved form, is immaterial. The test is, whether a material part, *verbatim* or in substance, of a work entitled to protection, is published without the consent of the owner of the copyright.

Unauthorized Dramatization for Performance. — Law as Expounded in England. — The question now arises, whether it is

that we have taken every syllable, comma, and i dot of the original. The question cannot be how much we have taken, for we have taken all; nor how much we have added, for we have added nothing; but only *how* we have taken, and what we have done with it?" 2 Wall. Jr. 560. The court seems to have taken the same view of the law, and solemnly declared that the publication of an unlicensed literal translation of one of the most remarkable works of the imagination produced in this century is no invasion of the author's property, because it is not a "copy." If this is the proper construction of the statute, the copyright law of the United States is worse than useless, worse than a mockery. It is a fraud, by declaring that authors shall

the whole. We concede and we boast have protection, when there is no protection. But, fortunately, such is not the intention of the legislature, nor the effect of the statute. As wisely construed by the courts, the meaning of the word copy in the section of the act relating to infringement cannot be restricted to a literal transcript of language, but applies equally to a reproduction of the substance of a work.

If the above language is strong, there is justification for it. For a wrong decision followed as a precedent, without examination into its soundness, may remain firmly established in our jurisprudence for a century.

[1] See *ante*, pp. 445–446.

[2] Tinsley *v.* Lacy, 1 Hem. & M. 747. See also Reade *v.* Lacy, 1 Johns. & H. 524.

piratical to dramatize, for public representation, without authority, a copyrighted work in which the author has not expressly reserved to himself the right of dramatization. This subject has been judicially considered in England, but not in the United States.

The essential facts in Reade *v.* Conquest were these: Charles Reade had written the drama Gold, and registered it as a dramatic piece, thereby securing the exclusive right of representing it on the stage. He had also registered it as a book, and published it in print. Afterward, he put the drama into the form of a novel, which contained substantially the same plot, incidents, characters, and dialogue as were in the play. The novel was copyrighted as a book, and published with the title, It is Never too Late to Mend. While both novel and drama were thus under the protection of the statute, the defendant publicly represented a play named It is Never too Late to Mend, which was a dramatization of Reade's novel. The person who dramatized the novel had not at the time of doing so seen the drama Gold, and was unaware of its existence; but there was naturally and necessarily a substantial identity between the plays Never too Late to Mend, and Gold. The court held that the unlicensed performance of the dramatization was not a violation of any right in the novel;[1] but that, in dramatizing the novel, the defendant had indirectly copied Gold, and thereby infringed the playright in that drama.[2]

Substantially the same questions were raised in Toole *v.* Young.[3] It appeared that John Hollingshead had published in 1863, in the magazine called Good Words, a story entitled Not Above his Business, which he had written in dramatic form, that it might, with slight alterations, be performed on the stage. Soon after, the author adapted the piece for representation, and called the play Shop, which was substantially the same as the published story. In 1865, the play was bought from the author by the comedian Toole; and, when the action was brought, it had not been published or acted. In 1870, Grattan dramatized the story, which had appeared in Good Words, and afterward sold the play to the defendant, by whom

[1] 9 C. B. N. S. 755.
[2] 11 Id. 479.
[3] Law Rep. 9 Q. B. 523.

it was repeatedly performed on the stage, under the name of Glory. It was admitted that the plays were substantially the same, and that the defendant's had been obtained from the story, and not from the plaintiff's Shop. The judgment of the court was that no rights, either in the work dramatized or in the plaintiff's play, had been invaded by the defendant's dramatization; that, by first publishing his composition as a book, an author forfeits the exclusive right to dramatize and to represent it on the stage; and, though he should afterward dramatize his own published composition, he cannot thereby bar others from exercising the same privilege.[1]

If the law was correctly interpreted in these cases, the unauthorized dramatization of a work for public performance is not an infringement of the author's rights in that work, nor in a dramatization of it made by the author after the publication of the original. But, when the author's dramatization has preceded the publication of the novel, the latter cannot be dramatized, except by authority, without violating the author's rights in his play.[2] If this is a sound exposition of the English law, it must be adopted also in the United States. The statutes of the two countries are substantially the same on this point, and hence should be construed alike.

The Law as Construed in England Criticised. — The law as it has been judicially declared has now been given. It remains to consider whether it has been soundly interpreted. The American courts are yet untrammelled by precedents on this point; they are not bound to follow the English decisions, unless those decisions are grounded on sound principles.

The two doctrines affirmed in Reade *v.* Conquest, and recognized in Toole *v.* Young, that an unauthorized dramatization

[1] See also Tinsley *v.* Lacy, 1 Hem. & M. 747.

[2] In Reade *v.* Conquest, 9 C. B. N. S. 759, Erle, C. J., said: "Perhaps the only way in which the author of a novel can protect himself from this sort of infringement is by dramatizing it himself." In Tinsley *v.* Lacy, 1 Hem. & M. 751, Vice-Chancellor Wood remarked *obiter*, that "the only way in which an author can prevent other persons from reciting, or representing as a dramatic performance, the whole or any portion of a work of his composition, is himself to publish his work in the form of a drama, and bring himself within the scope of dramatic copyright." But, according to the authority of Toole *v.* Young, an author cannot protect his novel from unlicensed dramatization by dramatizing it after its publication.

of a novel for public performance is not a violation of any right in the novel, but that it is an infringement of the playright in a dramatization made by the author before the publication of the novel, are wholly inconsistent with each other; and, if the former is sound, the latter is antagonistic to a fundamental principle of the law of copyright.

Copyright protects only the thing copyrighted against unlicensed copying. Any number of persons may publish precisely the same thing, provided no one copies the protected work of another. Whatever may be the likeness between two works, each author is entitled to protection for his own production, and is barred only from copying that of the other. The owner of a protected drama cannot prevent another from printing or performing a play essentially or identically the same, provided the latter has not been copied from the former. Two or more persons may translate, adapt, or dramatize any work which is common property; and, notwithstanding the likeness between any two versions, neither will infringe the other, provided each is the result of independent labor. Hence the playright in a drama bars every person without authority from copying that play; but it prevents no one from producing a play substantially the same from any common materials.[1] Now, it is clear that, if the law does not protect a novel from unauthorized dramatization, the novel to this extent becomes common property. As far as dramatization for public performance is concerned, it is in precisely the same position as a novel which is not protected by copyright. This principle is in no wise affected by the question whether the author has or has not dramatized the novel, or whether his own dramatization has preceded or followed the publication of the novel. If an unauthorized dramatization does not violate any right of property in the work itself, it cannot infringe the author's rights in a drama which is formed from, or one which is the basis of, the published work. For the charge of pirating the authorized dramatization is fully met when it appears that the play complained of was obtained from a source open to all; and the novel is common property for this purpose, if the law does not protect it from unlicensed dramatization. In this

[1] See *ante*, pp. 205–208, 300–400.

case, the author can have no better title to dramatize it than has any other person; and he has no more right to monopolize his own work for this purpose than the work of another author. In other words, the author stands in this respect in the same relation to his own as to any other published novel, and his relation to his own is the same as that of all other persons to it.

The distinction drawn by the judges in Toole *v.* Young between the facts in that case and those in Reade *v.* Conquest, to the effect that in the latter case Reade's play had been written and copyrighted before the novel was published, while in Toole *v.* Young the publication of the plaintiff's story had preceded its conversion into a play, has no foundation in reason or principle. Its plausibility only tends to mislead. The doctrine affirmed in Reade *v.* Conquest was based on the ground that dramatizing the novel, though no violation of the property in that work, was an indirect copying of Reade's drama, and therefore an invasion of his rights therein. If this view of the law is sound, then the defendant in Toole *v.* Young was not less guilty of piracy, since in appropriating the plaintiff's story he had indirectly copied his drama: and it was not less a case of indirect and piratical copying because the plaintiff had published his story before adapting it for representation. The fallacy of this theory becomes apparent when it is considered, that in every case when two similar works are produced from common materials, as two adaptations of a common novel, the later one might thus be considered to be an indirect copy of the earlier one. Such a doctrine is antagonistic to a fundamental principle of the law of copyright. The dramatization complained of in Reade *v.* Conquest was produced by independent labor, from what the court had declared to be a common source. It could not, therefore, be piratical on the ground that it was an indirect copy.[1]

[1] See *ante*, p. 399. The court acted on the same erroneous theory in Reade *v.* Lacy, 1 Johns. & H. 524, where the plaintiff complained of the publication of a dramatization of his novel Never too Late to Mend. Vice-Chancellor Wood refused to grant an injunction on the ground of piracy of the novel, until the plaintiff's right should be established at law; but restrained the publication of the dramatization, as being an invasion of the copyright in the plaintiff's drama, Gold. The defendant's dramatization was clearly an infringement of the copyright in the plaintiff's novel; and this doctrine was

In Reade *v.* Conquest, the court laid great stress on the fact that the person who dramatized the novel was not the author of the resulting play, and therefore had no right to represent it while playright existed in the drama of which Reade was the author.[1] This argument would apply with equal force if Reade had published only the novel, and not the play; for in that case the dramatist could not be considered the author of the play, which he had simply adapted from the novel. Moreover, the same theory would have reversed the judgment in Toole *v.* Young. Here the person who had prepared the play complained of had no better title to authorship than had the defendant in Reade *v.* Conquest. A dramatist is manifestly not the author of what he takes from the work of another. He is the author of the changes which he makes. But the controlling question of piracy in this, as in all cases, is not whether one person has by his own labor and skill made changes and improvements in the work of another, not whether he has reproduced it in a new and useful form, but whether he had the right so to use the original.

On the question whether an unauthorized dramatization of a novel is an infringement of the playright in a dramatization made by the author, the authority of Toole *v.* Young is in direct conflict with that of Reade *v.* Conquest. The controlling facts were alike in both cases. Both were governed by the same principles. The two judgments could not be different without one being wrong.

When an Unlicensed Dramatization for Performance is Piratical.

It remains to consider the true principles which govern the question whether any right secured by the statute in a published work is violated by an unauthorized dramatization of that work for public performance. The determination of this

afterward declared in Tinsley *v.* Lacy, 1 Hem. & M. 747. When the court in Reade *v.* Lacy refused an injunction on this ground, it could not consistently or properly grant one on the ground that the copyright in the drama had been violated. For, if the dramatization of the novel was not a violation of the copyright in the novel, it could not infringe the copyright in the drama.

[1] 11 C. B. N. S. 492.

question depends entirely on the fact whether the work dramatized is a dramatic composition within the meaning of the law. All productions protected by the statute may be divided into those which are and those which are not dramatic compositions. In the latter, copyright alone vests. It gives to the owner the exclusive right to print and to sell copies; but it does not prevent any person from making any public oral use of the work. But, in a dramatic composition, two distinct rights are secured; viz., copyright and playright. The statute expressly confers the exclusive right of publishing, and the sole liberty of representing it in public; and expressly prohibits any person without license from either printing or performing it. In the case of a published work, these two rights vest simultaneously, and on the same conditions; and whether one or both attach to any production depends solely on the fact whether the production is, within the meaning of the law, a dramatic composition. When any copyrighted work is found to be a dramatic composition, it is protected not only by copyright, but also by playright. The copyright, as in the case of any composition, is not infringed by any public oral use of the work; but substantially the same production, or a material part of it, cannot be copied and represented on the stage, except by authority, without violating the playright. In this case, piracy is determined by the same principles that govern when a material part of a copyrighted book is printed without authority.

If, then, any work of fiction can be considered a dramatic composition within the meaning of the law, it is clear that the public performance of an unlicensed dramatization of it will amount to piracy; if it is not a dramatic composition, any person is at liberty to dramatize it for public performance.

The only difficulty surrounding the question under consideration proceeds from the doubt as to what judicial construction will or should be given to the words dramatic piece in the English and dramatic composition in the American statute. I have endeavored elsewhere to show that dramatic compositions must be taken in law to embrace a wider range of productions than what are nominally dramas, or what are written expressly for stage representation; that a work of fiction, if it has the essential qualities of a drama, is entitled to protection

as a dramatic composition, although not expressly designed for the stage, and although changes in its form may be necessary to adapt it for that purpose.[1] That this view is in accordance with right and justice will scarcely admit of two opinions. An author is entitled to all the fruits of his genius or his industry, to his share of all the profits arising from any public use whatever of his production. Protection adequate to secure these results should be expressly provided by the legislature, and not left to the conflicting opinions of the courts. But we have to consider the law as it has been made, and not as it should have been made.

While the statute must be interpreted, not arbitrarily, but in accordance with recognized principles of construction, it should be construed in case of doubt as to its meaning with that liberality which tends to realize the primary object of the legislature. In granting the right of publicly performing dramatic compositions, the intention of the legislature may fairly and properly be taken to have been to secure, in the full enjoyment of the fruits of his literary labor, every author whose production is useful and valuable for dramatic purposes. Assuming this to be the true object of the statute, that object will in many cases clearly be defeated if works of fiction are exposed to unlicensed dramatization. Of course, every work of fiction is not a dramatic composition. Some are wholly descriptive, and incapable of dramatic representation. But a novel which can be dramatized and adapted for acting must be dramatic in character, and have all the essential qualities of a drama. Such works are often of the highest value for dramatic purposes; and by changes, in many cases slight, they may be transformed into acting plays. No argument would seem to be necessary to show that the law intended to secure the advantages arising from this use of any production to him who is entitled to them, and to whose genius the creation of the work is due. Without underrating the skill of the dramatist, it is manifest that the life and essence of a dramatized work are due to the author of the original, and not to him who adapts it for the stage. The interesting plot, the dramatic situations, the well-drawn characters, the brilliant dialogue, are

[1] See Chap. XIV.

simply transferred, often with little variation, from the original production to the play. The dramatist invents nothing, creates nothing. He simply arranges the parts, or changes the form, of that which already exists. A work of fiction is often the fruit of genius. A stage-manager can dramatize it. Uncle Tom's Cabin was the most successful American novel of this century. Its success as a drama was scarcely less remarkable. In both forms it was substantially the same, and was the creation of one mind. It is clear, then, that in a large sense the dramatist has no claim to the authorship of what he has simply adapted for representation; and that, in making this use of a work of which he is not the author, he avails himself of the fruits of genius and industry which are not his own, and takes to himself profits which belong to another.

It is true that, in adapting a literary composition for the stage, the dramatist contributes his own labor and skill, which are often of much value, and for the results of which he may justly claim protection when he has not thereby invaded the lawful rights of another. Any one is free to dramatize a work not protected by copyright, or a copyrighted publication with the consent of the owner. In such case, the dramatist takes property which he has a right to use, and becomes entitled to protection for the changes and improvements which he makes. He may thus acquire the exclusive right of publishing his own version in print, and the sole liberty of performing it in public. But it is conceded that he cannot publish an unlicensed dramatization of a copyrighted work without infringing the copyright in the original.[1] On the same principle, he cannot publicly represent the dramatization without violating the author's right to this use of his production.

No changes made in what is conceded to be a dramatic composition will give to any person the right to perform it without the author's consent.[2] It may be so faulty in construction that radical and extensive changes are necessary to prepare it for the stage. A drama in name and structure, it must be dramatized, so to speak, before it can be successfully performed. It is clear that, however extensive may be the required altera-

[1] See *ante*, p. 456.

[2] Levy *v.* Rutley, Law Rep. 6 C. P. 523; Shelley *v.* Ross, Ibid. 521, note; Daly *v.* Palmer, 6 Blatchf. 256.

tions, no one can lawfully take this liberty with a copyrighted drama without the author's consent. The principle is not different in the case of a work of fiction which may not be in name, but is in substance, a dramatic composition. In other words, the changes necessary to prepare an undisputed drama for performance are sometimes not less extensive or less radical than are required to adapt a novel for the stage. To make this unlicensed use of a copyrighted drama is piracy. Is it less so when the original is a work of fiction? So, a drama, besides the main plot and characters, may contain a subordinate, or "side," series of incidents, which are entirely independent of the principal action, and may in themselves constitute a complete farce or play. In other words, the work may contain a drama within a drama. To separate one from the other, and represent it on the stage as an independent play without license, would be a clear case of piracy. In what respect is it different in principle to evolve a play from a novel? If the latter contains a drama, or the essence of a drama, it is a dramatic composition; and the author is entitled to the sole liberty of taking out such drama and representing it on the stage.

The judgment both in Reade *v.* Conquest and in Toole *v.* Young turned solely on the point whether the story in question was a dramatic piece within the meaning of the law. This principle was the key to the decision in each case; and in each it was entirely overlooked or disregarded by the court. If the novel was a dramatic composition, there vested in it both copyright and playright. The former right was violated by the printing, and the latter by the representation, of an unlicensed dramatization. It was immaterial whether or not substantially the same production had been published also as a drama by the author, or whether or not the original had been dramatized by him. Was, then, Reade's novel, Never too Late to Mend, or Hollingshead's story, Not Above his Business, a dramatic piece? When it is considered that the former was simply a drama reproduced as a novel, and that the latter had been written in dramatic form with a view to its representation on the stage, there would seem to be little doubt that both were dramatic pieces within the meaning of the law, which had been

construed to embrace even a simple song, and, in the language of Chief Justice Denman, "any piece which could be called dramatic in its widest sense; any piece which, on being presented by any performer to an audience, would produce the emotions which are the purpose of a regular drama, and which constitute the entertainment of the audience." [1]

If the performance of an unauthorized dramatization is an infringement of the right secured in a novel, it is a violation of the playright in an authorized dramatization of the novel. This fact has little practical importance, when the same person, as in Reade's case, is the owner of both the novel and the dramatization; but it removes an apparent difficulty in a case like that of Toole *v.* Young, when the owner of the dramatization and the owner of the work dramatized are different persons. In such case, it might be contended that the owner of the play is not the proper person to maintain an action for the unlawful dramatization of the novel. This may be an apparent, but is not a real, objection. To dramatize a novel for public performance is no infringement of the copyright in the novel. Such a dramatization can be unlawful only on the ground that it is a violation of the owner's exclusive right to the public representation of the work. I have maintained that the author has this right before he has dramatized his novel, and that he has it afterward. But the right, whether lodged in the novel or in the dramatization, is one and the same; and it is equally violated whether the novel or the dramatization is made the means of its invasion. When the author has himself dramatized the novel, and made an absolute assignment of the play, he has parted with, and the buyer has acquired, the exclusive right of representing that work; and this, as said above, embraces the entire right of representation, whether lodged in the novel or in the dramatization. Having thus divested himself of this right, the author is barred from making, or authorizing another to make, a second dramatization of his novel. And any unauthorized adaptation of the novel for public performance is a violation of the right to represent what is contained in the novel. This right is vested in the buyer of

[1] Russell *v.* Smith, 12 Q. B. 236. See also Clark *v.* Bishop, 25 L. T. N. S. 908.

the authorized dramatization ; and hence he is the proper person to maintain an action for its violation, whether the novel or the dramatization is made the means of such violation. The same is true when the author has made an absolute assignment of the right to dramatize his work and the dramatizing is done by the buyer. But of course the case is different when the author has not absolutely parted with the right of representation, but has merely licensed another to use the dramatization. In such case, the ownership of the right of representation continues in the author.

CHAPTER X.

REMEDIES IN LAW FOR THE INFRINGEMENT OF COPYRIGHT.

GREAT BRITAIN. — BOOKS.

THE 8 Anne, c. 19, provided that the printer, publisher, importer, or seller of a pirated book should forfeit every copy or sheet to the owner of the copyright, by whom it was to be destroyed, and should further be liable to a penalty of one penny for every copy or sheet found in his possession, — one half to go to the queen, and the other half to any person who should sue for it.[1] But there was a proviso which allowed any person to import or sell "any books in Greek, Latin, or any other foreign language, printed beyond the seas."[2] This provision, as far as it permitted the importation of books first printed in Great Britain and reprinted abroad, was annulled in 1739, by the 12 Geo. II. c. 36, which, in the case of the importing of such works, provided for a forfeiture of the copies which were to be destroyed, and imposed a heavy penalty, to be sued for by any person, and to be divided between the king and the person suing. This act, which was to remain in force for a limited time, was continued by several succeeding statutes.[3] Until 1801, there was no statute giving to the owner of the copyright an action for damages sustained by the piracy of his book. But such action would lie on the principle that, when a statute secures a right and makes no specific provision for its protection, the common-law remedy is available. In 1801, however, the 41 Geo. III. c. 107, gave to the owner of the copyright a special action on the case for damages, increased the penalties to threepence for each pirated copy, and provided for the for-

[1] s. 1. [2] s. 7.
[3] 20 Geo. II. c. 47; 27 Geo. II. c. 18; 33 Geo. II. c. 16.

feiture of copies.[1] It also re-enacted penalties and forfeitures in the case of the importation of books first published in Great Britain and reprinted abroad.[2]

Remedies Provided by Existing Statute. — From 1801 to 1842, the law continued substantially the same with respect to the penalties and forfeitures imposed on the offender, and the remedies given to the owner of the copyright. But by the 5 & 6 Vict. c. 45, passed in the latter year, an important change was made. From the reign of Anne till that of Victoria, the forfeitures and penalties were intended as a punishment of the offender, rather than a direct benefit to the owner of the copyright; since any person might sue for the penalties, and the forfeited copies were required to be destroyed. By the statute of Victoria, the penalties, except in the case of the importation of books originally published in England and reprinted abroad, are abolished. The action for damages is continued;[3] and piratical copies of a book are declared to be the property of the author, who is empowered to recover them, or damages for their detention.[4] The provisions of this statute apply to all literary productions, musical compositions, maps, charts, and plans.[5]

Action for Damages against Unlawful Printing, Importing, or Selling. — By section 15, it is enacted, "that if any person shall, in any part of the British dominions, 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 import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession, for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright."

This section prohibits the unauthorized printing of a copy-

[1] s. 1.
[2] s. 7.
[3] s. 15.
[4] s. 23.
[5] See definition of book in s. 2. As to maps, charts, and plans being within this statute, see *ante*, p. 174.

righted book, "in any part of the British dominions," and the importation or sale of "any such book so having been unlawfully printed." The words, "so having been unlawfully printed," in the connection in which they are here used, naturally and correctly refer to copies printed in the British dominions without the written consent of the author; since the printing in a foreign country of an English copyrighted book is not unlawful.[1] Hence, a strict construction of the section would limit its application to books unlawfully printed in the British dominions, and the prohibition would not extend to the importing or selling of piratical copies printed in a foreign country. But, by books "unlawfully printed," Parliament doubtless meant those printed "without the consent in writing of the proprietor" of the copyright; which, of course, would apply to books printed in a foreign country, as well as those printed in Great Britain.[2] Every preceding act properly prohibited printing or importing without the written consent of the author, and the sale of copies which had been so printed or imported.[3] Thus, provision was expressly and clearly made against the importation and sale of piratical copies printed abroad. There is little doubt that Parliament intended to continue this provision in the statute of Victoria, and that what is above pointed out is a defect which resulted from a careless change in the language copied from the preceding acts. The statute will probably be judicially construed according to this intent, rather than its literal reading.

The statutory remedy is given, not only against the person who actually sells piratical copies, but against any person who exposes such copies to sale or hire, or has them in his possession for sale or hire.

Knowledge of Piracy. — Neither the printer nor the importer

[1] "How can it be unlawful," asked Chief Justice Wilde, "to print a work *abroad?*" Boozey *v.* Tolkien, 5 C. B. 480.

[2] In Novello *v.* Sudlow, 12 C. B. 189, Talfourd, J., said: "The language, however, of the clause [s. 15, 5 & 6 Vict. c. 45] is not new; it is adopted from the corresponding section of 54 Geo. III. c. 156, s. 4, which it follows, except that, instead of repeating the words, 'without the consent in writing,' to each condition of infringement, it uses the words, 'so unlawfully printed,' &c., which perhaps were incorrectly adopted to avoid repetition."

[3] 8 Anne c. 19, s. 1; 41 Geo. III. c. 107, s. 1; 54 Geo. III. c. 156, s. 4.

can successfully plead that he did not intentionally or knowingly violate the copyright of another; but the publisher or the seller is not liable, unless he knows that the book was unlawfully printed or imported.[1] If the publisher is also the printer or the importer, as is not unfrequently the case, ignorance of wrong will be no excuse for his unlawful printing or importing.

Forfeiture of Copies. — A further remedy against piracy is given by section 23, which provides that all copies of a book which shall have been printed or imported without the written consent of the owner of the copyright shall be deemed to be the property of such owner, who, after demand in writing, shall "be entitled to sue for and recover the same, or damages for the detention thereof, in any 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." The owner of the copyright is here entitled to claim as his property piratical copies from any person who either has them in his possession, or who has unlawfully converted them to his own use. He may sue for the recovery of the copies found in the possession of the wrong-doer, and for the value of those which have been unlawfully disposed of. In Delf *v.* Delamotte, the Court of Chancery ordered the defendant to deliver to the plaintiff all unsold copies, and to pay the net profits on those which had been sold. The plaintiff claimed the full value of the latter; but the court said that, if he wanted more than the net profits, he must seek his remedy in a court of law.[2]

[1] Colburn *v.* Simms, 2 Hare, 543, 557; Leader *v.* Strange, 2 Car. & Kir. 1010. See *ante*, pp. 401–404.

[2] 3 Jur. N. S. 933; s. c. 3 Kay & J. 581. "This point," said Wood, V. C., "is new, and, I think, is now taken for the first time. On all the occasions hitherto in which a dispute of this sort has arisen, the proprietor of the copyright has never in any one reported case obtained more than the profits which the defendant has made by the sale of the piratical copies of the book. It may be that it has been intended to introduce as great an alteration in respect of the proceeds of the copies which have been sold as in the right of property in the copies which have not been sold, and which by the present law are declared to be the property of the true proprietor of the copyright, and are handed over to him accordingly; whereas under the former law they were always destroyed, so that the injured author could never utilize them. On the whole, however, I do not see why a court of equity should give the plaintiff more than it has always given him leaving him to get what further damages he may at law, by an action of trover for the conversion." 3 Jur. N. S. 933.

See also Colburn *v.* Simms, 2 Hare, 543, which was decided under the statutes in force before 5 & 6 Vict. c. 45.

Penalties against Unlawful Importing. — Section 17 prohibits the unauthorized importation, into any part of the British dominions, of any copyrighted book first published in the United Kingdom and reprinted in a foreign country; and declares that every such book which shall be so imported for sale or hire, or shall be sold, published, or exposed to sale, or let to hire, by any person knowing it to have been so imported, "shall be forfeited, and shall be seized by any officer of customs or excise, and the same shall be destroyed by such officer." It further provides that the offender, being duly convicted, shall forfeit ten pounds for every offence, and double the value of every copy which he has unlawfully imported, published, sold, or exposed to sale; "five pounds to the use of such officer of customs or excise, and the remainder of the penalty to the use of the proprietor of the copyright."

Under a similar provision in 12 Geo. II. c. 36, it was held that two penalties might be incurred on the same day, for two distinct sales.[1]

[1] Brooke *v.* Milliken, 3 T. R. 509. I shall not attempt to explain the provisions of a statute which in one part (s. 23) provides that copies of a book piratically imported shall become the property of the owner of the copyright, and in another (s. 17) declares that such copies shall be seized and destroyed by any officer of customs or excise; which in one part (s. 23) enacts that the wrong-doer shall be liable to the owner of the copyright for the value of every unlawfully imported copy which he has sold, and in another (s. 17) says that he shall forfeit double the value of every such copy sold. The highly penal provisions of s. 17 not only cause confusion and uncertainty as to the meaning of the law, but they are unnecessary and out of place in a statute which otherwise amply provides for the protection of literary property against the importation of pirated copies.

I cannot regard the copying of this provision in the 5 & 6 Vict. c. 45, otherwise than as an instance of the looseness with which statutes are too often drawn. The provision was originally enacted in 1739, and was designed not for the prevention or redress of piracy, but simply to increase the revenues and protect the industrial interests of the kingdom. This is manifest from the preamble of the statute, 12 Geo. II. c. 36, which recites that "the duties payable upon paper imported into this kingdom, to be made use of in printing, greatly exceed the duties payable upon the importation of printed books, whereby foreigners and others are encouraged to bring in great numbers of books originally printed and published in this kingdom and reprinted abroad, to the diminution of his Majesty's revenue, and the discouragement of the trade and manufacture of this kingdom." "The prevention thereof for the future," was the avowed object of the act. It was to continue in force only for seven years, and was renewed for short periods by several other acts, which had no reference to literary property. 20 Geo. II. c. 47; 27 Geo. II. c. 18; 33 Geo. II. c. 16. The provision was inserted, for what reason is not apparent, in the copyright act 41 Geo. III. c. 107, s. 7, passed in 1801;

Common-Law Remedies Available under Statute. — It is a recognized principle of statutory construction that where a right, previously existing by the common law, is secured by a statute which provides no remedy for its protection, the common-law remedies are available; and where the statute prescribes penalties and forfeitures, but does not provide a remedy for damages, the common-law action for damages will lie.[1] This rule has been applied in the interpretation of the copyright statutes. The statute of Anne imposed penalties and forfeitures for the violation of copyright, but did not give an action for damages. Such action, it was held, was afforded by the

from which, doubtless because it was found in that act, it was copied in the existing statute of Victoria. While books piratically imported were by this provision made subject to forfeiture and to be destroyed by the customs officer, they were also by the copyright statutes in force before the 5 & 6 Vict. c. 45, — viz., 8 Anne, c. 19, s. 1; 41 Geo. III. c. 107, s. 1; and 56 Geo. III. c. 156, s. 4, — required to be forfeited to the owner of the copyright, to be by him destroyed. In either case, therefore, they were subject to destruction. But 5 & 6 Vict. c. 45, as has been seen, enacts in one section that they shall become the property of the owner of the copyright, and in another that they shall be destroyed by any officer of customs or excise.

The matter has been still further complicated by the Customs Laws. The latest Consolidation Act, 39 & 40 Vict. c. 36, passed in 1876, prohibits the importing of certain enumerated articles, and declares that they "shall be forfeited, and may be destroyed or otherwise disposed of as the commissioners of customs may direct." s. 42. Among the things thus enumerated are "Books wherein the copyright shall be first subsisting, first composed, or written or printed, in the United Kingdom, and printed or reprinted in any other country, as to which the proprietor of such copyright or his agent shall have given to the commissioners of customs a notice in writing, duly declared, that such copyright subsists, such notice also stating when such copyright will expire."

Section 44 enacts that "The commissioners of customs shall cause to be made, and to be publicly exposed at the custom-houses in the several ports in the United Kingdom, lists of all books wherein the copyright shall be subsisting, and as to which the proprietor of such copyright, or his agent, shall have given notice in writing to the said commissioners that such copyright exists, stating in such notice when such copyright expires, accompanied by a declaration made and subscribed before a collector of customs or a justice of the peace, that the contents of such notice are true."

Section 45 provides that persons complaining of the prohibition of books in the copyright lists may appeal to a judge in chambers.

Section 152 prohibits the importation into the British possessions abroad of foreign reprints of English copyright books; but provides that "nothing herein contained shall be taken to prevent her Majesty from exercising the powers vested in her by the 10 & 11 Vict. c. 95, intituled 'An Act to amend the law relating to the protection in the colonies of works entitled to copyright in the United Kingdom,' to suspend in certain cases such prohibition."

[1] See Sedgwick, Construction of Stat. & Const. Law (2d ed., by Pomeroy), 75, 341, 342; Potter's Dwarris on Statutes, 185, 219; Maxwell, Interpretation of Statutes, 368.

common law.[1] When the statutory are coextensive with the common-law remedies the question may arise, whether the former are exclusive or cumulative. But when the statutory remedies are not complete, nor adequate for the protection of the right conferred, the common-law remedies have been held to be in force. Thus, by section 15 of 5 & 6 Vict. c. 45, the printer is made liable to an action for damages, only when the printing is "for sale or exportation;" and the importer, only when copies are imported "for sale or hire." No remedy is given against any person who prints or imports for gratuitous distribution, or who gratuitously distributes copies printed or imported without authority. But, in Novello *v.* Sudlow, it was held that an action for damages would lie under the statute for the gratuitous distribution, among the members of a singing society, of lithographic copies of a musical composition.[2] So in Rooney *v.* Kelly, where the plaintiff declared that parts of his book had been pirated, it was contended for the defendant that section 15 of 5 & 6 Vict. c. 45, prohibited the publication only of a *book*, and that the plaintiff should have alleged that his entire work had been taken. But the Irish Queen's Bench, without approving this view of that section, expressed the opinion, that, "independently of the 15th section, the proprietor of the copyright in a book may maintain an action for the infringement of such copyright;" that, the right being secured by the statute, "it is clear that a common-law right of action would attach upon any invasion of such statutable right, even though it be invaded by the printing, publishing, &c., of only a *part*, but not the *entire*, of the proprietor's work, and though the remedy given by the 15th section did not extend to the case of such partial printing or publication," &c.[3]

When Common-Law Remedies not Available. — But the principle that the common law affords a remedy when one is not provided by the statute does not apply in the case of any right

[1] Beckford *v.* Hood, 7 T. R. 620; Cadell *v.* Robertson, 5 Pat. App. Cas. 493; Roworth *v.* Wilkes, 1 Camp. 94, 98; Colburn *v.* Simms, 2 Hare, 543, 559. See also Thompson *v.* Symonds, 5 T. R. 41; Sheriff *v.* Coates, 1 Russ. & My. 159, 167.

[2] 12 C. B. 177. See also Alexander *v.* Mackenzie, 9 Sc. Sess. Cas. 2d ser. 748; Boozey *v.* Tolkien, 5 C. B. 476.

[3] 14 Ir. Law Rep. N. S. 158, 171, 172.

not secured by the statute. The copyright in a book secured by the 5 & 6 Vict. c. 45, is the exclusive right of printing or otherwise multiplying copies; and the penalties, forfeitures, and remedies provided by that statute are directed against the printing, importing, and selling of piratical copies. Hence, the unauthorized public reading, representation, or performance of any composition is not a violation of the copyright therein; and, in such case, the person injured is not entitled to the remedies provided for the infringement of copyright.[1] In the case of a dramatic or musical composition, such wrong is an invasion of playright which is expressly secured by statute, and for which specific remedies are provided. The law on this subject is considered under the head of playright.[2]

So the unauthorized public exhibition of a copy of an engraving was held not to be a violation of 17 Geo. III. c. 57.[3] But in the case of paintings, drawings, and photographs, the statute expressly prohibits the exhibition of piratical copies.[4] In the case of sculpture, models, and casts, the statute gives to the owner of *any* such article "the sole right and property" therein for fourteen years "from first putting forth or publishing the same."[5] The right thus secured is not restricted to printing or the circulation of copies; but is coextensive with the common-law property, which embraces the exclusive right of publicly exhibiting the work. Hence, although the statute does not expressly provide a remedy against unlawful exhibition, the common-law remedy may be held to be available, on the principle that when a right is secured the legislature is presumed to have intended complete remedies for its protection.

Limitation of Actions. — Section 26 of 5 & 6 Vict. c. 45, prescribes that "all actions, suits, bills, indictments, or informations for any offence that 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

[1] Coleman *v.* Wathen, 5 T. R. 245; Reade *v.* Conquest, 9 C. B. N. S. 775; Tinsley *v.* Lacy, 1 Hem. & M. 747; Clark *v.* Bishop, 25 L. T. N. S. 908. See also Murray *v.* Elliston, 5 Barn. & Ald. 657; Martin *v.* Wright, *infra*.

[2] See Chap. XVI.

[3] Martin *v.* Wright, 6 Sim. 297.

[4] 25 & 26 Vict. c. 68, ss. 6, 7.

[5] 54 Geo. III. c. 56, s. 1.

shall be void and of none effect;" but provides that this limitation shall not apply to actions respecting copies of books required to be delivered to the British Museum and the four other libraries. The question has been raised, whether the limitation here prescribed applies only in the case of penalties and forfeitures, or extends also to actions for damages. The doubt relates to the sense in which the word offence is used. The language of section 26, above quoted, is copied *verbatim* from section 10 of 8 Anne, c. 19, except that the limitation is changed from three to twelve months. But the statute of Anne imposed penalties and forfeitures, without providing an action for damages; hence, in an early Scotch case, it was held that the limitation clause of the act applied only to the penalties and forfeitures, and not to actions for damages or injunctions.[1] The same view of the statute of Victoria was taken in a more recent case by the Court of Session in Scotland.[2]

In Hogg *v.* Scott, it appeared that the defendant had published, in 1868, the first, and in the latter part of 1862, the second, edition of a book containing matter pirated from the plaintiff's works. He also intended to publish a third edition. In August, 1873, the plaintiff applied for an injunction to restrain the defendant from further publishing or selling any copies of such piratical work. One of the defences set up was that the statutory limitation applied to all actions and suits, whether for the penalties or damages or injunctions, and hence that the plaintiff's suit was barred by lapse of time. Vice-Chancellor Hall expressed the opinion, that the word offence was not used in section 26 in the same sense as in section 15, which gives an action on the case for damages; that the limitation prescribed was intended to apply only in cases of penalties and forfeitures; that it could not operate to destroy the property secured; and that an action for damages, or a suit for an injunction, might be maintained, although more than a year had passed since the wrong was done. But, however this might be, he had no doubt that the defendant could not go on committing new wrongs or offences by continually publishing and selling the piratical work, in violation of the

[1] Clark *v.* Bell, 10 Mor. Dict. of Dec. Lit. Prop. App. p. 9.

[2] Stewart *v.* Black, 9 Sc. Sess. Cas. 2d ser. 1026.

plaintiff's right of property. The injunction was therefore granted.[1]

[1] Law Rep. 18 Eq. 444. The Vice-Chancellor said: —

"I cannot allow the objection taken to the plaintiff's right to sue, because more than twelve months elapsed before he filed a bill in this court. By the 3d section of the statute, a property is created in an author's work which *prima facie* is to endure for a term certain, and that property will remain in the author or his representatives, as owners of it, till it be taken away from him or them. The argument that, if a case arises for a suit in respect of the author's right to his property, and the author does not commence his suit within twelve months, that therefore his property is gone, I do not agree with. I do not find that clearly expressed in the statute, and I cannot put such a construction upon the 26th section. The 15th section gives to an owner of copyright a special action on the case in respect of any piracy. The remedy so provided is apparently a cumulative one; but whether it be so or not is not very important. The remedy is given against the person who is called the 'offender,' and the act spoken of as the 'offence' is the printing for sale or exportation of any book in which there shall be subsisting copyright. Mr. Morgan, in his argument, contended that the court ought to put upon the word offence in the 26th section the same construction as it bears in the 15th section of the statute. If that were a reasonable construction, it might be adopted; but, looking at the other sections in the statute which refer to penalties, I do not think it would be reasonable. There is nothing to be found in them about any 'offence' in the sense contended for on the part of the defendant. If the book which has been improperly published by the defendant contains property belonging to the plaintiff, the owner of copyright, I do not see how it can be successfully contended that he is suing in respect of an offence in the sense urged on the part of the defendant. The plaintiff is suing in respect of his copyright; that is his property. The 26th section is no doubt not very happily framed; but I am of opinion that, on the true construction of that and the other sections of the statute, the 'offence' contemplated by it must be the doing, in contravention of its provisions, of something expressly prohibited by them.

"The real question is, What is the 'offence' intended by the statute? It is the printing for sale or exportation of any work or part of a work, by a person who is not the owner of the copyright of that work, and without the consent of the owner. The non-suing by the owner of the copyright in respect of a particular edition, or part of an edition, of the defendant's work, is one thing; and even if it could be said that so far the owner's remedy was barred by his own neglect, still I find nothing in the statute which states that the person who has already published the edition, or part of the edition, complained of, may go on doing so, and that, if he does, the owner has then no remedy for such further 'offence.' In reference to this question, I may add that the Scotch cases referred to by Mr. Fischer are not to be disregarded. They were, no doubt, decisions in reference to books published before the passing of the statute; still they seem to me to be quite consistent with good sense and the reasonable interpretation of the statute. The right of the owner of the copyright to his property in it is not to cease because one copy of the work, which without his sanction contains the piracies, has been sold and disposed of without any complaint on his part. He is not on that account to lose all his property in his copyright; therefore I hold, in accordance with the decisions referred to, and on the construction of the statute, that the plaintiff has not lost his right to sue." Ibid. 450.

"The offence is committed every time a copy is sold." James, V. C., Jarrold *v.* Heywood, 18 W. R. 281.

Engravings and Prints.

Penalties and Forfeitures. — For piracy of engravings and prints, penalties and forfeitures are prescribed by 8 Geo. II. c. 13, and an action for damages is given by 17 Geo. III. c. 57. The former act declares, that if any person shall engrave, etch, or work, or in any other manner copy and sell, "in the whole or in part, by varying, adding to, or diminishing from the main design," or shall print or import for sale a print, without the written consent of the owner of the copyright signed in presence of two witnesses, or shall sell or expose to sale a print knowing it to have been so unlawfully printed or imported, such offender shall forfeit the plates and the prints to the owner, to be by him destroyed, and shall further pay five shillings for every print found in his custody; the penalty recovered to be equally divided between the king and the informer.[1]

Action for Damages. — The 17 Geo. III. c. 57, provides that every person shall be liable to an action for damages who shall engrave, etch, or work, or in any other manner copy, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print or import for sale, or shall publish, sell, or otherwise dispose of any copy or copies of a print or prints "which hath or have been or shall be engraved, etched, or drawn or designed in any part of Great Britain, without the express consent of the proprietor or proprietors thereof first had and obtained in writing" signed in presence of two witnesses.[2]

When Seller is Liable. — The former statute imposes penalties and forfeitures on such seller only who sells or exposes to sale copies which he knows to have been unlawfully printed or imported. The meaning of 17 Geo. III. c. 57, is not satisfactorily clear on this point. There is little doubt that the seller is made liable to an action for damages although he is ignorant of the piracy; and the statute has been so construed.[3] But

[1] s. 1.

[2] In Moore *v.* Clarke, the question was raised, but not decided, whether an action can be maintained under this statute without proof of actual damage. "Perhaps if the piracy were established," said Baron Parke, "the law would imply damage." 9 Mees. & W. 694.

[3] West *v.* Francis, 5 Barn. & Ald. 737; Gambart *v.* Sumner, 5 Hurl. & N. 5. See *ante*, p. 470.

the question has been raised, whether a seller is liable for the unauthorized sale of copies which have not been unlawfully printed or imported. In Murray *v.* Heath, it appeared that the plaintiff had employed the defendant to engrave plates from certain drawings. The drawings were the property of the plaintiff, and the plates had been prepared for his exclusive use; but he permitted the defendant to retain one hundred copies of the prints, on the express condition that he was not to sell them. Afterward, the defendant became bankrupt, and the copies passed to his assignees, who advertised them for sale. In the action for damages, wherein the assignees were codefendants, the defence was set up, that the copies had not been unlawfully printed or imported, and therefore their sale was not piracy. The court thought that "reading the statute 17 Geo. III. c. 57, alone, it would be very difficult to answer the argument urged on behalf of the plaintiff;" but construing that act in connection with the two statutes, 8 Geo. II. c. 13, and 7 Geo. III. c. 38, which it recited, it was held that the sale complained of, though a breach of contract, was not a violation of copyright.[1]

[1] 1 Barn. & Ad. 804. It is not satisfactorily clear, from the opinions of the judges, on what ground this decision was based. Lord Tenterden, C. J., interrupting counsel, who had referred to the clause of 17 Geo. III. c. 57, directed against piracy, said: "Can the clause be understood to apply to prints taken from the original plate? The prints were not engraved without the consent of the proprietor." Ibid. 808. In delivering his opinion, the same judge, after referring to 8 Geo. II. c. 13, and 7 Geo. III. c. 38, continued: "The question therefore is, whether the act imputed to the defendant be one for which he would have been liable to the forfeiture imposed by either of the recited statutes. If it be not, he is not liable to the action on the case given by 17 Geo. III. c. 57. Now, both the recited statutes are manifestly confined to prints struck off from engravings pirated from other engravings. The present case, therefore, is not within either; for here the first engraver took a certain number of impressions from a plate engraved by himself, but which he had contracted to engrave for the use of another." Ibid. 810.

"Taking the statute 17 Geo. III. c. 57," said Littledale, J., "in conjunction with the other statutes which it recites, and whereby a print-seller, or other person selling pirated prints, is made liable to forfeit the plates on which they are copied, to the proprietor of the originals, I think it is manifest that the last statute does not apply to the case of taking a print unlawfully from a lawful plate." Ibid. 811.

The 17 Geo. III. c. 57, taken in connection with the prior acts, may admit of the construction that a seller is not liable to an action for damages, unless the copies sold were unlawfully printed or imported. This is the only ground on which the above decision can be sustained. If the court intended to hold that the defendants were not guilty of piracy, because the copies had been printed from the original

Copying by Lithography, Photography, or other Processes Unlawful. — The 15 & 16 Vict. c. 12, s. 14, declares that the provisions of the several acts relating to copyright in prints, shall "include prints taken by lithography, or any other mechanical process by which prints or impressions of drawings are capable of being multiplied indefinitely."

Although photography had not been discovered when the statutes for the protection of copyright in engravings were passed, these statutes have been construed to prohibit unlawful copying by that or any other process by which copies may be indefinitely multiplied.[1] The same construction has been given to the American statute.[2]

Copies Made by Hand. — The question was raised, but not decided, in Gambart *v.* Ball, whether the unauthorized copy of an engraving made by hand is a violation of the copyright secured by the statutes. Mr. Justice Willes expressed the opinion that

plates the principle is not sound. The governing question is, whether the printing is done with or without due authority. If the latter, it is clearly immaterial whether the copies are printed from the original or pirated plates. Stevens *v.* Gladding, 17 How. 447; Prince Albert *v.* Strange, 2 De G. & Sm. 652, on ap. 1 Mac. & G. 25.

Moreover, the court, as will be seen from the language of the Chief Justice above quoted, seems to have held that a person is not liable to an action under 17 Geo. III. c. 57, unless he is also liable to the penalties under the two preceding statutes. But this position is indefensible, and is opposed by West *v.* Francis, 5 Barn. & Ald. 737, and Gambart *v.* Sumner, 5 Hurl. & N. 5, wherein it was held that a seller ignorant of piracy is liable to an action under 17 Geo. III. c. 57, although he is not subject to the penalties under the earlier statutes, unless he sells prints knowing them to be piratical. And in Graves *v.* Mercer, 16 W. R. 790, it was held that an action for damages might be brought under 17 Geo. III. c. 57, without regard to the limitation of time prescribed by 8 Geo. II. c. 13.

[1] Gambart *v.* Ball, 14 C. B. N. S. 306; Graves *v.* Ashford, Law Rep. 2 C. P. 410. In the latter case, Kelly, C. B., said: "It is obvious that the legislature could not, in providing for the protection of works of art, describe a piracy by means of a process not then within the knowledge of mankind. But it by no means follows that, when words large enough to embrace it are used, the prohibition should not, as well as the protection, be extended to a subsequently discovered mode of reproducing and multiplying copies. It appears to us, therefore, that the argument derived from 15 & 16 Vict. c. 12 and 25 & 26 Vict. c. 68, altogether fails; and that the effect of all the acts, taken together, is, that any process, whether known at the time, or the result of subsequent invention or discovery, by which pictures or engravings may be imitated or copied, is within the mischief as well as within the express words which the legislature has used. And we cannot help thinking that a more limited construction would be contrary to the whole spirit of the legislation on the subject, and productive of great injustice." Ibid. 420.

[2] See *post*, p. 492.

such copying is not within the statutory prohibition.[1] But this construction is not in harmony with the words or the spirit of the statute. Their object is to give full protection to the owner of the copyright, and they expressly prohibit unlicensed copying in any manner. When the property in an engraving is injured by the unauthorized sale of copies made by hand, there is no reason why such copies should not be held to be piratical, especially when it is considered that they are within the strict letter of the law. The principle is the same as in the case of a literary work, where it might be very easy to make and circulate many manuscript copies of a short composition. But except by authority this could not be done without violating the statute, which secures to the author the exclusive right of "printing or otherwise multiplying copies" of his production.

Substantial Identity Test of Piracy. — It is no defence of piracy that the unlicensed copy is larger or smaller than the original.[2] Nor need it be an exact copy. The question is whether the print complained of is substantially a copy of that entitled to protection.[3]

In an action under 8 Geo. II. c. 13, and 17 Geo. III. c. 57, it was held not to be piracy of an engraving of a painting to make a copy from the painting itself.[4] But now copyright in paintings is secured by 25 & 26 Vict. c. 68. It has been held that an assignee may maintain an action for the piracy of an engraving, although the statute does not expressly give him that right;[5] also, that it is necessary to allege where the piracy has been committed.[6]

[1] 14 C. B. N. S. 318.

[2] Graves *v.* Ashford, Law Rep. 2 C. P. 410; Bradbury *v.* Hotten, Law Rep. 8 Exch. 1. "Whether the photographic copy is of the same size as the original, or is enlarged or very much diminished, the statute has in terms provided for that. It is not the extent of the paper covered by the picture which conveys the pleasure to the mind. Thus, in the representation of The Horse Fair, we feel the same degree of pleasure in looking at the forms and attitudes of the beautiful animals there portrayed whether we see them in the size in which they are drawn in the original picture, or in the reduced size of the engraving, or in the still more diminished form in which they appear in the photograph." Erle, C. J., Gambart *v.* Ball, 14 C. B. N. S. 317.

[3] Roworth *v.* Wilkes, 1 Camp. 94; West *v.* Francis, 5 Barn. & Ald. 737; Moore *v.* Clarke, 9 Mees. & W. 692.

[4] De Berenger *v.* Wheble, 2 Stark. 548.

[5] Thompson *v.* Symonds, 5 T. R. 41.

[6] Graves *v.* Logan, 7 Sc. Sess. Cas. 3d ser. 204.

Limitation of Actions. — It is provided by 8 Geo. II. c. 13, that actions and suits shall be brought within three months after the offence has been committed.[1] By 7 Geo. III. c. 38, the time is limited to six months.[2] No limitation is prescribed by 17 Geo. III. c. 57. In the recent case of Graves *v.* Mercer, the Irish Queen's Bench held that "the limitation of three months given by the 8 Geo. II. c. 13, applies only to actions and proceedings given by that act. The action given by 17 Geo. III. c. 57, is an action on the case, and comes under the 20th section of the Common Law Procedure Act (Ireland), 1853, which gives a limitation of six years to such action."[3]

Maps and Charts. — The copyright in maps, charts, and plans is now governed, not as formerly by the statutes relating to engravings, but by the 5 & 6 Vict. c. 45.[4]

Paintings, Drawings, and Photographs.

Penalties and Forfeitures. —The 25 & 26 Vict. c. 68, secures to the author or the owner of a painting, drawing, or photograph the "exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death."[5] It then provides that if the author, after having sold or disposed of the copyright, or if any other person, not being the owner of the copyright, "shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, . . . any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, . . . any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding

[1] s. 8.
[2] ss. 6, 8.
[3] 16 W. R. 790.
[4] Stannard *v.* Lee, Law Rep. 6 Ch. 346. See *ante*, p. 174.
[5] s. 1.

ten pounds; and all such repetitions, copies, and imitations made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright." [1]

The author himself is here expressly prohibited from repeating or making duplicate copies of his production "or the design thereof," after he has sold the copyright, although he might be able to produce a duplicate without the original or a copy before him. It will also be noticed that unauthorized copying, not only for sale, but also for hire, exhibition, or distribution, is made unlawful; and either to import, sell, publish, let to hire, exhibit, or distribute copies, knowing them to have been unlawfully made, is declared to be piracy. In the case of the person who copies or prints, or who procures the copying or the printing to be done, the statute does not require that guilty knowledge shall be shown.[2]

Is Unlicensed Copying of Engraving Piracy of Painting?— Where the copyright in a painting and in an engraving of it were vested in the same person, it was held to be an invasion of the copyright in the painting to make without authority copies of the engraving. The court was of opinion "that the copy from an intervening copy is a copy from the painting, and within the prohibition of the statute." [3]

[1] s. 6.

[2] *Ex parte* Beal, Law Rep. 3 Q. B. 387, 392.

[3] *Ex parte* Beal, Ibid. 393, 394.

"The next question," said Blackburn, J., "is this: The copyright in the picture belongs to Mr. Graves; he made an engraving of it, of which he sold copies; he had not given any right to others to multiply them, and the photographs for which the penalties were recovered were made by photographing the engraving, and not the original picture, and it has been argued that the photograph of the engraving, being the reproduction of a copy of the design of the painting, is not a copy of the painting itself. It seems to me that cannot be so. When the subject of a picture is copied, it is of no consequence whether that is done directly from the picture itself or through intervening copies; if in the result that which is copied be an imitation of the picture, then it is immaterial whether that be arrived at directly or by intermediate steps. It must be borne in mind that Mr. Graves is the owner of the copyright in the painting and the engraving; had they been in different persons, another question might have arisen, which it is unnecessary to consider. I think that the copy from an intervening copy is a copy from the painting, and within the prohibition of the statute. A doubt was suggested by the court whether there might not be a difficulty arising upon the wording of section 6; and it was thrown out that, *reddendo singula singulis*, the enactment might merely mean the imitation of a painting by a painting, of a drawing by a drawing, and of a photograph by a photograph, and

This judgment is open to criticism. It is true that a copy of an engraving of a painting is an indirect copy of the painting. But is it such a copy within the meaning of the law as will violate the copyright in the original? The statute secures copyright in a painting, and also in an engraving, a photograph, or other copy of it. The copyright in the original is one thing. It affords a remedy against the unlawful copying of the original by any process. The copyright in any copy is another thing. It is this copyright which makes unlawful the unlicensed copying of the copy. There appears to be no reason why the general principle, that copyright is violated only when the thing copyrighted is copied, should not govern in the case under consideration. If an engraving of a painting should become common property, and the copyright in the painting itself be valid, there is no reasonable doubt that the latter right would not be violated by any publication of the engraving. So, if the owner has sold the copyright in the engraving, and retained that in the painting, it does not appear that he would have any remedy against the unlicensed copying of the engraving, although such copying might be injurious to the property in the painting. The court admitted that such a case might be governed by a different rule from that which applies when the same person owns both original and copy. But the principle is the same in both cases.

Penalty for Every Copy Unlawfully Sold. — Where it appeared that twenty-six piratical copies had been sold in two lots, and it was contended that only two offences had been committed, as there had been but two sales, it was held that the penalty might be recovered for each copy sold.[1]

that a photograph of a drawing would not be within the meaning of the legislature. But when we look at the first section, which is the key to the whole act, it gives to the author of every original painting, drawing, or photograph, the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph and the negative thereof, by any means and of any size; and the terms used are so extensive that it is plain that a photograph of a painting, of a drawing, or of another photograph, made without the consent of the owner, though of a different size, provided it be a reproduction of the design, is such an infringement as would subject the maker to the penalty."

[1] *Ex parte* Beal, Law Rep. 3 Q. B. 387, 394. See also Brooke *v.* Milliken, 3 T. R. 509. In the former case, Blackburn, J., said: "The only other question is, whether the offender is liable to a penalty for every copy sold, or

Unlawful Importing Prohibited. — Action for Damages Given. — By section 10, the importing of piratical copies is expressly prohibited. Besides prescribing penalties and forfeitures, the statute gives to the injured owner a remedy by action for damages.[1] The statute also prescribes penalties for the sale of a painting, drawing, or photograph fraudulently represented to be the work of a person who is not the author.[2]

Limitation of Actions. — No limitation of time within which actions under it shall be brought is prescribed by 25 & 26 Vict. c. 68.

Sculpture.

The 54 Geo. III. c. 56, which secures to the owner the copyright in sculpture, models, copies, and casts, gives an action for damages against any person who shall "make or import, or cause to be made or imported, or exposed to sale, or otherwise disposed of, any pirated copy or pirated cast," whether it "be produced by moulding or copying from, or imitating in any way" the original.[3] It is provided that no person shall be subject to such action who has bought the original work by

only on each contract to sell. In point of fact twenty-six copies were sold, but they were sold in two parcels, thirteen copies in each; and it has been contended that there were but two offences. In the case of Brooke *v.* Milliken, 3 T. R. 509, the penalty was imposed by 12 Geo. II. c. 36, for importing for sale any book first published in this kingdom and reprinted in any other place, and it enacted that the offender should forfeit £5 and double the value of every book sold. In that case, there could be no doubt that the meaning of the statute was, the penalty should be cumulative, viz., double the value of each book. In the present case, the words are, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding £10. It is quite clear that this imposes a penalty for every copy sold: a different construction would result in an absurdity, and defeat the intention of the legislature. The penalty is imposed also for importation, and it would be monstrous that if a man had consigned from abroad a cargo of imitations, the utmost penalty that could be imposed on him would be the sum of £10. It would be well worth his while to run the risk of paying that small sum, and to import and to distribute for sale elsewhere a quantity worth many thousands of pounds. The legislature were dealing with an offence which was likely to be committed wholesale, and they have used words meaning that the sale of every copy shall be an offence; and, if ten copies be sold at one time, ten offences are committed, and the offender may be punished for each separately."

[1] s. 11.

[2] s. 7. See also as to piracy of paintings, *In re* Johnson, 15 L. T. N. S. 163; *Ex parte* Graves, Law Rep. 3 Ch. 642; of photographs, Strahan *v.* Graham, 16 L. T. N. S. 87, on ap. 17 Id. 457.

[3] s. 3.

a deed in writing, signed by the owner in the presence of two witnesses.[1] Actions for piracy are to be begun "within six calendar months next after the discovery of every such offence, and not afterwards."[2] Section 7 of 13 & 14 Vict. c. 104, imposes on the offender a penalty of not less than five nor more than thirty pounds for every offence, to be recovered by the owner of the copyright.

United States. — Books.

The act of 1831 provided that any person who should print, publish, or import a book, without the written consent of the owner of the copyright, or should sell a book knowing it to have been so printed or imported, should forfeit every copy to such owner, and should be liable to pay fifty cents for every sheet found in his possession; one-half of the penalty to go to the United States, and the other half to the owner of the copyright.[3] Like provisions were contained in the statute of 1790, except that the owner of the copyright was required to destroy the forfeited copies.[4] The act passed in 1870 abolished penalties for piracy in the case of books, and was the first American statute to give an action for damages for the infringement of copyright.[5]

Action for Damages and Recovery of Piratical Copies. — Section 4964 of the Revised Statutes enacts that "every person who, after the recording of the title of any book as provided by this chapter, shall 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, or import, or knowing the same to be so printed, published, or imported, shall sell or expose to 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."

A wrong-doer is here made liable for a wrongful act done at any time "after the recording of the title of any book," and

[1] s. 4.
[2] s. 5.
[3] s. 6; 4 U. S. St. at L. 437.
[4] s. 2; 1 Id. 124.
[5] The statute of 1856, 11 Id. 138, gave an action for damages for the invasion of playright.

within the term of protection; but, before an action for damages or forfeitures can be brought, the copyright must be completely secured by the performance of all the statutory requisites.[1] The person entitled to bring such action is the owner of the copyright, who must either be the author of the book or hold a good legal title of ownership derived from the author. An equitable title, or interest in the work, which might entitle the holder to an injunction for the protection of his rights, is not enough in a court of law.[2] Two distinct remedies are given by the statute to the owner for the invasion of his property. He may sue for the damages which he has sustained, and for the recovery of the printed copies. He is not restricted to either one of these, but may avail himself of both at the same time.

Persons Liable. — Knowledge of Piracy. — These remedies lie against four classes of persons, — the printer, the publisher, the importer, and the seller of piratical copies. The first three are made liable though ignorant of the piracy; but, in the case of the seller, it must be shown that the book was unlawfully printed, published, or imported, and that in selling or exposing to sale he was aware of that fact.[3] All of the wrong-doers are made liable; and there appears to be no reason why the injured person may not proceed against any one of them whom he may select,[4] or more than one, if necessary to the vindication of his rights. Of course the printing, publishing, or selling, to amount to piracy, must be done in the United States.[5] When piratical copies are imported, it is immaterial where they were printed.

Gratuitous Circulation of Copies. — In subjecting the printer, publisher, and importer to the penalty of forfeiture and an action for damages, the statute does not, as does the English law, prescribe that the copies shall be printed, published, or

[1] See *ante*, p. 205.

[2] Numerous authorities cited in considering transfer of copyright, Chap. VI., are to the effect that the plaintiff in an action at law must show a good legal title. In the English equity cases, Mawman *v.* Tegg, 2 Russ. 385, Sweet *v.* Maugham, 11 Sim. 51, and Sweet *v.* Cater, Ibid. 572, the court ordered the defendant to admit the legal title of the plaintiff in an action at law to determine the latter's rights. See also Sweet *v.* Shaw, 3 Jur. 217.

[3] See Millett *v.* Snowden, 1 West. Law Jour. 240. See *ante*, pp. 470, 478, 401-404.

[4] Greene *v.* Bishop, 1 Cliff. 186, 203.

[5] See Graves *v.* Logan, 7 Sc. Sess. Cas. 3d ser. 204, cited *ante*, p. 481, note 6.

imported *for sale*. Hence, the wrong-doer is made liable when he publishes or imports for gratuitous circulation, or other purposes harmful to the owner of the copyright. So the gratuitous distribution of piratical copies would be an infringement of the copyright.[1]

Are Copies Subject to Forfeiture when only Part of Book is Piratical? — It is settled that when one book contains a substantial part of another, the former is, within the meaning of the law governing the infringement of copyright, a copy of the latter, and its unlawful publication will amount to piracy. Hence, under section 4964 of the Revised Statutes, which provides that any person who shall unlawfully print, publish, or import any copy of a book shall forfeit such copy, and be liable to an action for damages, there is no doubt that such action will lie when the book complained of is a substantial copy, or contains a material part, of the one entitled to protection. But is the word copy used in the same sense in relation to forfeitures? This question cannot arise concerning any other subject of copyright than a book; because in the case of maps, charts, musical compositions, prints, engravings, &c., the statute imposes penalties and forfeitures when the work is pirated "either in whole or in part."[2]

In Rogers *v.* Jewett, the Circuit Court of the United States expressly held that the word copy of a book in section 6 of the statute of 1831 must be taken to mean a transcript or reprint of the entire work, and hence that the penalties imposed by that section were not incurred by the wrongful publication of any part of a book.[3] The contrary doctrine had previously been affirmed by the Circuit Court of the United States in another circuit by a *pro forma* ruling in Backus *v.* Gould,

[1] See this point under the English statute considered, *ante*, p. 474.

[2] s. 4965. Rogers *v.* Jewett, *infra*.

[3] 12 Monthly Law Reporter, 339. In Rooney *v.* Kelly, wherein the Court of Queen's Bench in Ireland held that, in an action for damages under section 15 of 5 & 6 Vict. c. 45, it was sufficient to declare that parts of the book complained of were piratical, O'Brien, J., said *obiter*: "I may observe that, from other provisions of the statute, there appears to me great difficulty in holding that the word book *wherever* it is used in the statute, comprises and includes '*part of a book.*' It would, for instance, be difficult to maintain that under the 23d section [imposing forfeitures] the proprietor of the copyright in a book would acquire the property of all copies of another book which contained printed therein a few pages or passages of his book." 14 Ir. Law Rep. N. s. 158, 171.

which was an action for the penalties under the act of 1831 for the publication of parts of certain books. The case was taken for review to the Supreme Court of the United States; but the question which we are now considering was not passed upon by that tribunal, which simply decided that the penalty was limited to the sheets found in the possession of the defendant.[1]

The doctrine that a wrong-doer is not liable to the penalties or forfeitures unless the whole of the book entitled to protection has been copied, especially in considering the meaning of the present statute with reference to forfeitures, is open to question. The early rule that penal laws are to be strictly construed has been materially modified in later times. In interpreting such statutes, the strict meaning of the language used is still kept in view; but it is not allowed to defeat the plain intent of the legislature. The courts seek to ascertain that intent and to give effect to it. In section 4964 of the existing statute the word copy is used without distinction with reference to a forfeiture of the piratical work and an action for damages. In the latter case, as has been seen, a book which contains a substantial part of another is clearly a copy; and there is nothing in the section to show that a different rule is to be applied in the case of forfeitures. The question, therefore, is, What was the intention of the legislature? In declaring that every copy of a piratical book should be forfeited to the owner of the copyright, Congress had these objects in view: 1, to deter persons from committing piracy; 2, after its commission, to punish the offender, and to remedy the injury done. The end sought was the protection of copyrighted books. It is true that the action for damages is a means to the same end. But Congress manifestly considered this to be an insufficient remedy, and therefore gave an additional one by prescribing forfeitures. If the provision concerning forfeitures is to apply only when the whole of a book is pirated, it is clear that the purposes of such provision may easily, and often will, be defeated. It will be in the power of any wrong-doer to annul the law as far as a forfeiture of copies is concerned, by leaving out a small part — a chapter, or even a few pages — in reprinting the book which he pirates. He may thus take all that is valuable in a copyrighted work, and escape the

[1] 7 How. 798.

penalty of forfeiture by omitting an insignificant part. The statute would thus fail to reach the very persons who are the most guilty; viz., those who knowingly and wilfully commit piracy. As this construction would operate to annul the law in many, doubtless a majority, of cases, and especially in the case of those against whom its penal provisions were particularly aimed, it is reasonable to suppose that it does not give effect to the intention of the legislature. On the other hand, it is clear that the law will often be harsh, and perhaps unjust, in its operation, if every book which contains a material quantity of piratical matter may be seized by the injured person.

If one or the other of these extreme constructions must be adopted, there are reasons for choosing the latter. It would doubtless give greater effect to the intention of the legislature; and would be supported by the principle, recognized in cases of piracy, that whoever wrongfully mixes the matter of another with his own must suffer the consequences. But the courts are not bound to go to either extreme in construing the statute. They may hold that the appropriation of an entire work is not necessary to subject the wrong-doer to the penalty of forfeiture; and, on the other hand, that such penalty is not necessarily incurred by taking a part, though such part may be enough to amount to piracy, for which an action of damages will lie. In this view of the law, the forfeiture would attach when a work consists chiefly or largely of pirated matter, or when it contains a large or valuable part of a book entitled to protection. But, when the pirated matter forms a small part in quantity and value of the book complained of, the injury may be redressed by an action for damages.

In the examination of this question, the fact has not been overlooked that, in that part of the statute [1] which requires two copies of every copyrighted book to be deposited in the library of Congress, the word *copy* must be taken to mean a transcript of the entire work. But the intention of Congress in making this provision is obvious; and that intention would clearly be defeated by holding that a substantial, and not a *verbatim*, copy was meant.

[1] s. 4956.

Maps, Charts, Musical Compositions, and Works of Art.

Penalties and Forfeitures. — Section 4965 of the Revised Statutes provides that any person who, without the written consent of the owner of the copyright, signed in presence of two witnesses, shall engrave, etch, work, copy, print, publish, or import, either in whole or in part, or by varying the main design with intent to evade the law, or knowing it to be so printed, published, or imported, shall sell or expose to sale any copy of a copyrighted map, chart, musical composition, print, cut, engraving, photograph, chromo, painting, drawing, statue, statuary, or model or design intended to be perfected as a work of the fine arts, shall forfeit to the owner of the copyright all the plates on which the same shall be copied, and every sheet thereof either copied or printed. The offender is further made liable to pay a penalty of one dollar for every sheet found in his possession, either printing, printed, copied, published, imported, or exposed for sale. In the case of a painting, statue, or statuary, the penalty, besides forfeiture of plates and copies, is ten dollars for every copy found in the possession of the offender, "or by him sold or exposed for sale." The owner of the copyright is entitled to one-half of the prescribed penalties, and the United States to the other half.

In the case of all the articles above named, excepting paintings, statues, and statuary, the wrong-doer is not liable to pay the penalty for any copies not found in his possession.[1]

[1] Backus *v.* Gould, 7 How. 798. In Dwight *v.* Appleton, which was an action in the United States Circuit Court for unlawfully importing and publishing a book, the report says that "the jury were authorized [by Mr. Justice Thompson] to give fifty cents for every sheet contained in the volumes found at any time, within the period stated in the declaration, to have been in the possession of the defendants. The law applies to all the copies which the defendants had imported or sold, or held for sale, contrary to the rights of the plaintiffs." 1 N. Y. Leg. Obs. 198.

If by this was meant that the defendants were liable to the penalties for all the copies which were in their possession when the action was brought, including all of such copies which may have been afterward sold, the ruling was doubtless correct. But if the court intended to construe the law to the effect that the defendants were liable to pay the penalties for the copies which had been imported and sold before the action was brought, and which therefore were not found in their possession, the decision was against the plain reading of the statute, and is in opposition to the law as since expounded by the Supreme Court of the United States in Backus *v.* Gould.

Persons Liable. — Knowledge of Piracy. — Besides the printer, publisher, importer, seller, and the person exposing to sale, any person who shall unlawfully "engrave, etch, work," or "copy" any article mentioned in section 4965 is made liable to the forfeitures and penalties. Guilty knowledge must be shown on the part of the wrong-doer who sells or exposes to sale, but not in the case of the others.[1]

Substantial Copy subject to Penalties and Forfeitures. — The penalties and forfeitures are incurred not only when the whole of the copyrighted article has been unlawfully taken, but when it has been pirated, "either in whole or in part, or by varying the main design with intent to evade the law." When the thing complained of is not an exact reprint, the question is, whether it is a substantial copy of that entitled to protection.[2]

When the piratical copy appears to be an imitation or a colorable copy, it would seem to be necessary to show that the main design of the original had been varied "with intent to evade the law." But I do not understand that the words just quoted apply, or were intended to apply, to a copy which is an exact reproduction of the whole or a part of the original.

Although the statute does not expressly prohibit copying on a larger or a smaller scale than that of the original, there can be little doubt that an enlarged or a diminished copy made without authority would subject the offender to the penalties and forfeitures.[3]

Copying by Photography and other Processes Unlawful. — The statute prohibits unlawful copying, and the word copy is comprehensive enough in its meaning to embrace all modes and processes of multiplying copies. Thus, when the statute of 1831 was passed, photography had not been discovered; but although a photograph was not, within the meaning of section 1 of that act, a "print, cut, or engraving" entitled to protection,[4] an unlicensed photographic copy of a print, cut, or

[1] Millett *v.* Snowden, 1 West. Law Jour. 240. See *ante*, pp. 478, 470, 401–404.

[2] Reed *v.* Carusi, Tan. Dec. 72; Rogers *v.* Jewett, 12 Monthly Law Reporter, 339. Br. Roworth *v.* Wilkes, 1 Camp. 94; West *v.* Francis, 5 Barn. & Ald. 737; Moore *v.* Clarke, 9 Mees. & W. 692.

[3] See English cases on this point, *ante*, p. 481, notes 2, 3.

[4] Wood *v.* Abbott, 5 Blatchf. 325.

engraving was within the prohibition of section 7.[1] The same construction has been given to the English statutes.[2]

Is Copying of Engraving or Photograph Piracy of Painting? — In England, piracy of an engraving of a painting has been held to be an infringement of the copyright in the painting. The soundness of this doctrine has been questioned in this work.[3] There can be little doubt that this rule will not apply in construing the clause of section 4965 of the American statute which prescribes a penalty of ten dollars for every unlawful copy of a painting, statue, or statuary. The proper construction of this provision would seem to be, that a person is not made liable to the penalty, unless he copies directly from the painting or statue, or from a piratical copy. When he unlawfully reproduces a copyrighted engraving, photograph, or chromo of a painting, he is subject to the penalties and forfeitures expressly prescribed for such cases.

Gratuitous Circulation of Copies. — Under the statute of 1831, in an action for the penalties or forfeitures against the printer or importer, it was necessary to show, in the case of prints, cuts, engravings, maps, charts, and musical compositions, that the copies had been printed or imported "for sale."[4] But, in the existing statute, the words for sale are omitted.[5]

Action for Damages. — Section 4965 does not give an action

[1] Rossiter *v.* Hall, 5 Blatchf. 302. Benedict, J., said: "The argument of the defendant is, that the exclusive privilege given by the first section of the act does not include the photographing the copyrighted engraving because that is not a 'printing' or a 'reprinting,' and that the general words of the seventh section cannot be held to forbid in others what has not been exclusively reserved to the author by the words of the first section; and, further, that photographing could not have been within the intent of the lawmakers, as the art of photography had not been discovered when the act was passed. In support of such a construction, the decision of Judge Shipman, in the case of Wood *v.* Abbott, 5 Blatchf. 325, is cited. I cannot agree to the construction of the act which is contended for. In my opinion, sections one and seven should be read together; and, so taken, the words used disclose a clear intent to protect a copyrighted work from such a mode of duplication as is practised by the defendant. Section seven provides that any person who shall engrave, etch, or work, sell or copy, the engraving, shall be an offender. The word copy is a general term added to the more specific terms before used, for the very purpose of covering methods of reproduction not included in the words engrave, etch, or work, and, if it covers any thing, should cover the photographic method, which, more nearly than any other, produces a perfect copy."

[2] See *ante*, p. 480.

[3] *Ex parte* Beal, Law Rep. 3 Q. B. 387. See *ante*, pp. 483, 484.

[4] Reed *v.* Carusi, Tan. Dec. 72.

[5] See *ante*, pp. 487, 488.

for damages for the piracy of any article therein mentioned; and section 4964 provides such remedy only in the case of books. Any article, however, named in section 4965, which may be considered as a book within the general meaning of the law, is within the scope of section 4964. Thus, maps, charts, and musical compositions have been expressly held to be books. Moreover, the common-law remedy by action for damages is available in any case where such remedy is not expressly provided by the statute.[1]

General Provisions.

Penalty for False Printing of Copyright Notice. — Section 4963 provides that every person who shall insert or impress the notice of copyright, "or words of the same import, in or upon any book, map, chart, musical composition, print, cut, engraving, or photograph, or other article, for which he has not obtained a copyright, 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." Under the corresponding provision of the act of 1831,[2] it was held that the penalty could not be recovered in the name of more than one person; but that the statute might admit of a more liberal construction if the penalty had been given to the person aggrieved, instead of a common informer.[3]

Unlicensed Publication of Manuscripts. — Section 4967 gives to the owner an action for damages against "every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, if such author or proprietor is a citizen of the United States, or resident therein." This provision has been fully considered in another chapter.[4]

Limitation of Actions. — Section 4968 provides that "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." It is no defence, in an action for unlawful printing, that more than two years have passed since the plates were engraved or stereo-

[1] See *ante*, p. 473.
[2] s. 11; 4 U. S. St. at L. 438.
[3] Ferrett *v.* Atwill, 1 Blatchf. 151.
[4] See *ante*, p. 124.

typed, or since copies were first printed. Every act of printing is a violation of the right secured; and, if done within two years, will subject the offender to the forfeitures and penalties.[1] On the same principle, an action against the seller is not barred by the fact that the copies sold, or offered for sale, were printed or imported more than two years before. The controlling question is, whether the sale complained of is within the two years.

The limitation clause of the statute applies only to cases wherein it is sought to recover forfeitures or penalties. The time within which an action for damages may be brought, or redress in equity sought, is not limited by the statute.[2]

In Atwill *v.* Ferrett, it was held that an action on the case, and not trespass, is the proper form in law for infringement of copyright.[3] Penalties and forfeitures must be sued for in a court of law, and not in equity.[4]

Neither Oral Use of Production, except Dramatic Composition, nor Exhibition Prohibited. — The statute is directed against the multiplication and circulation of piratical copies, and the unlawful performance of dramatic compositions. It does not secure to the author the exclusive right of reading his production in public, except in the case of a dramatic composition; nor of publicly exhibiting any work of art, nor of performing a piece of music, unless it be also a dramatic composition. Nor is such public use of a work prohibited. Hence, statutory copyright is not violated by the unauthorized public reading of a literary or the playing of a musical composition, or the exhibition of a copy of a painting, statue, engraving, or other work of art. The unlicensed public performance or reading of a dramatic composition is a violation, not of the copyright, but of the playright therein; which is expressly secured by the statute, and for whose protection remedies are specially provided.[5]

The statutory remedies for the violation of playright are treated in Chapter XVI.

[1] Reed *v.* Carusi, Tan. Dec. 72.

[2] Reed *v.* Carusi, in which it was held that the defendant was liable only for a wrong done within two years before the action was brought, was a *qui tam* action for the penalties under section 7 of the statute of 1831. See 8 Law Reporter, 410.

As to limitation under English statutes, see *ante*, pp. 475, 482.

[3] 2 *Blatchf.* 39, 47.

[4] Stevens *v.* Gladding, 17 How. 447. See Chap. XII.

[5] See *ante*, pp. 474, 475.

CHAPTER XI.

REMEDIES IN EQUITY FOR THE INFRINGEMENT OF COPYRIGHT.

Nature and Extent of Equity Jurisdiction in Copyright Cases. — Equity jurisdiction in cases of copyright is dependent on the legal right, and is exercised for the purpose of making that right more effective, on the ground that relief in law is inadequate.[1] "The jurisdiction upon subjects of this nature," said Lord Eldon, "is assumed merely for the purpose of making effectual the legal right, which cannot be made effectual by any action for damages; as, if the work is pirated, it is impossible to lay before a jury the whole evidence as to all the publications, which go out to the world, to the plaintiff's prejudice. A court of equity, therefore, acts with a view to make the legal right effectual by preventing the publication altogether."[2] The remedies afforded by law are available only when the wrong has been done. They do not directly prevent a threatened mischief, nor the continuation or repetition of an injury already done. Moreover, the cost of seeking redress, the difficulty and uncertainty in ascertaining the damages sustained, and the delay in obtaining relief, are usually greater in law than in equity. Hence, in a great majority of the copyright cases which have arisen in England and the United States, protection has been sought in a court of equity. "It is quite plain," said Mr.

[1] Hogg *v.* Kirby, 8 Ves. 215; Wilkins *v.* Aikin, 17 Id. 422; Lawrence *v.* Smith, Jac. 471; Bramwell *v.* Halcomb, 3 My. & Cr. 737; Saunders *v.* Smith, Ibid. 711, 728; Spottiswoode *v.* Clarke, 2 Phillips, 154; Pierpont *v.* Fowle, 2 Woodb. & M. 23.

[2] Wilkins *v.* Aikin, 17 Ves. 424. In Hogg *v.* Kirby, the same judge said: "The principle of granting the injunction in those cases is, that damages do not give adequate relief; and that the sale of copies by the defendant is, in each instance, not only taking away the profit upon the individual book, which the plaintiff probably would have sold, but may injure him to an incalculable extent which no inquiry for the purpose of damages can ascertain." 8 Ves. 225.

Justice Story, "that, if no other remedy could be given in cases of patents and copyrights than an action at law for damages, the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights."[1]

The chief remedies afforded by equity are the injunction and the account of profits. By the former, the publication, sale, or other unlawful use of a piratical work may be stopped, or its intended publication prevented. By the latter, the wrong-doer may be made to pay to the owner of the copyright the profits arising from such publication and sale. To these remedies may be added that by discovery, whereby the person guilty of piracy may be ordered to disclose the number of piratical copies published, sold, or on hand, and the amount received from sales.

English chancery courts formerly had no power to adjudicate the legal questions on whose determination depended the right to maintain a suit; and in cases of doubt the plaintiff was often required to establish his right in a court of law before relief would be given by a court of equity.[2] Sometimes an injunction was granted, and, at the same time, the plaintiff directed to establish his title at law; the continuance of the injunction depending, of course, on the result of the legal trial.[3] "The court," said Lord Chancellor Cottenham, in 1838, "always exercises its discretion as to whether it shall interfere by injunction before the establishment of the legal title."[4] But unless, said the same judge, "the court is quite clear as to

[1] 2 Eq. Jur. § 931. "Our jurisdiction, unless I mistake, is founded on this: that the law does not give a complete remedy to those whose literary property is invaded; for, if publication after publication is to be made a distinct cause of action, the remedy would soon become worse than the disease." Lord Eldon, Lawrence *v.* Smith, Jac. 472.

[2] Wolcott *v.* Walker, 7 Ves. 1; Southey *v.* Sherwood, 2 Meriv. 435; Rundell *v.* Murray, Jac. 311; Lawrence *v.* Smith, Ibid. 471; Lowndes *v.* Duncombe, 2 Coop. (*temp.* Cottenham) 216; Bramwell *v.* Halcomb, 3 My. & Cr. 737; Saunders *v.* Smith, Ibid. 711; Spottiswoode *v.* Clarke, 2 Phillips, 154; M'Neill *v.* Williams, 11 Jur. 344.

[3] Hogg *v.* Kirby, 8 Ves. 215; Wilkins *v.* Aikin, 17 Id. 422; Mawman *v.* Tegg, 2 Russ. 385; Bacon *v.* Jones, 4 My. & Cr. 433; Sweet *v.* Shaw, 3 Jur. 217; Sweet *v.* Maugham, 11 Sim. 51; Sweet *v.* Cater, Ibid. 572; Campbell *v.* Scott, Ibid. 31; Dickens *v.* Lee, 8 Jur. 183; Bogue *v.* Houlston, 5 De G. & Sm. 267; Jarrold *v.* Houlston, 3 Kay & J. 708.

[4] Saunders *v.* Smith, 3 My. & Cr. 735.

what are the legal rights of the parties, it is much the safest course to abstain from exercising its jurisdiction till the legal right has been determined."[1] In recent years, a different practice has prevailed. In 1862, courts of equity were empowered to adjudicate all questions of law or fact on which the title to relief depended,[2] and now, under the recent judicature acts,[3] the chancery and the law divisions of the High Court of Justice have equal jurisdiction in determining rights and redressing wrongs. Hence, the courts of equity now determine all questions relating to the validity of the copyright and the alleged piracy. This is also the practice in the United States, where courts of equity in cases of copyright have usually adjudicated both the right and the infringement.[4]

Complainant's Title. His Consent, Delay, and Acquiescence Considered as Defences of Piracy.

What must Appear before Equity will Interfere. — Before a court of equity will interfere in a case of alleged violation of copyright it must appear: 1. That a valid copyright exists. 2. That the plaintiff has a good title. 3. That piracy has been committed by the defendant.

It is for the complainant to show that a copyright has been secured in due form, and that he is the legal or equitable owner. "Persons claiming that they own the copyright of a book," said Mr. Justice Clifford, "in a suit for infringement must prove their ownership by competent evidence, else their suit cannot be maintained, as the burden is upon the complainant to prove his title to copyright, as well as to prove infringement."[5] But when it appears that the copyright has been

[1] Spottiswoode *v.* Clarke, 2 Phillips, 157.

[2] 25 & 26 Vict. c. 42, s. 1.

[3] 36 & 37 Vict. c. 66; 38 & 39 Vict. c. 77; 39 & 40 Vict. c. 59; 40 & 41 Vict. c. 9; Id. c. 57.

[4] Pierpont *v.* Fowle, 2 Woodb. & M. 23; Atwill *v.* Ferrett, 2 Blatchf. 39; Baker *v.* Taylor, Ibid. 82; Little *v.* Gould, Ibid. 165, 362; Paige *v.* Banks, 7 Blatchf. 152, on ap. 13 Wall. 608; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402; Farmer *v.* Calvert Lithographing, Engraving, & Map-Publishing Co., 5 Am. L. T. R. 168. "It is now well settled," said the court, in the case last cited, "that both the right and the infringement may be set up and adjudicated in a court of equity without having been first determined at law." Ibid. 170. See also Little *v.* Gould, 2 Blatchf. 184.

[5] Chase *v.* Sanborn, 6 U. S. Pat. Off. Gaz. 933. In Parkinson *v.* Laselle,

secured in the manner prescribed by the statute, and that it is the property of the plaintiff, a *prima facie* case is made out, and the burden is on the defendant to show that the copyright is invalid or the plaintiff's title defective.[1]

Defences against Charge of Piracy. — In the United States, any one of the following defences may be pleaded in a suit for alleged infringement of copyright:

I. That the work for which protection is claimed is not a proper subject of copyright for the reason: 1. That it is a thing not within the scope of the copyright law. 2. That it is not original. 3. That it is not innocent. 4. That it is the production of a foreign author.

II. That the copyright is not valid, for the reason: 1. That the three requisites relating to the filing of the title, the printing of the copyright notice, and the delivery of copies to the library of Congress, have not been performed in accordance with the statute. 2. That the work has not been published within a reasonable time after recording the title. 3. That its publication in a foreign country preceded its publication in the United States. 4. That the copyright has expired.

III. That the plaintiff has not a good title.

IV. That piracy has not been committed, for the reason: 1. That there has been no copying from the plaintiff's book. 2. That the copying or other use made of it is within the allowed privilege of "fair use." 3. That the defendant has acted with the consent of the plaintiff.

Any one of the above defences, when established, will defeat the complainant's right to relief in equity. The defendant may plead the general issue and give the special matter in evidence.[2]

The qualities essential to copyright, and the statutory requisites for securing it, what amounts to piracy and what is a fair use, are fully treated elsewhere under their proper

3 Sawyer, 330, the bill was dismissed on demurrer that it did not allege a compliance with the statutory requisites essential to securing copyright. See also Marsh *v.* Warren, 9 Chic. Leg. News, 395; s. c. 4 Am. L. T. N. S. 126.

[1] "The copyright is *prima facie* evidence that he was the author, and the burden of proof is upon the defendant, to show the contrary." Taney, C. J., Reed *v.* Carusi, Tan. Dec. 74. "*Prima facie*," said Mr. Justice Story, "the copyright confers title; and the *onus* is on the other side to show clearly that, notwithstanding the copyright, there is an intrinsic defect in the title." 2 Eq. Jur. § 936, note 6.

[2] U. S. Rev. St. s. 4969.

heads. Here will be considered the complainant's title, and what consent, laches, or acquiescence on his part will defeat his right to sue in equity.

Equitable Title Sufficient in Court of Equity. — It is not essential to relief in equity that the legal title shall be in the plaintiff. Where a valid copyright exists, a court of equity will protect the rights of a complainant who has a good equitable title.[1] In Chappell *v.* Purday, Lord Chief Baron Abinger, referring to Lord Mansfield's remark, in Millar *v.* Taylor, that a court of equity would not interfere unless the author had a legal right, said: "Now, if by this it was meant to be said, that a court of equity would only interfere when the legal right was in the party applying for its interference, I will not go so far; because I think that a court of equity will assist any party having an equitable right, where the legal right intervenes to prevent his obtaining justice; otherwise, great fraud would ensue."[2] And so, in Bohn *v.* Bogue, Vice-Chancellor Shadwell said: "This court always takes notice of the equitable interest; and, if the equitable right to the copyright is complete, this court will take care that the real question shall be tried, notwithstanding there may be a defect in respect of the legal property."[3]

No general rule can be laid down as to what will amount to an equitable title or interest in the complainant sufficient for maintaining a suit. As has been seen, he may assert his rights in a court of equity without a perfect legal title. On the other hand, it is obvious that a person who has no material

[1] **Br.** Mawman *v.* Tegg, 2 Russ. 385; Colburn *v.* Duncombe, 9 Sim. 151; Sweet *v.* Shaw, 8 Jur. 217; Hodges *v.* Welsh, 2 Ir. Eq. 266; Sweet *v.* Cater, 11 Sim. 572; Chappell *v.* Purday, 4 Y. & C. Exch. 485, 493; Bohn *v.* Bogue, 10 Jur. 420; Sims *v.* Marryat, 17 Q. B. 281; Turner *v.* Robinson, 10 Ir. Ch. 121, 510. **Am.** Little *v.* Gould, 2 Blatchf. 362, 369; Pulte *v.* Derby, 5 McLean, 328; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402. In Sweet *v.* Shaw, Shadwell, V. C., said: "The plaintiffs do not set up that they have the legal copyright; what they state is this, that they have agreed with A. and B that A. and B. shall report cases for them, and accordingly A. and B. do take notes of cases which are printed by Sweet and others, the plaintiffs, and they publish them, and then the plaintiffs aver that they have a copyright in the cases published. Now I think that they have in equity, but I cannot understand how they have got the copyright at law." The plaintiffs "have made out only an equitable right, though still they have stated quite a sufficient case to support the bill." 3 Jur. 219.

[2] 4 Y. & C. Exch. 493.

[3] 4 Jur. 421.

interest in the work for which protection is claimed has no right to complain of a violation of the copyright in such work. But, between these two extremes, what interest in the copyright will entitle a person to restrain a piratical publication must be determined by the circumstances in each case.

In England, an injunction will not be granted until the work has been registered.[1] In the United States, the copyright is not perfected, and an action at law cannot be maintained, until all the statutory requisites have been performed. But an imperfect right accrues on the recording of the title;[2] and the opinion has been judicially expressed, that such right is entitled to protection in a court of equity for a reasonable time before the other acts essential to complete the copyright have been done.[3]

Suit Barred by Plaintiff's Consent to Publication. — The statutory penalties and remedies may be enforced against any person who makes a prohibited use of a work without the written, and, in the United States, attested, consent of the owner of the copyright. But courts of equity are not governed by this rule. They have recognized the principle that a person who has consented to the doing of a thing has no right, in equity, to complain when it is done. Hence, the court will not interfere with the publication or sale of an alleged piratical work, when the defendant can show that he has acted with the express or implied consent of the owner of the copyright, though such consent is not in writing.[4] Thus, in Heine *v.* Appleton, the plaintiff sought to restrain the defendants from publishing and selling certain books containing drawings which the former had made, and which the defendants had published, in the belief that they were public property. The court held that, even if the copyright claimed by the plaintiff were valid, the fact that he had been employed by the defendants to aid in the publication of the drawings, and that he had done so without claiming any exclusive rights in them, would be a bar to his suit. "The plaintiff," said Ingersoll, J., "thus aided in the publication of some of the works of the defendants. When

[1] See *ante*, p. 278.

[2] Wheaton *v.* Peters, 8 Pet. 664; Boucicault *v.* Hart, 13 Blatchf. 54.

[3] Pulte *v.* Derby, 5 McLean, 332. See *ante*, p. 268.

[4] Latour *v.* Bland, 2 Stark. 382; Rundell *v.* Murray, Jac. 311; Saunders *v.* Smith, 3 My. & Cr. 711; Strahan *v.* Graham, 17 L. T. N. S. 457; Heine *v.* Appleton, 4 Blatchf. 125.

he thus aided in their publication, he made no claim of copyright. It would be inequitable now to permit him, when he has been paid to aid in their publication and sale, and has thus aided in their publication, with a view to their sale, to stop their sale, even if he had a valid copyright in them. By aiding in their publication, he agreed to their publication; and, by agreeing that they might be published, he agreed that they might be sold; and he cannot now with success ask that the defendants may be restrained from doing that which he has agreed they may do." [1]

When Plaintiff's Consent may not be Implied. — In Saunders *v.* Smith, Lord Cottenham refused to restrain the publication of the second volume of Smith's Leading Cases before trial at law, for the reason that he found "in the dealings of the plaintiff in this case what amounts to that species of conduct which prevents, in this stage of the cause, at least, the interposition of this court." After quoting from the opinion in Rundell *v.* Murray,[2] the Lord Chancellor continued: "Lord Eldon there lays it down that not only conduct with the party with whom the contest exists, but conduct with others, may influence the court in the exercise of its equitable jurisdiction by injunction. Now, here I find permission, whether express or implied, given to others." [3]

The strongest inference against the plaintiffs, warranted by the facts in this case, was that they must be presumed to have known that the defendant, in preparing his Leading Cases, would take cases from their copyrighted reports. They had given the defendant no permission to do this, and had no knowledge that he was doing it, or intended to do it. They had even told him, before the publication of the first volume of the Leading Cases, that he might not reprint any reports from their works. They did not complain of that volume, for the reason that it contained only one case, and parts of two others, copied from their publications. They had no knowledge of the contents of the second volume until its publication, when they immediately applied for an injunction. It is not denied that the dealings between two persons may amount to an im-

[1] 4 Blatchf. 129. [2] See *post*, p. 507. [3] 3 My. & Cr. 729, 730.

plied consent that one shall make use of copyrighted matter belonging to the other, and that such consent may be successfully pleaded as a bar to a suit in equity. But to hold that, in order to save his rights, even in a court of equity, the owner of a copyright is bound to warn a person not to violate that right, when he has given no consent to the contrary; and, when he has no information, nothing more than a presumptive knowledge or suspicion, that such person is doing or intends to do so, is an exposition of the law as wild as it is erroneous. Even if the owner is aware that another person is preparing a work which will infringe his copyright, he is not bound to assert his rights until the piratical book has been published; unless there has been in his conduct something more than absence of protest to encourage the defendant. A person who commits piracy cannot justify the wrong by the plea that he had no warning not to do it. In law and in equity, he is sufficiently warned by the fact that what he appropriates does not belong to him.[1]

In Morris *v.* Ashbee,[2] one of the defendants testified that the plaintiff had said to him that it would not be unlawful for any one to copy certain parts from the plaintiff's or any other directory. The plaintiff denied having said this Vice-Chancellor Giffard found the facts to be in favor of the plaintiff; but he said that even the conversation alleged by the defendant to have taken place would not be enough to authorize the latter to copy the parts referred to. "A copyright," said the Vice-Chancellor, "is not lost by the mere expression of an opinion." "In order that the defence should prevail, it must be made out that there is proof of at least one of three propositions: viz., either that the plaintiff authorized what was done by the defendants; or that his conduct conduced to what was done by them; or that there is enough to displace the *prima facie* proof of the plaintiff's copyright."

The plaintiff in Maxwell *v.* Somerton [3] was the publisher of the Belgravia Magazine and the Belgravia Annual, which had

[1] See Morris *v.* Ashbee, Maxwell *v.* Somerton, *infra*; Hogg *v.* Scott, *post*, p. 509; Strahan *v.* Graham, 17 L. T. N. S. 457.

[2] Law Rep. 7 Eq. 34.

[3] 30 L. T. N. S. 11.

been sent for about eight years to the defendants, who had been in the habit of selecting from them extracts, and occasionally entire stories, and reprinting them in the Bristol Mercury. The last named was a weekly paper, of which copies containing the selections referred to were sent to the plaintiff. In November, 1873, the defendants received the Belgravia Annual, with a request to notice it in their paper. They published a short review of it, and reprinted one entire story. In December, another story was taken from the magazine. In each case, due acknowledgment was made of the source whence the tale was taken, and a copy of the Mercury was sent to the Belgravia office. Without previous notice to the defendants, the plaintiff moved to restrain the further publication or sale of any copies of the paper containing either of the stories. Vice-Chancellor Bacon held, that the alleged custom of the trade was no defence, and that the defendants were not justified in reprinting, as they had done, entire stories. The injunction was accordingly granted.

Delay or Acquiescence on Part of Plaintiff.—The American statute prescribes the time within which actions for the penalties or forfeitures, but not suits in equity, shall be brought.[1] In England, the statutory limitation has been held not to apply when remedies in equity are sought.[2] But the doctrine has been recognized that the plaintiff may forfeit his rights in equity by laches in applying for relief. Hence, when the plaintiff has for an unusual time delayed to assert his rights, the court has sometimes denied him relief, on the ground that he is guilty of laches, or that by acquiescing in what has been done he impliedly consented to it. And the same principle has been held to apply when the plaintiff has suffered other piracies than that by the defendant to be committed without protest.[3] "It is, therefore," said Vice-Chancellor Wood, "of the utmost importance to authors to come at the earliest possible stage to obtain the protection of the court against the violation of their rights of property."[4]

[1] See *ante*, p. 404.

[2] See *ante*, p. 476.

[3] Rundell *v.* Murray, Jac. 311; Saunders *v.* Smith, 3 My. & Cr. 711; Chappell *v.* Sheard, 1 Jur. N. S. 906; s. c. 2 Kay & J. 117; Keene *v.* Clarke, 5 Rob. (N. Y.) 66, 67.

[4] Tinsley *v.* Lacy, 1 Hem. & M. 752. See also Correspondent Newspaper Co. *v.* Saunders, 12 L. T. N. S. 540.

Plaintiff not Responsible for Delay when Ignorant of Piracy. — The plaintiff will not be considered guilty of culpable delay during the time that he had no knowledge of the infringement.[1] Where it appeared that the printing of the defendant's work had been begun in 1832, and completed in 1834, that the plaintiffs learned at the end of 1837 that the sale of their work was interfered with by a Scotch publication, which in February, 1838, they ascertained to be the defendant's Gazetteer, and that they discovered the piracy by an examination of the work in June, and applied for an injunction in the following month, Lord Langdale held that there had not been any improper or unnecessary delay.[2]

The burden of showing that the plaintiff was aware of the piratical publication is on the defendant. "The plaintiffs have to purge themselves from the imputation of laches; but the *onus* of proving the laches is on the defendants. They must show a clear knowledge in the plaintiffs of the former infringements, and of their having put up with them for a length of time, if they wish to fix the plaintiffs with the consequences of that laches so as to prevent them from having protection against any other depredations."[3]

Delay may be Explained. — When the delay is explained to the satisfaction of the court, it will not be allowed to defeat the complainant's suit. Where it appeared that the first part of the work complained of, the London Encyclopædia, had been published in January, 1826, and that the plaintiffs first learned in March that many articles in it had been copied from the Encyclopædia Metropolitana, but did not file their bill till August, Lord Eldon thought that the delay was "in a great degree accounted for by the necessity of comparing the whole of the two works, for the purpose of seeing how much of the Encyclopædia Metropolitana had been in a substantial sense taken from it and infused into the London Encyclopædia, before any application could be made to this court."[4] So in

[1] Lewis *v.* Fullarton, Chappell *v.* Sheard, *infra.* See also Greene *v.* Bishop, 1 Cliff. 186, 202; Boucicault *v.* Fox, 5 Blatchf. 87; Boucicault *v.* Wood, 7 Am. Law Reg. N. S. 530, 550; S. C. 2 Biss. 34.

[2] Lewis *v.* Fullarton, 2 Beav. 6.

[3] Wood, V. C., Chappell *v.* Sheard, 1 Jur. N. S. 997.

[4] Mawman *v.* Tegg, 2 Russ. 393.

Buxton *v.* James, it was shown that the piratical work had appeared in November, 1849, when the plaintiffs promptly protested against its publication; but they did not then begin legal proceedings owing to the doubtful state of the law as to the validity of the copyright in the work of a foreign author. This doubt was apparently removed by the decision in Boosey *v.* Jefferys, rendered May 20, 1851. On August 20, the plaintiff again notified the defendant of the violation of his rights, and soon after filed his bill for an injunction. The delay was held to be justifiable.[1]

Plaintiff's Rights not Prejudiced by Custom. — The plaintiff's case is not prejudiced by the fact that he chooses to assert a right which other authors have not sought to enforce. Thus where the plaintiff moved to restrain the publication of a dramatization of his novel, and it was objected that other authors had not complained of the dramatization of their works, the court said: "It is no answer to say that similar infringements have often been committed. Although Sir Walter Scott and others did not choose to assert any claim of this kind, this does not affect the rights of the plaintiff; and it is to be observed, moreover, that there has been a considerable alteration of the law since the time referred to by the extension of copyright to dramatic performances."[2] Nor can the custom of the trade be successfully pleaded against the plaintiff's right to sue.[3]

Stronger Case of Acquiescence on Final Hearing than Preliminary Application. — A stronger case of acquiescence on the part of the plaintiff is required to justify the refusal of an injunction at the final hearing than on a preliminary application; "for at the hearing of a cause it is the duty of a court to decide upon the rights of the parties, and the dismissal of the bill upon the ground of acquiescence amounts to a decision that a right which has once existed is absolutely and for ever lost."[4]

Are Plaintiff's Rights Lost by Apparent Acquiescence? — In cases wherein the plaintiff seeks to enforce his rights after

[1] 5 De G. & Sm. 80.

[2] Wood, V. C., Tinsley *v.* Lacy, 1 Hem. & M. 752.

[3] Campbell *v.* Scott, 11 Sim. 31; Maxwell *v.* Somerton, 30 L. T. N. S. 11, considered *ante*, pp. 503, 504. See remarks of Lord Cottenham in Saunders *v.* Smith, 3 My. & Cr. 729.

[4] Turner, L. J., Johnson *v.* Wyatt, 2 De G. J. & S. 18, 25.

having knowingly suffered them to be invaded for an unusually long time without protest, and wherein he offers no explanation of his delay, the practice of the courts and the views of the law expressed by them are by no means uniform. In Rundell *v.* Murray, where it appeared that the plaintiff had given a manuscript to the defendant, and permitted him to publish it as his own for fourteen years, at the end of which period she claimed the exclusive property in it, and sought to restrain the defendant from further publishing it, Lord Eldon, in refusing to grant an injunction, said: "There has often been great difficulty about granting injunctions, where the plaintiff has previously, by acquiescing, permitted many others to publish the work; where ten have been allowed to publish, the court will not restrain the eleventh. A court of equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things that occasions the application; and, therefore, without saying with whom the right is, whether it is in this lady, or whether it is concurrently in both, I think it is a case in which strict law ought to govern."[1]

In Lewis *v.* Chapman, the injunction was refused, because it appeared that the publication complained of had been issued, and the attention of the plaintiff called to it, six years before the bill was filed; and that, more than a year before beginning proceedings, the plaintiff had obtained a copy of the work for the express purpose of ascertaining whether it was piratical.[2] In Chappell *v.* Sheard, the defence was set up that the plaintiffs had been aware of the defendant's publication for about two months before applying for an injunction, and that they had suffered other piracies to be committed without proceeding against the offenders. Vice-Chancellor Wood refused to interfere, until the plaintiffs should make an affidavit as to whether they had had knowledge of these piracies as charged by the defendants.[3]

[1] Rundell *v.* Murray, Jac. 316.

[2] 3 Beav. 133.

[3] 1 Jur. N. S. 996. "There must be a further affidavit," said the Vice-Chancellor, "on the point of knowledge by any of the partners. It appears strange that this imitation should have been out so long ago as the 14th April, and the managing partner of the plaintiffs not to be aware of it till June; and if it turn out that he was aware of it all that time, such laches would be very important."

The plaintiffs having satisfied the court that they had acted without delay when they learned that their rights had been invaded, the injunction was granted. "The only doubt," said the Vice-Chancellor, "I have felt in this case was as to the laches; I have no doubt as to the infringement. But the principle is this; that, if the owner of a copyright suffers one depredation to go unchallenged, the court will not allow him to call another's infringement in question."

In Rundell *v.* Murray, the controlling question was, not whether the plaintiff had forfeited her right to equitable relief solely by delay, but whether by agreement she had not in equity conveyed her copyright to the defendant. In Lewis *v.* Chapman, the injunction was refused on the sole ground of delay on the part of the plaintiff, and the same principle was recognized in Chappell *v.* Sheard.

Tendency of Recent Decisions toward Doctrine that Plaintiff's Rights are not Lost by Mere Delay. — But the tendency of more recent decisions has been toward the doctrine that the plaintiff's rights in equity are not lost by mere delay in asserting those rights. The defendant must show that he has acted with the express or implied consent of the owner of the copyright; and such consent is not proved by the mere fact that the owner was long aware of the piracy without protesting against it, or that he has not chosen sooner to assert his rights in a court of law or equity, against either the defendant or any other wrongdoer. In other words, the principle seems to have been recognized, though it may be going too far to say that it is established, that the defendant will not be allowed to escape the legal consequences of his wrongful acts by pleading mere delay or lack of protest on the part of the plaintiff. No person has a right to use property without the consent of the owner; and, when he does so, he must suffer the consequences.[1]

As early as 1815, Lord Eldon intimated that a year's delay would not deprive the plaintiff of his remedies in equity.[2] And,

[1] **Br.** Hogg *v.* Scott, Law Rep. 18 Eq. 444; Maxwell *v.* Somerton, 30 L. T. N. S. 11; Morris *v.* Ashbee, Law Rep. 7 Eq. 34. See also Strahan *v.* Graham, 17 L. T. N. S. 457. **Am.** Greene *v.* Bishop, 1 Cliff. 186, 202; Boucicault *v.* Fox, 5 Blatchf. 87; Boucicault *v.* Wood, 7 Am. Law Reg. N. S. 539, 550; S. C. 2 Biss. 34.

[2] Platt *v.* Button, 19 Ves. 447. "The plaintiff has permitted several persons to publish these dances," said

in 1818, the opinion was expressed by the King's Bench in an action at law, wherein it appeared that the defendant had been publishing a sonata for about six years without objection on the part of the plaintiff, that, "although from the publication so long ago as the year 1812, without any complaint having been made, it might be inferred that the defendant had authority from the plaintiff to publish at that time; yet that it was impossible to infer for what time that authority might have been given, and whether it subsisted at the time of the publication of which the plaintiff complained in the present case."[1]

In the recent case of Hogg *v.* Scott, it appeared that the plaintiff had published in 1868 the first, and in the latter part of 1872 the second, edition of The Orchardist, which contained matter pirated from the plaintiff's works. In 1869, the plaintiff received a copy of the book, and wrote a friendly letter to the defendant concerning part of its contents, without intimating that it contained any thing copied from his own publications. In June, 1873, the plaintiff, being about to publish a new edition of one of his books, and having discovered, as he alleged, in the preceding April, the piratical nature of the defendant's work, moved to restrain its further publication or sale. The bill was dismissed in July, on the ground that the plaintiff's work had not been properly registered, and a new suit was begun in August. The defence was set up that the plaintiff had knowledge in 1869 of the piracy, and was, therefore, barred by delay from bringing suit; that the defendant was about to issue a third edition of his work, and that he was entitled to republish any thing that had appeared in the earlier editions. The court held that, even if the plaintiff had been aware of the piratical nature of the defendant's book for four years before beginning suit, he was not thereby deprived of his remedies in equity. "The omission to take any proceedings at law or in equity for a time," said Vice-Chancellor Hall, "does not in itself appear to me an encouragement to the defendant to republish. The Lord Chancellor, "some of them for fifteen years; thus encouraging others to do so. That, it is true, is not a justification; but under these circumstances a court of equity will not interfere in the first instance. If, as is represented, some of them were published, only last year, and one two months ago, the bill ought to have been confined to those." See also Baily *v.* Taylor, 3 L. J. (Ch.) 66.

[1] Latour *v.* Bland, 2 Stark. 383.

fendant amounting to an equitable bar in this court. It is not enough to show that the legal right is not to be protected here." "Knowledge by the plaintiff that the defendant was advertising his work which contained the objectionable matter and that he was going on selling it does not appear to me to amount to that description of acquiescence in the defendant's dealing with the subject-matter, which must be taken to deprive the plaintiff of the interference of this court as from any given time." [1]

[1] Hogg *v.* Scott, Law Rep. 18 Eq. 454, 456. The Vice-Chancellor said: "It does not, in the view which I take of this case, appear to me to be necessary to say what is the true conclusion or the legal inference to be drawn in reference to the knowledge of the plaintiff of the contents of the book, more or less, from the time when he received a copy of it. Assuming that he must be taken as, from the time when he received a copy, to have been fully aware of the contents, I still think that that circumstance is not sufficient to deprive him of the relief which he seeks in this suit. I have expressed my opinion upon the construction of the Act of Parliament in reference to the question — a new question, in my view — of the period within which the suit ought to have been commenced. The position of things, assuming that he had knowledge at that time, appears to me to be this: The plaintiff was at the time he received the copy of the book, which is relied upon as having given him knowledge of its contents, the undoubted legal owner of the copyright, the piracy of which is complained of. That was his property, and he had a right to say to the defendant, 'That is my property, and I will neither allow you to make nor recognize your making use of it.' The plaintiff did not take any step founded on his right to property until he filed his bill. He did file his bill soon after he received a copy of the second edition; but, assuming the most in the defendant's favor, all that had taken place in the mean time, beyond the letter which was sent to him, was the acquisition by the plaintiff of knowledge that the defendant was going on publishing The Orchardist for two years afterwards, and that the plaintiff knew in October, 1872, that the defendant was about to publish a new edition of his book, which was to be much larger and more expensive.

"Now up to the time of his knowledge of the new edition, in October, 1872, the plaintiff was aware only that the defendant was going on selling copies of The Orchardist. When he became aware of the defendant's intended new edition, there was nothing at all events to induce him to suppose or believe that there would be any new matter introduced into it, taken from the plaintiff's work. The matter stood, so far as the plaintiff was concerned, exactly as it did before. I have first of all to consider whether not taking any proceeding with reference to the old matter in any given time would deprive the plaintiff, on the ground of acquiescence, of the right to come to this court. The omission to take any proceedings at law or in equity for a time does not in itself appear to me to be an encouragement to the defendant amounting to an equitable bar in this court. It is not enough to show that the legal right is not to be protected here. It must not be assumed that the court is satisfied that the plaintiff by his conduct has led the defendant to incur material expenses in reference to his new book. . . .

"Now in this case knowledge by the plaintiff that the defendant was advertising his work, which contained the objectionable matter, and that he was going on selling it, does not appear to me to amount to that description of ac-

So, in Greene *v.* Bishop, the fact that the first edition of the book alleged to be piratical had been published in 1852, and a second edition in 1853, and that no legal proceedings had been taken against the publisher, was held not to be a bar to the suit brought in 1854 against the defendant as a vendor. It further appeared, however, that the unlicensed publication had taken place in another State than that in which the plaintiff resided, and in which the suit against the defendant was brought.[1]

In Boucicault *v.* Fox, which was an action for damages for nine representations of a copyrighted drama, the court ruled that the fact that the plaintiff was aware of the performances during their progress, and made no objection, would not warrant the jury in inferring his assent to them. "If the defendant's dealing with the subject-matter which must be taken to deprive the plaintiff of the interference of this court as from any given time. I am satisfied that his legal right remained, and to have tried the question at law for damages would, under all the circumstances, have been an unsatisfactory thing to do. Then the question arises, whether the case is altered by the fact that the plaintiff knew — and I must take it that he knew — that the defendant was about to issue a new edition of his book. Am I to assume against the plaintiff that he knew what the contents of the new book would be, whether of the old matter, as in the first edition, or not? Or am I to consider that it was incumbent upon him to inquire from the defendant all the circumstances — whether he was going to put in the new edition what he was at that moment illegally retaining in the old one? Considering the time when the advertisement came out, and the character of that advertisement, and the fact that the plaintiff was one of the editors of The Horticultural Journal, that does not to my mind make it a sufficiently strong case of encouragement or acquiescence on the part of the plaintiff to justify me in saying that this court will withhold the relief which he would otherwise be entitled to, leaving him with his undoubted legal right to proceed in a court of law in respect of the same matter; that is to say, that the court having determined the legal question in his favor, should send him to a court of law to get damages, and refuse an injunction. Under such circumstances, to do so would be playing with justice and the forms of procedure. I have, therefore, come to the conclusion that the plaintiff's right in this court has not been taken away by what has occurred." Ibid. 453, 456.

[1] 1 Cliff. 186, 202. "Both the bill and the answer," said Mr. Justice Clifford, "disclose the fact that the first edition of the respondent's book was published in 1852, in another State; and the second in 1353, by the same publishers, while the complainant was residing in this district, and this bill was filed during the following year. At what time the complainant became possessed of the knowledge of these publications does not appear; and there is no evidence tending to show that he ever in any manner acquiesced in the claim of the respondent, or recognized the validity of his acts, except what may be inferred from the omission to prosecute. No other laches appears on the face of the bill, and no such defence is set up in the answer."

ants," said Mr. Justice Shipman, "had been ignorant of the plaintiff's right, and had gone on under a misapprehension of the facts, or if they had supposed he assented, they might make this claim with a better grace."[1]

In Boucicault *v.* Wood, the court expounded the law to the effect that the owner might lose his common-law rights in an unpublished play, by allowing it "to be represented throughout the community for a long space of time, without license and without objection, knowing the fact to be so. . . . But it must be apparent that it has been done with his knowledge and without objection on his part. That is to say, the facts must exist to indicate that he consented or acquiesced in their performance. Otherwise, he is not prevented from claiming his property in these plays, — I mean, of course, his property at common law."[2]

How Piratical Copying is Ascertained.

When piracy is denied, it becomes necessary to ascertain whether the defendant's work has been copied from that of the plaintiff; and, if so, to what extent, and what are the piratical parts. The determination of these questions will not only require a careful comparison of the two books, but not unfrequently, especially if the publications in controversy are compilations, a laborious examination of other works. The plaintiff

[1] 5 Blatchf. 87, 99.

[2] 7 Am. Law Reg. N. S. 539, 550. See also dissenting opinion of Monell, J., in Keene *v.* Clarke, *post*, p. 577, note 1. Paige *v.* Banks was a controversy as to the effect of an agreement by which the plaintiff had sold a manuscript to the defendant. The latter was the undisputed owner of the copyright during the period of twenty-eight years; but, at the expiration of that term in 1858, each party claimed to be entitled to renew the copyright for fourteen years, and each warned the other against the infringement of his alleged rights. The defendant continued to publish the book without interference by the plaintiff. The latter died in March, 1868; and ten months later his executors sought to restrain the defendant from publishing the book. The Circuit Court, 7 Blatchf. 152, dismissed the bill on the ground that the plaintiff by the original agreement had parted with all his rights, and this judgment was affirmed by the Supreme Court of the United States. It does not appear what view of the law the court would have taken if the decision had turned on the question of delay or acquiescence on the part of the plaintiff. But there is some significance in the fact that this question was not considered by the Circuit Court, and that the Supreme Court referred to the defendant's course only as evidence of his intention in making the original agreement. 13 Wall. 608, 616. This case is considered in connection with another subject, *ante*, p. 328.

is not required to specify the parts of the defendant's publication which are pirated! A general allegation of infringement is enough.[1] The comparison of the two books may be made by the court or by a master. In England, laborious examinations have frequently been made by the judges.[2] In the United States, the usual practice in cases involving much labor has been to make a reference to a master.[3] The reference is usually ordered and the master's report made before the final hearing; but, in Lawrence *v.* Dana, by election of the parties, the decision of the court on the legal questions involved was first rendered, and afterward the case was referred to a master to report on the extent of the piracy. The injunction was withheld until the master's report should be made. "Equity suits for the infringement of a copyright," said Mr. Justice Clifford, "are usually referred to a master before the final hearing, to ascertain whether the charge is proved, and, if so, for a final report as to the nature and extent of the infringement; and in such cases the general rule is, that the complainant, if he prevails in the suit, is entitled, if at all, to an injunction at the time the decretal order is entered, to restrain the respondent from any further violation of his rights, as the whole case is then before the court. Even when the case is heard before any such reference and report, if the charges of infringement are few and of a character that the extent of the infringement can be conveniently determined by the court without sending the case to a master, the court, if the case be one

[1] "As long as I remember the court, it has never been thought necessary for a party who complains that his copyright has been infringed to specify, either in his bill or his affidavit, the parts of the defendant's work which he thinks have been pirated from his work; but it has always been considered sufficient to allege generally, that the defendant's work contains several passages which have been pirated from the plaintiff's work, and to verify the rival works by affidavit. Then when the injunction has been moved for, the two works have been brought into court, and the counsel have pointed out to the court the passages which they rely upon as showing the piracy." Shadwell, V. C., Sweet *v.* Maugham, 11 Sim. 53. See also Rooney *v.* Kelly, 14 Ir. Law Rep., N. S. 158.

[2] Lewis *v.* Fullarton, 2 Beav. 6; Murray *v.* Bogue, 1 Drew. 353; Jarrold *v.* Houlston, 3 Kay & J. 708; Spiers *v.* Brown, 6 W. R. 352; Pike *v.* Nicholas, Law Rep. 5 Ch. 251.

[3] Folsom *v.* Marsh, 2 Story, 100; Webb *v.* Powers, 2 Woodb. & M. 497; Story *v.* Derby, 4 McLean, 160; Story's Executors *v.* Holcombe, Ibid. 306; Greene *v.* Bishop, 1 Cliff. 186; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402; Chase *v.* Sanborn, 6 U. S. Pat. Off. Gaz. 932.

where an injunction is the proper remedy, will order it at the same time that the decision is announced upon the merits. But where the cause comes to a final hearing without any such report, the court, if the charges of infringement are numerous and of a character to require extended examination before the extent of the infringement can be ascertained, will ordinarily send the case to a master for further examination and report in respect to all matters not previously adjudged by the court; and the general rule in such cases is, that the injunction will not be granted until the nature and extent of the infringement are fully ascertained and determined, as its effects and operation might work great injustice. Obviously the present case falls within the latter rule; and, therefore, an injunction will not be ordered until the court shall have acted finally upon the report of the master."[1]

Where it did not satisfactorily appear that what the defendant had done or intended to do would be in violation of the plaintiff's right, the court, on a motion for a preliminary injunction which was denied, refused to make a reference to a master.[2]

The master may be required not only to report the facts, but also to give his opinion as to whether the plaintiff's work is original, and whether it has been infringed by the defendant;[3] and whether the sale of the plaintiff's publication is prejudiced, and to what extent, by the defendant's.[4] The master's opinion is subject to review by the court. In Story's Executors *v.* Holcombe, the master reported that the defendant's work was a *bona fide* abridgment of the plaintiff's, and therefore not piratical. But the court found that the first third of the defendant's

[1] 2 Am. L. T. R. N. S. 432. The same judge further said: "The settled practice in equity is, where the works are voluminous and of a complex character, containing, as in this case, much original matter mixed with common property, the cause will, at some stage of the case, be referred to a master to state the facts, together with his opinion, for the consideration of the court. Much the better course is to make the references before the final hearing; but the parties in this case waived any reference at that stage of the cause, and elected to proceed to final hearing without any such report. Cases arise, where the court, under such circumstances, would not order a reference, but would proceed to compare the books and ascertain the details of the infringement; but the case before the court is far too complex to admit of that course of action." Ibid. 420.

[2] Smith *v.* Johnson, 4 Blatchf. 252.

[3] Story *v.* Derby, 4 McLean, 160; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402.

[4] Greene *v.* Bishop, 1 Cliff. 186; Osgood *v.* Allen, 1 Holmes, 185.

work was not an abridgment, but a compilation pirated from the plaintiff's book, and accordingly granted an injunction.[1]

Defendant should Point out Copied Parts, Produce Manuscript, &c. — Lord Eldon thought that it was the duty of the defendant, when piratical and original matter were combined in his work, to point out the parts which had been copied.[2] In a very doubtful case of piracy, the defendant may escape an adverse judgment of the court by producing his manuscript.[3] In Jarrold *v.* Houlston, the fact that copying was denied, falsely in the belief of the court, was an important circumstance in leading the Vice-Chancellor to grant the injunction.[4]

Temporary Injunction.

When the validity of the copyright or the plaintiff's title is disputed, or the piracy is denied, the determination of the questions raised will often require much time, and in some cases the plaintiff may suffer irreparable damage, unless the piratical publication is restrained without delay. In such case, immediate relief may be given by a temporary or provisional injunction, which may be granted when the application is first made, or at some stage during the proceedings. It will be ordered to stand until the coming in of the defendant's answer or the master's report, or the final hearing, or the further order of the court.[5]

[1] 4 McLean, 306. For discussion as to exceptions to master's report, see Greene *v.* Bishop, 1 Cliff. 190–196.

[2] Mawman *v.* Tegg, 2 Russ. 895.

[3] Hotten *v.* Arthur, 1 Hem. & M. 609. "It is of great importance," said Wood, V. C., "as evidence of *bona fides*, that the original manuscript should be produced. That decided me in favor of the defendant in the French dictionary case. Spiers *v.* Brown, 6 W. R. 352. I saw that he had bestowed great pains and labor on his subject; and, though he had certainly copied a great deal from the plaintiff, I was convinced that he had honestly exercised his mind upon his work."

[4] 3 Kay & J. 708. "In the case before me," said Wood, V. C., "not only have I the fact of my arriving at close copying or colorable alteration of the plaintiff's book; but I have also this strong fact, and I confess I rely upon it as one that ought to have a considerable bearing upon my decision, that Mr. Philp has taken upon himself to deny by his affidavit that he has copied or taken any idea or language from the plaintiff's book. I find it impossible to come to a conclusion in his favor on the issue he has so tendered; and, that being so, the very circumstance of that denial on his part is a very strong indication of an *animus furandi*; and if the *animus furandi* be established, I ought to interfere by injunction." Ibid. 722.

[5] 2 Story's Eq. Jur. § 873.

When Temporary Injunction Granted. — The question of granting a temporary injunction is affected by many considerations. It depends chiefly on the extent of the doubt as to the validity of the copyright, and whether it has been infringed; the damage that will be sustained by the plaintiff if the injunction is withheld, and the injury that will be done to the defendant if it is granted. The court will exercise its discretion in following that course which appears to be most conducive to justice to both parties.[1] Although the matter may not be wholly free from doubt, yet if the plaintiff makes out a *prima facie* case, and the court is reasonably satisfied that a piracy has been committed, a temporary injunction will usually be granted; especially if the consequences are likely to be more serious to the plaintiff if the injunction is withheld than they will be to the defendant if it is granted.[2] When the complain-

[1] Referring to cases wherein the plaintiff's right was doubtful, Lord Cottenham said: "But even in the cases so referred to I have always held that it was for the discretion of the court to consider whether the defendant might not suffer greater injury from an improper injunction than the plaintiff from the delay in granting a proper one. In the present case where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether. The interposition of the court in these cases [unpublished works] does not depend upon any legal right, and to be effectual it must be immediate." Prince Albert *v.* Strange, 1 Mac. & G. 46.

[2] Scott *v.* Stanford, Law Rep. 3 Eq. 718; Smith *v.* Chatto, 31 L. T. N. S. 775; Little *v.* Gould, 2 Blatchf. 165; Banks *v.* McDivitt, 13 Id. 163; Shook *v.* Rankin, 3 Cent. Law Jour. 210. "No doubt," said Hall, V. C., in Smith *v.* Chatto, "this question might be left to be decided at the hearing, but I think it better to decide it at once; particularly considering how difficult it would otherwise be to assess the plaintiff's damages, if he should ultimately prove to be in the right. But, in granting the injunction for which the plaintiff asks, I do not lose sight of the fact that compensation may have to be made to the defendants, if at the hearing I decide in their favor. The amount of such compensation can, however, be more easily fixed than if it had to be made to the plaintiff; and if given will have to be substantial. . . . The plaintiff must undertake to abide by such damages, if any, as the court may, at the hearing, think fit to award."

What Vice-Chancellor Bruce said in Dickens *v.* Lee, 8 Jur. 185, concerning the course to be pursued with reference to continuing the injunction until the plaintiff should establish his legal title, is equally applicable in a case of doubt whether a temporary injunction should be granted. "Now, as far as the plaintiff is concerned, there is at least, — perhaps I should put it the other way, — there is at least a fair question whether the plaintiff is not entitled; my impression at present being that he is entitled, and that the probability of right is in his favor. . . . I am satisfied the proper course in this case is to continue the injunction, and for this reason, among others (a reason upon which the court acts very much, chiefly, indeed, with regard to patent cases): viz., that if all persons are to be allowed to infringe, without injunc-

ant makes out a *prima facie* case, "and the injury which results is not easily remedied if the injunction is refused, a court of equity will grant an injunction, unless the bill or the case made out by the bill is absolutely refuted."[1] "Where an infringement is palpable," said Mr. Justice Shipman, "and a provisional injunction will not be attended with serious injury, it is not ordinarily refused, as to so much of the work as is a plain infringement of the prior publication."[2]

When it appears that piracy materially injurious to the plaintiff has been committed, an injunction may be granted against the piratical part without waiting to determine the full extent of the infringement.[3]

When Temporary Injunction not Granted. — If the court is not reasonably satisfied that the plaintiff has a valid copyright or that piracy has been committed, an injunction will not be granted before these questions have been determined.[4] So,

tion, until the plaintiff can succeed in an action, he may be ruined, and the value of his property may be entirely gone. For these reasons, therefore, I think it fit to continue this injunction, the plaintiff undertaking, if the defendant shall require it, to bring an action, and the plaintiff undertaking to abide by any order the court may make with regard to damages that may be sustained by the defendant in case the injunction should be dissolved."

[1] Shook *v.* Rankin, 8 Cent. Law Jour. 210.

[2] Banks *v.* McDivitt, 13 Blatchf. 170.

[3] Lewis *v.* Fullarton, 2 Beav. 6; Stevens *v.* Wildy, 19 L. J. N. S. (Ch.) 190; Kelly *v.* Morris, Law Rep. 1 Eq. 697; Farmer *v.* Calvert Lithographing, Engraving, & Map-Publishing Co., 5 Am. L. T. R. 168.

[4] Br. Bramwell *v.* Halcomb, 3 My. & Cr. 737; M'Neill *v.* Williams, 11 Jur. 344; Jarrold *v.* Houlston, 3 Kay & J. 708; Morris *v.* Wright, Law Rep. 5 Ch. 279. Am. Blunt *v.* Patten, 2 Paine, 397; Miller *v.* McElroy, 1 Am. Law Reg. 198; Jollie *v.* Jaques, 1 Blatchf. 618; Smith *v.* Johnson, 4 Id. 252; Flint *v.* Jones, 1 Weekly Notes of Cases, 334. In M'Neill *v.* Williams, Vice-Chancellor Bruce said: "The court has, of late years especially, given great weight to the consideration of the question, which of the two parties to the dispute is more likely to suffer by an erroneous or hasty judgment of an interlocutory nature against them; and to the consideration also of the very possible, if not probable effect which an injunction may have to the defendant's prejudice in an action. I agree that there ought to be none. I have in this case to weigh, on the one hand, the suspicious nature of the defendant's case, for suspicious, I confess, upon the present materials, it appears to me to be, and the probable mischief from not interfering at present in his favor, if he should ultimately prove to be right; and, on the other hand, the possibility — the rational possibility — for I am unable to bring myself to deny the rational possibility — that the plaintiff may be right. I have also to consider the mischief generally that may be done by interfering in this stage of the cause if the defendants shall ultimately appear to be right; including particularly the possible prejudice which may be created against them in an action by the existence of an injunction.

where the plaintiff has been guilty of negligence or delay in applying for an injunction, or has apparently acquiesced in what the defendant has done, the court may refuse to interfere, although it may appear on the final hearing that the plaintiff is entitled to an injunction.[1]

Ephemeral Publications. — Before the rights of the parties are finally determined, the court may refuse to grant an injunction which will cause a greater mischief than it is intended to prevent. In refusing to restrain in December the sale of an almanac for the ensuing year in a case where the rights of the parties were doubtful, Lord Chancellor Cottenham said: "But the greatest of all objections is that the court runs the risk of doing the greatest injustice in case its opinion upon the legal right should turn out to be erroneous. Here is a publication which, if not issued this month, will lose a great part of its sale for the ensuing year. If you restrain the party from selling immediately, you probably make it impossible for him to sell at all. You take property out of his pocket and give it to nobody. In such a case, if the plaintiff is right, the court has some means, at least, of indemnifying him, by making the defendant keep an account; whereas, if the defendant be right, and he be restrained, it is utterly impossible to give him compensation for the loss he will have sustained. And the effect of the order

Upon the whole, I think the ends of justice in this case will be better answered by abstaining from granting the injunction at present; the defendants continuing to keep the account, which they have already undertaken to continue, and giving that undertaking which the defendant's counsel have consented to give with respect to damages, in case the infringement is proved and the plaintiff's title is established, and facilitating proceedings at law in any reasonable way the plaintiff in equity may require."

Lord Chancellor Cottenham said: "Where any doubt exists as to the legal right, it is very proper to be tried. The only question is whether, in the mean time, the injunction is to be continued, or whether it is to be dissolved, on the undertaking, which the defendant has offered, of keeping an account. It is obvious that it is the interest of both parties that the injunction should be dissolved; for if, in consequence of piracy, the defendant is, in fact, selling the plaintiff's work, the plaintiff will have the profits of the publication; but if, on the contrary, no piracy has been committed, a very great hardship is inflicted upon the defendant; and, on that supposition, he has already experienced a severe hardship, because the injunction has prevented the sale of his book during the season. If Mr. Stuart thinks it proper to press for the continuance of the injunction, I must look through the passages in the respective books." Bramwell *v.* Halcomb, 3 My. & Cr. 739.

[1] Johnson *v.* Wyatt, 2 De G. J. & S. 18. See *ante*, p. 506.

in that event will be to commit a great and irremediable injury. Unless, therefore, the court is quite clear as to what are the legal rights of the parties, it is much the safest course to abstain from exercising its jurisdiction till the legal right has been determined." [1]

But, in some cases, the ephemeral character of the works in controversy may afford an additional reason for the prompt interference of the court, especially when the piratical publication is sold at a lower price than the original. In this case, it is obvious that the remedies to which the plaintiff may be entitled will be practically annulled by delay. This principle was recognized by Lord Eldon, in a case relating to an East India Calendar or Directory. "There is a great difference," he said, "between works of a permanent and of a transitory nature. The case upon the former may be brought to a hearing. But the effect is very different upon a work of this kind, perishable, particularly in this instance; consisting of the names of persons continually fluctuating; a work that would be good for nothing in another year. . . . I am bound under these circumstances to continue this injunction to the hearing; for the defendant would merely have to account at the rate of 2*s.* 6*d.* for each book; and, if his publication proceeds at that reduced price, it will be impossible for the plaintiffs, obliged by the expense they have been at to charge a much higher price, to sell another copy." [2]

Should Injunction be Refused because Piratical may Easily be Replaced by Innocent Matter? — In Cox *v.* The Land and Water Journal Company, it appeared that the defendants had published in their newspaper an article called The Hunting Field of 1870, which had been copied from the List of Hounds contained in the plaintiff's newspaper. Vice-Chancellor Malins refused to grant an interlocutory injunction, on the ground that the matter in controversy was of a nature so ephemeral that to be valuable it must be revised at short intervals; that within a very short time the defendants could obtain from the original sources, and lawfully publish the same information as that

[1] Spottiswoode *v.* Clarke, 2 Phillips, 157. See Cox *v.* Land & Water Journal Co., Law Rep. 9 Eq. 324.

[2] Matthewson *v.* Stockdale, 12 Ves. 275. See also Wilson *v.* Luke, 1 Victorian Law Rep. 127.

complained of; and hence, that an injunction could protect the plaintiff but for a brief period.[1] And so in Baily *v.* Taylor, although other defences were set up, Vice-Chancellor Leach gave some weight to the consideration that the defendant, by calculating the mathematical tables which he was charged with having copied from the plaintiff's book, could immediately issue a new publication, substantially the same as that of the plaintiff, without infringing the latter's rights.[2]

Although granting an injunction in doubtful cases is discretionary with the court, the reasons set forth in the two cases last cited for refusing aid are by no means satisfactory. Where a material piracy is proved, the plaintiff is entitled to protection; and it is no defence that the defendant may in a short time replace the pirated matter with similar matter which is not piratical. He cannot avail himself of the plaintiff's labor, and, when called to account, successfully plead that he might himself have produced what he is charged with copying. If he chooses to pirate matter, instead of obtaining it by his own labor, he must suffer the consequences of piracy. If the above

[1] Law Rep. 9 Eq. 324. "But in this case," said Malins, V. C., "as in many others, the question arises, is it a case for the interference of the Court of Chancery at all, and if it is a case for interference, is it a case for interference on an interlocutory application? Now I do not think it is a case to be decided on an interlocutory application; and my reason is this: this list must be corrected from week to week; it could not be a correct list from the 1st of November until April, or to the end of the hunting season. Changes must take place; the list of masters, huntsmen, and whips can hardly continue to be correct even for a week. Now, suppose I were to grant an injunction, how can it be acted upon? The defendants have only to issue a fresh circular, make an urgent appeal for answers, or send a person by rail and get the information from the masters of the hunts, and next week bring out a very correct list; and how am I to know the way in which they got their information? At present I do not see that I can interfere. Whether the plaintiff is entitled to any remedy I do not at present decide, but I do not think it a case for an injunction, though the defendants are not entitled to avail themselves of the plaintiff's labors." Ibid. 332.

[2] 3 L. J. (Ch.) 66. "The plaintiff's title to the tables," said the Vice-Chancellor, "is that he calculated them; the defendant, by calculating them on his part, acquires the same right. By granting an injunction where the title is of such a nature, the court would interfere to grant protection for twenty-four hours only; for in that time the defendant might acquire as good a right as the plaintiff. Under such circumstances, therefore, I should doubt very much whether a court of equity ought to interfere to protect a title founded merely on a personal calculation, which any other individual would be equally competent to make." See also Baily *v.* Taylor, 1 Russ. & My. 76.

defence were a good one, the protection guaranteed to literary property would be defeated in numerous cases.

Account of Profits may be Ordered when Injunction Refused. — When the court refuses to grant a temporary injunction, it may order the defendant to keep an account of sales and profits until the final disposition of the case.[1]

Permanent Injunction.

Injunction Granted when Material Piracy Clear. — The facts necessary to determine the question of piracy, and its extent, having been ascertained by the master or otherwise, the case will be brought to a final hearing when the court will decide whether the plaintiff is entitled to a permanent injunction and other relief. Where the plaintiff's title has been established, and it appears that a whole or a material and valuable part of the defendant's publication is piratical, a permanent injunction is usually granted.

Injunction may be Refused in Doubtful Case. — But in a doubtful case the court may refuse to interfere unless it is reasonably satisfied that piracy has been committed.[2] In Murray *v.* Bogue, Vice-Chancellor Kindersley said: "On the whole, my conclusion is, that I cannot say that the defendant, in his work, makes an unfair use of the plaintiff's. I am not absolutely satisfied that the use made of it might not by another judge be looked at in a different light; but I cannot satisfy my mind that there is that unfair use which would justify me in restraining the publication of the defendant's work. The injunction must therefore be refused."[3]

Actual Damage Need not be Proved. — When a material piracy is shown, the plaintiff will not be required to prove actual damages. "Then the only question," said Vice-Chancellor Shadwell, "is whether there has been such a *damnum* as will justify the party in applying to the court; because *injuria* there clearly has been. What has been done is against the right of the plaintiff. Now, in my opinion, he is the person

[1] See *post*, p. 533.

[2] Murray *v.* Bogue, *infra*; Spiers *v.* Brown, 6 W. R. 352; Jollie *v.* Jaques, 1 Blatchf. 618, 626.

[3] 1 Drew. 353, 370.

best able to judge of that himself; and, if the court does clearly see that there has been any thing done which tends to an injury, I cannot but think that the safest rule is to follow the legal right and grant the injunction."[1]

Injunction Granted when Action for Penalties cannot be Maintained. — An injunction may be granted against the piratical publication of a copyright work, although the plaintiff may not be entitled to maintain an action for the penalties and forfeitures imposed by the statute. A strict compliance with the statutory provisions is essential to the maintenance of such action. Thus a seller or importer is made liable to the statutory penalties only when he knowingly commits piracy. But ignorance of wrong is no defence in a suit to prevent the repetition of the wrong by stopping the piratical publication. So in a court of law the plaintiff must show a good legal title; but in a court of equity, as has been shown, an equitable title is sufficient. The principle on which injunctions are granted when an action for the penalties cannot be maintained is the same as that on which an action for damages may be brought under the statute, although the defendant may not be liable to the penalties and forfeitures imposed.[2] "Though a party," said Vice-Chancellor Wigram, "is liable to be restrained by injunction from printing a work, the copyright of which is in another person, that does not make him an offender within the act, unless the case brings him within the precise situation contemplated. The act is remedial to some extent, but, so far as the forfeiture is imposed, it would be construed strictly."[3]

[1] Campbell *v.* Scott, 11 Sim. 39. "It appears to me that an infringement has taken place; and that, as to damage, the view taken by Shadwell, V. C., in Campbell *v.* Scott, is correct, that when once the court has found that there is '*injuria*,' the plaintiff ought to be allowed to judge of the '*damnum*;' who can tell to what extent she may be prejudiced by the best portions of her work being printed and sold without her consent? It would be very difficult for any jury to arrive at an exact conclusion upon that subject." Wood, V. C., Tinsley *v.* Lacy, 38 L. J. N. S. (Ch.) 539. See also Kelly *v.* Hooper, 4 Jur. 21; Sweet *v.* Maugham, 11 Sim. 51, 53; Morris *v.* Ashbee Law Rep. 7 Eq. 41. See Chap. XVI., under What Amounts to Piracy, where is given the opinion of Tindal, C. J., in Planché *v.* Braham, 4 Bing. N. C. 19, with the approval of Lord O'Hagan in Chatterton *v.* Cave, 3 App. Cas. 498, that the penalties for representing a drama may be recovered under 3 & 4 Will. IV. c. 15, without showing any damage. See also *ante*, p. 478, note 2.

[2] See *ante*, p. 478.

[3] Colburn *v.* Simms, 2 Hare, 558. See also Abernethy *v.* Hutchinson, 1

Injunction against any Wrong-doer. — An injunction against the seller will not be refused on the ground that the plaintiff has not proceeded against the publisher.[1]

Where there are two or more distinct acts of infringement, without privity between the wrong-doers, the latter cannot be joined as defendants in one suit.[2]

Injunction may be Refused when Piracy Slight. — When only a small part of the defendant's publication has been copied from that of the plaintiff, the piracy may be so slight as to create a doubt whether it is a proper case for the interference of a court of equity. The matter copied may be so inconsiderable in quantity or value; it may form so small a part of the publication complained of, and be so scattered through it; the piracy may cause so little injury to the plaintiff, and enjoining the defendant's publication may lead to consequences so serious to him, — that an injunction will produce a mischief far greater than that sought to be prevented. In such case, the court may leave the plaintiff to seek his remedy at law.[3] "The piracy proved," said Lord Cottenham, "may be so inconsiderable, and so little likely to injure the plaintiff, that the court may decline to interfere at all, and may leave the plaintiff to his remedy at law."[4] And so, in Mawman *v.* Tegg, Lord Eldon said: "But, after the quantity of matter which has

Hall & Tw. 28, 40. In a case under 27 Geo. III. c. 38, relating to copyright in designs, Lord Chancellor Lyndhurst said: "It does not appear to me that the provisions by which a remedy is given by the act, for infringement of the right, takes away the jurisdiction of this court. That jurisdiction is in my opinion founded on the first part of the clause, which gives the right of property, and which I consider to be a substantive and independent part of the act." Sheriff *v.* Coates, 1 Russ. & My. 167.

[1] Greene *v.* Bishop, 1 Cliff. 186. "Vendors are liable for the sale of a book which invades the copyright of another, on the same principle and for the same reasons that the vendor of a machine or other mechanical structure, in the case of patent rights, is held liable for selling the manufactured article without the license or consent of the patentee; and no reason is perceived for withholding from the complainant the common remedies for the injuries he has suffered by the acts of the respondent, merely because he has elected to seek redress in this district, instead of going into another district to pursue it against the publishers." Clifford, J., Ibid. 203.

[2] Dilly *v.* Doig, 2 Ves. 486.

[3] Br. Baily *v.* Taylor, 3 L. J. (Ch.) 66; Mawman *v.* Tegg, 2 Russ. 885; Lewis *v.* Fullarton, 2 Beav. 6; Bell *v.* Whitehead, 8 Jur. 68; Sweet *v.* Cater, 11 Sim. 572, 580; Campbell *v.* Scott, Ibid. 31; Bohn *v.* Bogue, 10 Jur. 420; Jarrold *v.* Heywood, 18 W. R. 279. Am. Webb *v.* Powers, 2 Woodb. & M. 497; Greene *v.* Bishop, 1 Cliff. 186.

[4] Lewis *v.* Fullarton, 2 Beav. 11.

been copied has been thus ascertained, the quantity of ma tte not piratical with which the piratical matter has been intermixed is still a circumstance of great importance. For, though this court has long entertained the jurisdiction of protecting literary property by injunction, there may be much doubt whether it would exercise the jurisdiction where only a few pirated passages occurred, and would not rather in such a case leave the complaining party to his action at law." [1]

No general rule can be laid down for determining what course should be followed under such circumstances. It will depend on the facts in each case. "It must appear," said Vice-Chancellor Shadwell, "where a complaint is made to this court that the piracy has either been of what is called 'a large part' or of 'a material part.'" [2]

The value of the matter taken will often be a more important consideration than the quantity.[3]

When Consequences to Defendant Considered. — When the piracy is important, and the consequent injury to the plaintiff material, an injunction is usually granted, notwithstanding the serious consequences to the defendant; [4] unless perhaps there is a marked inequitable disproportion between the wrong complained of and the remedy asked. But, where the objectionable matter forms but a small part of the defendant's publication, the court will compare the damage done to the plaintiff with that

[1] 2 Russ. 394. "Decided cases the second finding of the master, and have been cited by the counsel for the respondent, which show that, when the invasion of a copyright is slight, and the copying consists of indefinite or small parts, so scattered through the work that it is difficult or nearly impossible to estimate either the amount of the injury to the complainant, or the profit to the respondent, relief in equity has sometimes been refused, and the party turned over to his remedy at law. Those decisions were doubtless correct as applied to the facts and circumstances under which they were made; but it is clear, both from the finding of the master and all the evidence on which it is based, that no such difficulty can arise in this case; and consequently I hold that the complainant is entitled to an injunction, to be limited according to also to an account." Clifford, J., Greene *v.* Bishop, 1 Cliff. 203.

[2] Bohn *v.* Bogue, 10 Jur. 420.

[3] **Br.** Bramwell *v.* Halcomb, 3 My. & Cr. 737; Bell *v.* Whitehead, 3 Jur. 68; Kelly *v.* Hooper, 4 Id. 21; Campbell *v.* Scott, 11 Sim. 31; Tinsley *v.* Lacy, 1 Hem. & M. 747, 752. **Am.** Gray *v.* Russell, 1 Story, 11, 20; Story's Executors *v.* Holcombe, 4 McLean, 306, 309; Farmer *v.* Calvert Lithographing, Engraving, & Map-Publishing Co., 5 Am. L. T. R. 168, 174. See *ante*, p. 414.

[4] Mawman *v.* Tegg, 2 Russ. 385; Lewis *v.* Fullarton, 2 Beav. 6; Stevens *v.* Wildy, 19 L. J. N. S. (Ch.) 190; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402, see *post*, pp. 529, 530.

which the defendant will sustain if the injunction is granted and will hesitate to destroy the entire work in order to redress a very slight injury.[1] The court must sometimes "incur the hazard of occasioning finally some injurious consequence to one party or the other;"[2] and the aim will be to take that course which is most equitable in view of all the circumstances. "It appears to me," said Lord Langdale, "that an injunction ought to be granted whenever it appears by sufficient evidence that a copyright exists, and that piracy has been committed to an extent which is likely to be seriously prejudicial to the plaintiff; and that the extent of the injunction must depend on the amount of the proof and the nature of the work."[3]

Illustrations of Material Quantity and Value. — The court did not hesitate to grant an injunction, where the defendant's publication consisted of two volumes containing eight hundred and sixty-six pages, of which three hundred and nineteen pages of letters had been copied from the plaintiff's work, which was in twelve volumes, and contained six thousand seven hundred and sixty-three pages;[4] or where, in a compilation of seven hundred and ninety pages, consisting chiefly of selections of poetry, six entire poems and extracts from others, the whole amounting to eighteen pages, had been copied from The Poetical Works of Thomas Campbell.[5] In Kelly *v.* Hooper, it appeared that from the plaintiff's directory of eight hundred and seventy pages, only three and a half pages had been taken; but these formed a large part of the defendant's almanac, and constituted its chief value. An injunction had been obtained *ex parte*, and was continued.[6] Where the defendant had published in two numbers of a periodical detached extracts amounting to six or seven pages, from a farce of forty-two pages, an injunction was granted; but, on motion to make it perpetual, it was dissolved, on the ground that the quotations had been made for purposes of criticism.[7] In Cobbett *v.* Woodward, the court

[1] Spottiswoode *v.* Clarke, 2 Phillips, 154; M'Neill *v.* Williams, 11 Jur. 344; Pike *v.* Nicholas, Law Rep. 5 Ch. 251; Webb *v.* Powers, 2 Woodb. & M. 497.

[2] Lord Eldon, Hogg *v.* Kirby, 8 Ves. 226.

[3] Lewis *v.* Fullarton, 2 Beav. 12.

[4] Folsom *v.* Marsh, 2 Story, 100.

[5] Campbell *v.* Scott, 11 Sim. 31.

[6] 4 Jur. 21.

[7] Whittingham *v.* Wooler, 2 Swans. 428. See also Bell *v.* Whitehead, 3 Jur. 68.

said that the plaintiff was entitled to an injunction, if he thought it worth taking, against eight lines which were found to be piratical in the defendant's publication, the Illustrated Furnishing Guide, and which had been taken from the plaintiff's New Furnishing Guide.[1] In Mawman *v.* Tegg, an affidavit was made by the defence that, from the plaintiff's work, the Encyclopædia Metropolitana, published in nine parts, and containing upward of two hundred and twenty-seven thousand lines, two thousand one hundred and sixty lines had been used in various articles in the London Encyclopædia, Lord Eldon appears to have thought that it was a proper case for an injunction; but referred the matter to a master to report as to the precise extent of the piracy, and to point out the parts copied.[2]

In Chappell *v.* Davidson, where the chief complaint was of the unlawful use of the title of the plaintiff's song, Vice-Chancellor Wood said: "I do not think it is necessary to lay stress on the imitation of two bars of the music. That is only a question of copyright; and certainly, if the plaintiffs intend to insist upon it as copyright, I should have to hear them in reply upon that, and to put them to an action on terms, before I could continue the injunction."[3] In Pike *v.* Nicholas, on appeal, the court having found that the defendant had copied from the plaintiff's publication one passage which had been quoted from another author by the plaintiff, held that this, though under the circumstances it might be piratical, was not sufficient ground for an injunction.[4] In Webb *v.* Powers, where it appeared that there were scattered through the defendant's work only about twenty or thirty lines of the seven thousand contained in the plaintiff's, and that they had been taken without any *animus furandi*, the court thought that whatever damage the plaintiff had sustained could be more properly remedied at law, and that it would be inequitable to destroy the defendant's publication in order to redress so slight a wrong.[5]

[1] Law Rep. 14 Eq. 407.

[2] 2 Russ. 385.

[3] 2 Kay & J. 129.

[4] Law Rep. 5 Ch. 251.

[5] 2 Woodb. & M. 497. "So small a quantity," said Woodbury, J., "indicates rather illustration, and comports with the preface acknowledging aid from the plaintiff's work, but having some different and material purposes to accomplish, and not being a material substitute with no essential changes." Ibid. 520.

In Bell *v.* Whitehead, it appeared that the defendant had published in the Railway Times, a weekly publication, about four and a half pages copied from an article of nineteen pages in the Monthly Chronicle. Lord Chancellor Cottenham dissolved the injunction, which had been granted, chiefly on the ground that the extracts had been made for the purpose of criticism. But he said: "Here the value of the extract is very minute and trifling; and, if there were nothing else in the case, the extreme minuteness of value in the extract, and of injury sustained by the plaintiff, would be sufficient to induce the court not to interfere."[1]

A court of equity will not lend its aid to the protection of what is utterly insignificant. But, generally, where the value or importance of the plaintiff's publication appears to be small, the law will be construed with much liberality in his favor. If his production is a proper subject of copyright, although it may be of little worth or consequence, he is vested with a right which the law promises to protect.[2]

Form of the Injunction.

Injunction Granted only against Piratical Part. — The rule is settled in English and American chancery practice that, where only a part of a book is piratical, the remedy will not be extended beyond the injury. Hence, although the court may be satisfied that piracy has been committed, a permanent injunction is not usually granted until the extent of the infringement has been ascertained, and then only the objectionable part will

[1] 8 L. J. N. S. (Ch.) 142; S. C. 3 Jur. 68.

[2] Sheriff *v.* Coates, 1 Russ. & My. 159, 167; Cobbett *v.* Woodward, Law Rep. 14 Eq. 407; Folsom *v.* Marsh, 2 Story, 109–112; Woolsey *v.* Judd, 4 Duer, (N. Y.) 379. In the case first cited, Lord Chancellor Lyndhurst said: "It was said that the court ought not to interfere on account of the small value of the property in litigation. It is true that, as to the particular pieces of calico, or possibly as to the individual pattern, it may not be of much value. But, considering this as a general question, and as one affecting the manufacture, the subject is one of great value."

"It has been said," remarked Lord Abinger, "that the case is too unimportant to be so dealt with; but the same principles must be acted upon whether the piracy consists merely in the adaptation of opera music to quadrilles, or in extracting original airs from the finest operas of Rossini or Mozart." D'Almaine *v.* Boosey, 1 Y. & C. Exch. 802.

be restrained.[1] But, when an important and distinct part of the defendant's work is clearly piratical, the publication of that part may be restrained before the nature of the rest is ascertained.[2]

Again, so much of the book complained of may be found to have been unlawfully copied that an injunction against the piratical part will have the practical effect of destroying the whole. In such case, it may be unnecessary to ascertain the full and precise extent of the piracy.[3] Thus, in Lewis *v.* Fullarton, Lord Langdale, having satisfied himself that a large part of the defendant's work was piratical, that the parts which had been examined and compared afforded "fair indications" of the character of the rest, and that if what was known to be unlawful were taken away "there would be left an imperfect work, which could not to any useful extent serve the purposes of a gazetteer," granted an injunction against the piratical parts without examining the others.[4] In a case somewhat

[1] **Br.** Mawman *v.* Tegg, 2 Russ. 385; Lewis *v.* Fullarton, 2 Beav. 6; Jarrold *v.* Houlston, 3 Kay & J. 708; Kelly *v.* Morris, Law Rep. 1 Eq. 697; Scott *v.* Stanford, 3 Id. 718; Morris *v.* Ashbee, 7 Id. 34; Pike *v.* Nicholas, Law Rep. 5 Ch. 251; Hogg *v.* Scott, Law Rep. 18 Eq. 444; Smith *v.* Chatto, 31 L. T. N. S. 775. **Am.** Folsom *v.* Marsh, 2 Story, 100; Story's Executors *v.* Holcombe, 4 McLean, 306; Greene *v.* Bishop, 1 Cliff. 186; Daly *v.* Palmer, 6 Blatchf. 256; Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 402.

[2] Kelly *v.* Morris, *supra*.

[3] "I do not think," said the Vice-Chancellor in Stevens *v.* Wildy, "I am bound to go through the whole book; but I apprehend that the law at present is in conformity with the old Roman law, which is, that, if the defendant will take the plaintiff's corn and mix it with his own, the whole should be taken to be the plaintiff's; and, after the defendants in this case have taken so much as I see has been taken, I think the injunction ought to be granted." 10 L. J. N. S. (Ch.) 190.

[4] Lewis *v.* Fullarton, 2 Beav. 6, 14. "It appears to me," said Lord Langdale, "that an injunction ought to be granted, whenever it appears, by sufficient evidence, that a copyright exists, and that piracy has been committed to an extent which is likely to be seriously prejudicial to the plaintiff; and that the extent of the injunction must depend on the amount of proof and the nature of the work. The plaintiffs in the present case ask for an injunction, to restrain the defendant from publishing the whole or any part of the defendant's gazetteer. As it appears from the evidence that there are parts of the defendant's gazetteer which are not borrowed from the plaintiff's work, I cannot grant an injunction in those terms; and it becomes a question, whether an injunction should be granted in general terms against such parts as have been pirated, or whether means should be taken to ascertain what particular parts have been pirated, in order that the publication of those particular parts may be restrained. Now it appears to me, not, it must be admitted, by absolute proof and demonstration, for the two works

similar, Lord Eldon, before granting an injunction, referred the matter to a master to report the extent of the infringement.[1]

Entire Work may be Restrained when Piratical Part cannot be Separated. — When the part which has been copied from the plaintiff's work can be separated from that which has not been so copied, an injunction will be granted only against the objectionable part or parts. But if the original and the piratical matter are so mixed in the publication complained of that they cannot be distinguished, then the entire work may be restrained on the principle that whoever wrongfully mixes the matter of another with his own must suffer the consequences.[2]

have not been examined in every part, but upon proof and demonstration as to part, and as to the rest by strong inference and presumption, arising from the proof given as to those parts to which the proof applies, and from the nature of the work and the circumstances under which it is proved to have been composed, that if the parts pirated were taken away, though some articles would remain in their entirety, yet the greater number would be left in a state so imperfect and incomplete, that the defendant's work would lose its distinctive and useful character as a gazetteer.

"If the defendant were desirous to avail himself, as he has an undoubted right to do, of any original matter of his own, or of any matter which he has fairly taken from other sources, he would, I think, be under the necessity of recomposing his work, for the purpose of separating that which appears to me to have been improperly taken from the plaintiff's work. Lord Eldon says, 'In the cases which have come before me, my language has been, that there must be an injunction against such part as has been pirated, but in those cases the part of the work which was affected with the character of piracy was so very considerable, that, if it were taken away, there would have been nothing left to publish except a few broken sentences' [Mawman *v.* Tegg, 2 Russ. 385]; and it was because the evidence before him did not enable him to approach sufficiently to that result, that he made the particular order which he did in that case.

"But in this case, having availed myself of the evidence which has been so industriously collected during the long time that this motion was pending, and having read with great care all the affidavits laid before me, and more particularly the affidavits of Mr. Holliday and Mr. Cunningham, I think that I have reasons, on which I ought judicially to act; for considering that the parts of the work which have been examined and compared afford fair indications of the nature and character of those parts of the works which have not yet been examined and compared; and it appearing to me, under these circumstances, that, if the parts affected with the character of piracy were taken away, there would be left, I cannot say nothing but a few broken sentences, but there would be left an imperfect work, which could not, to any useful extent, serve the purposes of a gazetteer, I think that I ought to grant an injunction, to restrain the publication of the parts which are pirated, without waiting till all the parts which have been pirated can be distinctly specified." Ibid. 12.

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

[2] **Br.** Mawman *v.* Tegg, *supra*; Lewis *v.* Fullarton, 2 Beav. 11; Colburn *v.* Simms, 2 Hare, 554; Stevens

"Suggestion is made," said Mr. Justice Clifford, "that it will be impossible to separate that which is original from that which is borrowed, and to some extent the suggestion may be of weight; but the court is of the opinion that the difficulties in that behalf, when the matters pass under the searching examination of a master, will be much less than is apprehended by the parties. Should the difficulty in any instance or class prove to be insurmountable, then the rule in equity is, that, if the parts which have been copied cannot be separated from those which are original without destroying the use of the original matter, he who made the improper use of that which did not belong to him must suffer the consequences of so doing. If a second writer mixes the literary matter of another, which is under the protection of a copyright, with his own, without the license or consent of the proprietor, he must nevertheless be restrained from publishing what does not belong to him; and if the parts of the work cannot be separated, so that the injunction prevents also the publication of his own literary production so mixed with that of another, he has only himself to blame." [1]

Form of Injunction. — The parts of the publication to be restrained may be specified in the injunction.[2] Or, the defendant may be enjoined from printing, publishing, selling, or otherwise disposing of any copies of the book "containing any

v. Wildy, 19 L. J. N. S. (Ch.) 190. **Am.** Emerson *v.* Davies, 8 Story, 796; Webb *v.* Powers, 2 Woodb. & M. 521; Lawrence *v.* Dana, *infra*.

"As to the hard consequences which would follow from granting an injunction, when a very large proportion of the work is unquestionably original, I can only say that, if the parts which have been copied cannot be separated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and, if the parts of the work cannot be separated, and if by that means the injunction, which restrained the publication of my literary matter, prevents also the publication of his own literary matter, he has only himself to blame." Lord Eldon, Mawman *v.* Tegg, 2 Russ. 390.

[1] Lawrence *v.* Dana, 2 Am. L. T. R. N. S. 480.

[2] Kelly *v.* Morris, Law Rep. 1 Eq. 708; Pike *v.* Nicholas, Law Rep. 5 Ch. 260.

articles or article, passages or passage copied, taken or colorably altered from" the plaintiff's book;[1] or "from doing any other act or thing in invasion of the plaintiff's copyright in the said" book.[2] Or, the injunction may be directed specially against the piratical parts, and generally against any unlawful copying from the plaintiff's work.[3]

In Dickens *v.* Lee, where an injunction had been granted enjoining the defendant from "copying or imitating the whole or any part of the plaintiff's book," Vice-Chancellor Knight Bruce struck out "or imitating," saying there was no precedent for such words, but without expressing an opinion whether an injunction would properly go to that length.[4]

In Daly *v.* Palmer, the defendant was enjoined "from the public performance and representation, and from the sale for public performance or representation of the 'railroad scene' in the [defendant's] play of After Dark, or of any scene in substance the same as the 'railroad scene' in either of the two plays as such scene is herein defined."[5]

Account of Profits.

Besides granting an injunction, a court of equity will take from the defendant the profits he has made by the publication or sale of the piratical work and give them to the plaintiff.[6] This, however, is but an approximate measure of the damages which the plaintiff has sustained. The profits realized from

[1] Lewis *v.* Fullarton, 2 Beav. 14; Jarrold *v.* Houlston, 3 Kay & J. 723; Hogg *v.* Scott, Law Rep. 18 Eq. 458.

[2] Scott *v.* Stanford, 36 L. J. N. S. (Ch.) 732. See also Hotten *v.* Arthur, 1 Hem. & M. 610.

[3] Jarrold *v.* Houlston, Scott *v.* Stanford, *supra*.

[4] 8 Jur. 185. "I am struck," he said, "with the absence of any precedent for the use of those words in any injunction upon a case merely literary; and as I am of opinion, if I rightly understand it, that what is apprehended by the counsel for the plaintiff this court would restrain, I think it more prudent and safe to narrow the present injunction, rather than to leave in it a word apparently new in such cases, and which may be susceptible of an erroneous interpretation. I think, therefore, but I may say it without prejudice to any question whatever, without intimating any opinion of what it may be lawful or unlawful for the defendant, in the way of imitation or supposed imitation, to do, that the words 'or imitating' should be struck out."

[5] 6 Blatchf. 271.

[6] Mawman *v.* Tegg, 2 Russ. 385, 400; Lewis *v.* Fullarton, 2 Beav. 6, 12; Colburn *v.* Simms, 2 Hare, 543, 560; Kelly *v.* Hodge, 29 L. T. N. S. 387; Pierpont *v.* Fowle, 2 Woodb. & M. 23; Stevens *v.* Gladding, 17 How. 447, 455.

the sale of the defendant's publication may be materially less than those which the plaintiff would have made, had there been no unlawful interference with the sale of his work.[1] On the other hand, the court by this remedy may give to the plaintiff a sum greater than the amount of damages he has sustained; for the sale of his work may not have been materially diminished by even an extensive circulation of the publication complained of.[2]

Right to Account Dependent on Right to Injunction. — The right to an account of profits is dependent on the right to an injunction. "This court," said Sir John Leach, M. R., "has no jurisdiction to give to a plaintiff a remedy for an alleged piracy, unless he can make out that he is entitled to the equitable interposition of this court by injunction; and, in such case, the court will also give him an account, that his remedy here may be complete. If this court do not interfere by injunction, then his remedy, as in the case of any other injury to his property, must be at law."[3]

[1] "Though keeping an account of the profits may prevent the defendant from deriving any profit, as he may ultimately be obliged to account to the plaintiff for all his gains, yet, if the work which the defendant is publishing in the mean time, really affects the sale of the work which the plaintiff seeks to protect, the consequence is, that the rendering the profits of the former work to the complaining party may not be a satisfaction to him for what he might have been enabled to have made of his own work, if it had been the only one published; for he would argue that the profits of the defendant as compared with the profits which he, the plaintiff, has been improperly prevented from making, could only be in the proportion of eight shillings, the price of a copy of the one book, to one guinea, the price of a copy of the other." Lord Eldon, Mawman *v.* Tegg, 2 Russ. 400.

[2] "It is true that the court does not, by an account, accurately measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The court, by the account, as the nearest approximation which it can make to justice, takes from the wrong-doer all the profits he has made by his piracy and gives them to the party who has been wronged. In doing this, the court may often give the injured party more, in fact, than he is entitled to; for *non constat* that a single additional copy of the more expensive book would have been sold, if the injury by the sale of the cheaper book had not been committed. The court of equity, however, does not give any thing beyond the account." Wigram, V. C., Colburn *v.* Simms, 2 Hare, 560.

[3] Baily *v.* Taylor, 1 Russ. & My. 75. Quoted and approved in Smith *v.* London & South-Western Railway Co., 1 Kay, 415. See 2 Story's Eq. Jur. § 933; also Monk *v.* Harper, 3 Edw. Ch. (N. Y.) 109.

Account may be Ordered before Injunction Granted. — But where the court has been in doubt as to the plaintiff's right, and has refused to grant an injunction until the establishment of that right, the defendant has been ordered to keep an account in the mean time.[1] On the same principle, where a temporary injunction is refused in consequence of doubt, an account may be ordered to be kept until the final hearing, when it will be decided whether or not the profits shall be paid the plaintiff.

Account Ordered when not Asked for. — Where an account is not specifically asked for, it may be ordered under the prayer for general relief.[2]

Past Sales. — Profits of past sales may be ascertained from affidavits made by or on behalf of the defendant;[3] or a reference to the master may be ordered for that purpose.[4]

It has been held by the Circuit Court of the United States, that the owner of the copyright is entitled to the profits arising from the sales on commission of piratical copies.[5]

[1] Wilkins *v.* Aikin, 17 Ves. 422; Mawman *v.* Tegg, 2 Russ. 385; Spottiswoode *v.* Clarke, 2 Phillips, 154; M'Neill *v.* Williams, 11 Jur. 344; Jollie *v.* Jaques, 1 Blatchf. 618.

[2] Stevens *v.* Gladding, 17 How. 447, 455, and cases there cited.

[3] Pike *v.* Nicholas, 20 L. T. N. S. 909; Kelly *v.* Hodge, 29 L. T. N. S. 387.

[4] Folsom *v.* Marsh, 2 Story, 100; Stevens *v.* Gladding, *infra*.

[5] Stevens *v.* Gladding, 2 Curtis, 608. "I am not aware," said Mr. Justice Curtis, "that this question has ever been made in a copyright or patent case." After referring to cases of partnership in which a court of equity had ordered profits arising from sales on commission to be accounted for, he continued: "The jurisdiction in cases of copyright rests upon a similar principle. If the proprietor will waive his action for damages, he may have an account of profits, upon the ground that the defendant has, by dealing with his property, made gains which equitably belong to the complainant. And I perceive no sound reason for restricting those gains to the difference between the cost and the sale price of the map or book, or limiting the right to an account to those persons who have sold the work solely on their own account. He who sells on commission does in truth sell on his own account, so far as he is entitled to a percentage on the amount of the sales. What he so receives is the gross profit coming to him from the proceeds of the sales. And what he so receives diminishes the net profit of the one who employs him to sell. When the latter is called on to account, he has an allowance for the commissions he has paid; because those sums, though part of the gross profits of the sales, he has not received. That part of the profits of the sales being in the hands of the commission merchant, the consignor is not accountable for them. But why should not the commission merchant, who has them, account for them? He was liable to an action for damages for selling. That right is waived. I think he should pay over to the proprietor, in lieu of the damages, the gain he has made from the sales. It does not seem to me that the term 'profits' necessarily, or when construed in reference to the subject-matter, properly has so

Discovery.

The court may require the defendant to disclose the number of piratical copies which he has printed, imported, or sold, the number on hand, the proceeds of sales, &c. But the defendant cannot be compelled to make such discovery when it will subject him to forfeitures and penalties, unless these are waived by the plaintiff.[1]

In a recent English case, it was held that the plaintiff is entitled to a discovery of the sources from which the defendant's book has been compiled.[2] In the United States, courts of equity have no jurisdiction of the penalties and forfeitures imposed by the copyright laws. They must be recovered in a court of law.[3]

By the 21 & 22 Vict. c. 27, s. 2, passed in 1858, English courts of chancery were empowered to assess and award damages, either in lieu of, or in addition to, an injunction;[4] and they have this jurisdiction under the new judicial system. Before the statute of 1858, the court had, in one case, refused to give the plaintiff more than the net profits of the defendant's publication.[5] But in Mawman *v.* Tegg, Lord Eldon could not see

restricted a meaning as to exclude commissions received from the proceeds of sales of the property of the complainant"

[1] Atwill *v.* Ferrett, 2 Blatchf. 39, 44; Farmer *v.* Calvert Lithographing, Engraving, & Map-Publishing Co., 5 Am. L. T. R. 165, 170; 2 Story's Eq. Jur. §§ 1319, 1494, 1509. "It is an incontrovertible principle of equity law, that a defendant cannot be compelled to make disclosures in answer to a bill which seeks to enforce penalties and forfeitures against him by means of such discoveries. In this case, the bill claims a forfeiture under section 7 of the act of Feb. 3, 1831, of the plates and pieces of music on hand. Had the forfeiture been waived by the plaintiff, the defendants might be compelled to disclose the number of their publications, the quantity on hand, and the amount realized from sales, in aid of the recovery of damages in a suit at law. So probably on such discovery equity might compel the defendants to deliver up to the plaintiffs the forfeited copies. But the bill is clearly faulty in directly requiring the defendants to convict themselves of the act which carries with it the forfeiture sued for." Betts, J., Atwill *v.* Ferrett, *supra.*

[2] Kelly *v.* Wyman, 17 W. R. 399. "If I charge you," said James, V. C., "with having taken information from my book and you derived your information from original sources, I have a right to know what those original sources were." See also Tipping *v.* Clarke, 2 Hare, 383.

[3] See *post*, p. 548.

[4] Tinsley *v.* Lacy, 1 Hem. & M. 747; Johnson *v.* Wyatt, 2 De G. J. & S. 18; Pike *v.* Nicholas, Law Rep. 5 Ch. 260; Cox *v.* Land & Water Journal Co., Law Rep. 9 Eq. 324; Smith *v.* Chatto, 31 L. T. N. S. 775.

[5] Delf *v.* Delamotte, 3 Kay & J. 581; s. c. 3 Jur. N. S. 933.

why a court of equity, though he had never known it to be done, might not ascertain, and award to the plaintiff, the full amount of damages which he had sustained.[1]

Rule of Damages. — In Pike *v.* Nicholas, Vice-Chancellor James laid down the following rule for estimating the damages in cases of piracy: "The defendant is to account for every copy of his book sold, as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from the sale of so many additional copies." [2]

Injunctions on other Grounds than Infringement of Copyright.

Courts of equity have frequently interfered to protect the owner's rights in a literary work on other grounds than that of violation of the copyright, and have granted injunctions against publications which were not piratical.

Injunctions Protecting Titles. — There can be no copyright in a mere title;[3] but, on general principles of equity, an injunction will be granted restraining a person from appropriating the title of a well-known publication for a rival work. Nor will a person be allowed to use a title which is a mere colorable imitation of another, for the purpose of misleading the public into buying one publication in the belief that it is the other.[4] But, when the exact title is not copied, an injunction

[1] Mawman *v.* Tegg, 2 Russ. 400. "If the principle upon which the court acts," said the Lord Chancellor, "is that satisfaction is to be made to the plaintiff, I cannot see, though I never knew it done, why, if a party succeeds at law in proving the piracy, the court should not give him leave to go on to ascertain, if he can, his damages at law; or if, after applying the profits which are handed over to him by the defendants, he can show that they were not a satisfaction for the injury done to him, I cannot see why the court might not in such a case direct an issue to try what further damnification the plaintiff had sustained."

[2] Law Rep. 5 Ch. 260.

[3] See *ante*, p. 145.

[4] **Br.** Hogg *v.* Kirby, 8 Ves. 215; Constable *v.* Brewster, 3 Sc. Sess. Cas. 214; Chappell *v.* Sheard, 2 Kay & J. 117; Chappell *v.* Davidson, (in eq.) Ibid. 123; Chappell *v.* Davidson (in law) 18 C. B. 194; Prowett *v.* Mortimer, 2 Jur. N. S. 414; Ingram *v.* Stiff, 5 Id. 947; Clement *v.* Maddick, 1 Giff. 98; Bradbury *v.* Dickens, 27 Beav. 53; Kelly *v.* Hutton, Law Rep. 3 Ch. 703; Mack *v.* Petter Law Rep., 14 Eq. 431; Ward *v.* Beeton, 19 Id. 207; Metzler *v.* Wood, 8 Ch. D. 606; **Am.** Jollie *v.* Jaques, 1 Blatchf. 618, 627; Matsell *v.* Flanigan, 2 Abb. Pr. N. S. (N. Y.) 459; Osgood *v.* Allen, 1 Holmes, 185; Benn *v.* LeClercq, 18 Int. Rev. Rec. 94; Harte *v.* DeWitt, 1 Cent. Law Jour. 360.

will not be granted, unless the title and appearance of the defendant's publication are designed to deceive persons who are ordinarily intelligent and careful. Where there was a well-known comic paper named Punch, and another called Judy, and the defendant issued a publication with the title Punch and Judy, the court held that the defendant would not be at liberty to use Punch or Judy singly as a title, but refused to restrain the use of a title made up of the two words, for the reason that it was not such as to deceive persons of ordinary intelligence.[1] Where the plaintiff had simply advertised the future publication of a magazine, to be called Belgravia, the court refused to restrain the defendant from using the same title.[2]

[1] Bradbury *v.* Beeton, 18 W. R. 33. "The defendants," said Vice-Chancellor Malins, "clearly have no right to use a name which is calculated to mislead or deceive the public in purchasing; and if I thought, on the whole, that their journal was calculated to mislead persons of ordinary intelligence (for these are the persons I must consider), I should grant the injunction. Now Punch is well known both in name and appearance, and its price is three pence. Could any one be misled into buying this other paper instead, which has the words Punch and Judy printed on it in distinct letters, with a different frontispiece, and its price a penny? I am clearly of opinion that the mass of mankind would not be so misled." See also Spottiswoode *v.* Clarke, 2 Phillips, 154; Snowden *v.* Noah, Hopkins Ch. (N. Y.) 396; Bell *v.* Locke, 8 Paige (N. Y.), 75; Isaacs *v.* Daly, 7 Jones & Sp. (39 N. Y. Superior Ct.) 511.

[2] Maxwell *v.* Hogg, Law Rep. 2 Ch. 307. "That expenditure upon a work not given to the world," said Lord Justice Turner, "can create, as against the world, an exclusive right to carry on a work of this nature, seems to me a proposition quite incapable of being maintained. It never, so far as I am aware, has been thought that any such equity exists. Then, if the expenditure alone will not confer such a right, will the advertisements do so? Such an advertisement is nothing more than an announcement of an intention on the part of the plaintiff to publish in the month of October following a work under a given title. Can that be considered as constituting in him an equitable title, or any title, to the name under which that work is to be published? If it is to be considered as doing so, the consequence will be that, without having made any new publication at all, he might come to this court saying: 'I have advertised my intention to publish in October a given work under a given title, and nobody else shall publish a work under that title until I have had an opportunity of bringing my work before the public.' He does not by his advertisements come under any obligation to the public to publish the work, and therefore the effect of holding the advertisements to give him a title, would be that, without having given any undertaking or done any thing in favor of the public, he would be acquiring a right against every member of the public to prevent their doing that which he himself is under no obligation to do, and may never do.

". . . It has been argued that there is no distinction between the case of a title acquired, as the plaintiff asserts that this title is acquired, by advertisement, and a title acquired by actual publication, and that if there had been a publication of this work by the plaintiff under the title of Belgravia, there

Breach of Trust. — In Abernethy *v.* Hutchinson, wherein the plaintiff sought to prevent the publication in the Lancet of medical lectures which he had delivered to students in St. Bartholomew's Hospital in London, Lord Eldon, without determining the doubtful question of the plaintiff's property in lectures which had not been reduced to writing, granted the injunction, on the ground of breach of an implied contract or trust existing between the lecturer and his hearers. "If there is either an implied contract on the part of the student, or a trust," he said, "and if you can make out that the student has published, I should not hesitate to grant the injunction. With respect to the stranger, if this court is not to be told (and certainly it has no right to compel the parties to tell) whether the power of giving the oral lectures to the public was derived from a student or not, I think it very difficult to tell me that that should not be restrained which is stolen, if you would restrain that which is a breach of contract or of trust." "Although there was not sufficient to establish an implied contract as between the plaintiff and the defendants, yet it must be decided that, as the lectures must have been procured in an undue manner from those who were under a contract not to publish for profit, there was sufficient to authorize the court to say the defendants shall not publish."[1]

would have been an undoubted case for coming to this court to restrain another person from using that same title. It seems to me, however, that there is a great distinction between the case of advertisement followed by publication and a case resting upon advertisement only. In the case of advertisement followed by publication, the party publishing has given something to the world, and there is some consideration for the world's giving him a right; but in the case of mere advertisement he has neither given, nor come under any obligation to give, any thing to the world; so that there is a total want of consideration for the right which he claims. If this bill were to be maintained, I am not sure that a man might not advertise his intention to carry on business after a particular day under the name of a firm which had existed before, and which name might be of the greatest value, and then come into this court to restrain any other person from using that name." Ibid. 311, 312. See also Correspondent Newspaper Co. *v.* Saunders, 12 L. T. N. S. 540; Benn *v.* Le Clercq, 18 Int. Rev. Rec. 94.

[1] 1 Hall & Tw. 37, 40. Lord Eldon "had no doubt whatever that an action would lie against a pupil who published these lectures. How the gentlemen who had published them came by them, he did not know; but whether an action could be maintained against them or not, on the footing of implied contract, an injunction undoubtedly might be granted; because if there had been a breach of contract on the part of the pupil who heard these lectures, and if the pupil could not publish for profit, to do so would certainly be

The same doctrine was recognized in Prince Albert *v.* Strange,[1] where the complaint was of an unlawful use of unpublished etchings, which had been obtained by surreptitious means, to which the defendant, Strange, was not privy. The court had no doubt that the plaintiff was entitled to an injunction, on the ground of a violation of property; "but," said Lord Cottenham, "this case by no means depends solely upon the question of property, for a breach of trust, confidence, or contract would of itself entitle the plaintiff to an injunction."[2] And so, in Keene *v.* Wheatley, the Circuit Court of the United States held it to be a good ground for an injunction, that the defendant had represented the plaintiff's manuscript play, through a breach of trust on the part of an actor

a third party. If these lectures had not been taken from a pupil, at least the defendants had obtained the means of publishing them, and had become acquainted with the matter of the lectures in such a manner that this court would not allow of a publication. It by no means followed because an action could not be maintained that an injunction ought not to be granted." See also Newton *v.* Cowie, 4 Bing. 245; Murray *v.* Heath, 1 Barn. & Ad. 804; Turner *v.* Robinson, 10 Ir. Ch. 121, 510; Bartlett *v.* Crittenden, 4 McLean, 300, 5 Id. 32.

[1] 2 De G. & Sm. 652, on ap. 1 Mac. & G. 25.

[2] 1 Mac. & G. 44. "Upon the evidence on behalf of the plaintiff," continued the Lord Chancellor, "and in the absence of any explanation on the part of the defendant, I am bound to assume that the possession of the etchings by the defendant or Judge has its foundation in a breach of trust, confidence, or contract, as Lord Eldon did in the case of Mr. Abernethy's lectures, and upon this ground also I think the plaintiff's title to the injunction sought to be discharged fully established. The observations of Vice-Chancellor Wigram in Tipping *v.* Clarke, 2 Hare, 393, are applicable to this part of the case. He says: 'Every clerk employed in a merchant's counting house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk. If the defendant has obtained copies of books, it would very probably be by means of some clerk or agent of the plaintiff; and, if he availed himself surreptitiously of the information which he could not have had except from a person guilty of a breach of contract in communicating it, I think he could not be permitted to avail himself of that breach of contract.' In this opinion I fully concur, and think that the case supposed by Sir J. Wigram has actually arisen, or must from the evidence be assumed to have arisen in the present, and that the consequence must be what Sir J. Wigram thought would follow. Could it be contended that the clerk, though not justified in communicating copies of the accounts, might yet be permitted to publish the substance and effect of them? In that, as in this case, the matter or thing of which the party has obtained knowledge, being the exclusive property of the owner, he has a right to the interposition of this court to prevent any use being made of it, that is to say, he is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his. This was the opinion of Lord Eldon expressed in the case of Wyatt *v.* Wilson in 1820, respecting an engraving of

employed by the plaintiff.[1] So equity will restrain the publication of manuscripts obtained surreptitiously.[2]

False Representations as to Authorship. — In Seeley *v.* Fisher, the plaintiff was the publisher of the fifth edition of Scott's Commentary on the Bible, which contained the latest corrections and additions made by the author before his death, and not to be found in any preceding edition. The copyright had expired in the fourth edition, which was republished by the defendant, and announced "as a new and carefully revised edition of the work, and as intended to contain the whole unadulterated labors of the author, not as re-edited by a different hand and an inferior mind, but precisely as the learned commentator bequeathed them to the world; the edition being printed from the last which the author published in the vigor of his life." The Vice-Chancellor granted an injunction restraining the defendant from publishing his work with such notice, or from otherwise advertising it in such manner as to lead the public to believe that it contained the revised matter which was to be found only in the plaintiff's edition. Lord Chancellor Cottenham dissolved the injunction, on the ground that the defendant's statements did not amount to a representation that his publication contained matter which was the exclusive property of the plaintiff; and, although the defendant had represented "that any additional or other matter which was contained in any edition subsequent to the fourth was spurious, and of no value, that allegation, if untrue, was no subject for an injunction, although it might be the subject of an action, as being a libel on or disparagement of plaintiff's edition."[3]

In Byron *v.* Johnston, an injunction was granted, restraining the publication of certain poems falsely represented to be productions of Lord Byron.[4] In Hogg *v.* Kirby, Lord Eldon

George the Third during his illness, in which, according to a note with which I have been favored by Mr. Cooper, he said: 'If one of the late king's physicians had kept a diary of what he heard and saw, this court would not, in the king's lifetime, have permitted him to print and publish it.' The case of Sir J. Strange's Manuscripts, is applicable, upon this point also." Ibid. 45.

[1] 9 Am. Law Reg. 33, 101. See also Keene *v.* Kimball, 16 Gray (82 Mass.), 551, 552; Keene *v.* Clarke, 5 Rob. (N. Y.) 38, 61.

[2] Tipping *v.* Clarke, 2 Hare, 383.

[3] 11 Sim. 581. See also Archbold *v.* Sweet, 5 Car. & P. 219, considered, *ante*, p. 377.

[4] 2 Meriv. 29; see also Wright *v.* Tallis, 1 C. B. 893, considered *ante*, p. 197; Harte *v.* DeWitt, 1 Cent. Law Jour. 360.

restrained the publication of a periodical falsely represented to be a continuation of that of the plaintiff.[1]

External Likeness of Publications. — An injunction may be granted to restrain the publication of a book whose external appearance is made to resemble that of a copyrighted work, for the purpose of misleading the public to believe that the former is the same as the latter.[2]

Libellous, Immoral, and Blasphemous Publications. — In the absence of fraud or misrepresentation, a court of equity will not restrain the publication of a literary composition on the ground that it is injurious to the reputation, or hurtful to the feelings, of the person seeking relief;[3] nor, as a general rule, on the ground that it is libellous;[4] nor on the ground that it is blasphemous, immoral, or mischievous.[5] In refusing to grant an injunction against the unauthorized publication of Southey's poem, Wat Tyler, Lord Eldon said: "It is very true that in some cases it may operate so as to multiply copies of mischievous publications, by the refusal of the court to interfere by restraining them; but to this my answer is, that, sitting here as a judge upon a mere question of property, I have nothing to do with the nature of the property nor the conduct of the parties, except as it relates to their civil interests; and, if

[1] 8 Ves. 215.

[2] Spottiswoode *v.* Clarke, 2 Phillips, 154; Chappell *v.* Davidson, 2 Kay & J. 123; Mack *v.* Petter, Law Rep. 14 Eq. 431; Metzler *v.* Wood, 8 Ch. D. 606; Talcott *v.* Moore, 1 N. Y. Weekly Dig. 485. "The defendants," said Lord Romilly, M. R., in Mack *v.* Petter, "must be restrained from the publication of this work, and they are not entitled to publish a work with such a title, or in such a form as to binding or general appearance as to be a colorable imitation of that of the plaintiff." In Metzler *v.* Wood, Malins, V. C., enjoined "the defendant from publishing, selling, or offering for sale the defendant's work in or with its present form, title-page, and cover; or any other form, title-page, or cover, calculated to deceive persons into the belief that it is the plaintiff's work." 8 Ch. D. 609. This judgment was affirmed on appeal. Ibid. 610.

[3] Southey *v.* Sherwood, 2 Meriv. 435.

[4] Hime *v.* Dale, 2 Camp. 27 note *b*. Southey *v.* Sherwood, *supra*; Seeley *v.* Fisher, 11 Sim. 581; Clark *v.* Freeman, 11 Beav. 112; Brandreth *v.* Lance, 8 Paige, (N. Y.) 24. In Gee *v.* Pritchard, 2 Swanst. 413, Lord Eldon said: "The publication of the libel is a crime, and I have no jurisdiction to prevent the commission of crimes; excepting of course such cases as belong to the protection of infants."

[5] Wolcott *v.* Walker, 7 Ves. 1; Southey *v.* Sherwood, 2 Meriv. 435; Murray *v.* Benbow, 6 Petersd. Abr. 558; Lawrence *v.* Smith, Jac. 471; Martinetti *v.* Maguire, 1 Deady, 216; Shook *v.* Daly, 49 How. Pr. (N. Y.) 368. See Lord Campbell's criticism on Lord Eldon's course, in Wolcott *v.* Walker, *ante*, p. 183, note 1.

the publication be mischievous, either on the part of the author or of the bookseller, it is not my business to interfere with it."[1]

Specific Performance of Agreements. — An examination of the principles which govern courts of equity in cases relating to the specific performance of contracts, properly belongs to a treatise *on* equity jurisprudence. No further consideration of the subject will be here attempted than a reference to some adjudicated cases relating to literary contracts.

The publication of a work which is not piratical may be restrained on the ground of a violation of a covenant. Where an author has sold his copyright to a publisher, and has agreed not to prepare another work on the same subject, or not to do any thing prejudicial to the sale of the book which he has parted with, a court of equity will enjoin him or any other person from publishing a book in violation of the covenant.[2] And in Colburn *v.* Simms the law was laid down to the effect that a third person without notice may be restrained from publishing in violation of a covenant made by the author. "There is no question," said Vice-Chancellor Wigram in that case, "but that a court of equity will protect a publisher from a violation of his contract, and will interpose to restrain a party from committing any act amounting to such violation, even if that party had no previous notice."[3]

Where an author had sold to a publisher the copyright of a treatise on criminal law, and had agreed not to write or edit any other work on that subject, and was afterward advertised as about to edit Burn's Justice, a motion was made to restrain him from editing the articles relating to criminal law in that work. Lord Chancellor Brougham, in refusing to grant an injunction, said that "the defendant was at liberty to write in his closet what he pleased; and that the court would not interfere until there was a violation of the alleged undertaking by actual printing and publication."[4] But in Ward *v.* Beeton

[1] Southey *v.* Sherwood, 2 Meriv. 439.

[2] Morris *v.* Colman, 18 Ves. 437; Barfield *v.* Nicholson, 2 Sim. & St. 1; Brooke *v.* Chitty, *infra*; Colburn *v.* Simms, 2 Hare, 543; Ward *v.* Beeton, Law Rep. 19 Eq. 207; Warne *v.* Routledge, 18 Id. 497.

[3] 2 Hare, 543, 558. See also Barfield *v.* Nicholson, *supra*.

[4] Brooke *v.* Chitty, 2 Coop. (*temp.* Cottenham) 216. See also Stiff *v.* Cassell, 2 Jur. N. S. 348.

the defendant was restrained from advertising the intended issue of a rival publication, in violation of his agreement with the plaintiff.[1]

There was formerly some doubt whether a court of equity would interfere to prevent the violation of a negative covenant in a contract, if it could not compel a specific performance of the agreement affirmatively.[2] But injunctions are now granted to prevent a person from doing what he has agreed not to do, although the court may have no power to compel him to do what he has agreed to do. Thus, an actor will be restrained from performing at a theatre in violation of a covenant which he has made.[3] And the same principle has been recognized in the case of agreements between authors and publishers.[4] Where the plaintiffs had bought Beeton's Christmas Annual, with the exclusive right of using the defendant's name, and the latter had agreed to devote himself to the business of the plaintiffs, and not to engage in any other enterprise, he was enjoined from issuing or advertising an intended rival publication.[5]

In Clarke *v.* Price, where it appeared that the defendant Price, while under an agreement to prepare reports of cases for the plaintiffs, supplied like reports to other publishers, Lord Eldon held that he could neither compel Price specifically to perform his agreement with the plaintiffs, nor enjoin him or the co-defendant publishers from publishing the reports complained of.[6] But this decision was doubtless based on the

[1] Law Rep. 19 Eq. 207.

[2] Kemble *v.* Kean, 6 Sim. 333; Kimberley *v.* Jennings, Ibid. 340; Clarke *v.* Price, 2 Wils. C. C. 157; Baldwin *v.* Society for Diffusion of Useful Knowledge, 9 Sim. 393; Lumley *v.* Wagner, *infra*.

[3] Lumley *v.* Wagner, 5 De G. M. & G. 604; Montague *v.* Flockton, Law Rep. 16 Eq. 189; Daly *v.* Smith, 6 Jones & Sp. (38 N. Y. Superior Ct.), 158.

[4] Ward *v.* Beeton, Law Rep. 10 Eq. 207; Warne *v.* Routledge, 18 Id. 497.

[5] Ward *v.* Beeton, *supra*.

[6] 2 Wils. C. C. 157. "I have no jurisdiction," said Lord Eldon, "to compel Mr. Price to write reports for the plaintiffs. I cannot, as in the other case [Morris *v.* Colman, 18 Ves. 437], say that I will induce him to write for the plaintiffs, by preventing him from writing for any other person, for that is not the nature of the agreement. The only means of enforcing the execution of this agreement would be to make an order compelling Mr. Price to write reports for the plaintiffs; which I have not the means of doing. If there be any remedy in this case, it is at law. If I cannot compel Mr. Price to remain in the Court of Exchequer for the purpose of taking notes, I can do nothing. I cannot in-

ground that Price had not covenanted to prepare reports exclusively for the plaintiffs.[1] In Montague *v.* Flockton, the defendant was enjoined from acting in another theatre than that of the plaintiff, in violation of an implied covenant in his agreement with the plaintiff.[2] There appears to be no reason why literary contracts should not be governed by the same principle, or why a court of equity should not interfere to prevent the violation of a negative covenant which is not express, but is clearly implied and understood by the parties.[3]

directly, and for the purpose of compelling him to perform the agreement, compel him to do something which is merely incidental to the agreement. It is also quite clear that there is no mutuality in this contract." Ibid. 164. It was not specified how long the agreement should last, but the plaintiffs were to be "at liberty to relinquish the undertaking should they think it advisable."

[1] Referring to this decision of Lord Eldon, Lord St. Leonards said: "The whole of his judgment shows that he proceeded (and so it has been considered in later cases) on the ground that there was no negative covenant on the part of the defendant that he would not compose reports for any other person." Lumley *v.* Wagner, 1 De G. M. & G. 622.

[2] Law Rep. 16 Eq. 189. See also Webster *v.* Dillon, 3 Jur. N. S. 432; Fechter *v.* Montgomery, 33 Beav. 22.

[3] See also, concerning the specific performance of contracts relating to copyrighted works, Pulte *v.* Derby, 5 McLean, 328, 334; Crookes *v.* Petter, 3 L. T. N. S. 225; Strahan *v.* Graham, 17 Id. 457; Warne *v.* Routledge, Law Rep. 18 Eq. 499; opinion of McLean, J., *ante*, p. 362, note 1; also, Sweet *v.* Cater, Stevens *v.* Benning and Reade *v.* Bentley considered, *ante*, pp. 343, 345, 351.

CHAPTER XII.

JURISDICTION OF THE UNITED STATES COURTS.

PRIOR to 1870, the several copyright statutes of the United States provided simply that actions for piracy should be brought in any court having competent jurisdiction. They were silent as to suits in equity, except that section 9 of the act of 1831 authorized courts of the United States having cognizance of copyright cases to grant injunctions restraining the unlawful publication of manuscripts.[1] The act of 1856 provided that an action for damages against any person representing a copyrighted dramatic composition without authority should be brought "in any court of the United States."[2] Until 1870, the circuit courts of the United States had cognizance of copyright cases, irrespective of the citizenship of the parties or the amount in dispute, by authority of the act of 1819, which gave to these tribunals original jurisdiction, as well in equity as at law, of all actions and suits arising under the copyright laws, and empowered them to grant injunctions to prevent the violation of copyright.[3] The act of 1861 provided for an appeal in copyright cases to the Supreme Court of the United States without restriction as to the amount in controversy.[4]

The entire subject of jurisdiction is now governed by the Revised Statutes. Section 629[5] gives to the Circuit Courts of the United States original jurisdiction of all suits at law or in equity arising under the copyright law, without regard to the citizenship of the parties or the amount in dispute. Section 4970 provides that "the circuit courts, and district courts having the jurisdiction of circuit courts, shall have power, upon

[1] 4 U. S. St. at L. 438.
[2] 11 Id. 138.
[3] 8 Id. 481. Similar jurisdiction was given to the circuit courts and district courts having the jurisdiction of circuit courts by section 106 of the act of July 8, 1870; 16 Id. 215.
[4] 12 Id. 130.
[5] Cl. 9.

bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violations 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."

Three distinct rights are secured and protected by the copyright law. 1. Copyright, or the exclusive right of publishing and selling a printed work.[1] 2. Playright, or the sole liberty of representing a published dramatic composition.[2] 3. A right of action against any person who publishes a manuscript without authority.[3] For the violation of copyright or playright, or for the unlawful publication of a manuscript, an action at law for damages, or for the penalties or forfeitures in the cases wherein they are prescribed, or a suit for an injunction or other equitable relief, may be brought in the Circuit Court of the United States, or a district court having the jurisdiction of a circuit court, although the parties are citizens of the same State, and although the amount in controversy is less than $500. And an appeal may be made to the Supreme Court of the United States without regard to the sum in dispute.[4] Any action or suit for the violation of a right secured by the statute can be brought only in a federal court. All cases founded on any common-law right must be sued in a State court; unless the matter in dispute, exclusive of costs, exceeds $500, and an alien is a party, or the suit is between a citizen of the State where it is brought and a citizen of another State, in which case the circuit courts have jurisdiction.[5]

[1] U. S. Rev. St. ss. 4952, 4964, 4965.

[2] ss. 4952, 4966.

[3] s. 4967.

[4] U. S. Rev. St. s. 699, cl. 1.

[5] U. S. Rev. St. s. 629, cl. 1; Jollie *v.* Jaques, 1 Blatchf. 618, 627; Pulte *v.* Derby, 5 McLean, 328, 336; Little *v.* Hall, 18 How. 165, 171; Keene *v.* Wheatley, 9 Am. Law Reg. 33; Boucicault *v.* Hart, 13 Blatchf. 47; Talcott *v.* Moore, 1 N. Y. Weekly Dig. 485; Isaacs *v.* Daly, 7 Jones & Sp. (39 N. Y. Superior Ct.) 511.

Section 9 of the act of 1881 expressly empowered the courts of the United States to grant injunctions restraining the unauthorized publication of manuscripts. See Folsom *v.* Marsh, 2 Story, 118; Bartlett *v.* Crittenden, 4 McLean, 300, 5 Id. 32; Woolsey *v.* Judd, 4 Duer (N. Y.), 379, 382; Keene *v.* Wheatley, 9 Am. Law Reg. 33, 45; Boucicault *v.* Fox, 5 Blatchf. 97; Parton *v.* Prang, 3 Cliff. 537. The act of 1856 provided that actions for the violation of playright should be brought in any court of the United States. The corresponding sections 4966 and 4967 of the Revised Statutes are silent as to the jurisdiction of actions and suits brought for the invasion of playright and the publication of manu-

"Where a case arises under that act," said the Supreme Court of the United States, "we have jurisdiction, though both the parties, as in this case, are citizens of the same State. But if the act do not give the remedy sought, we can only take jurisdiction on the ground that the controversy is between citizens of different States."[1] Where complaint was made in the United States Court of the fraudulent use of the title of a musical composition, and both parties were citizens of the same State, the court said: "The question, therefore, whether the court will interfere to prevent the use of the title in fraud of the plaintiff upon principles relating to the good will of trades is not before us, as it cannot be entertained in this suit."[2] So when it is sought to enforce not the copyright itself, but a contract relating to the copyright, a federal court has no jurisdiction by virtue of the copyright statute, but only on the general ground of the citizenship of the parties.[3]

Manuscripts are protected by the common law as well as by the statute. Hence, for the unlawful publication of a manuscript, the owner may claim his common-law remedies in a State court; or, if a citizen or resident of the United States, he may seek redress under the statute in a federal court. The representation of a manuscript drama, is not a publication prohibited by section

scripts. But, as is shown in the text, jurisdiction of all cases arising under the copyright law is expressly vested in the federal courts which are further empowered to grant injunctions to prevent the violation of any right secured by the statute. Hence there can be no doubt that the jurisdiction of the United States courts in the case of dramatic compositions and manuscripts is now the same as it was under the previous statutes and as it is under the existing statute in the case of copyright. See Boucicault *v.* Hart, 13 Blatchf. 47.

[1] McLean, J., Little *v.* Hall, 18 How. 171.

[2] Jollie *v.* Jaques, 1 Blatchf. 627.

[3] Pulte *v.* Derby, 5 McLean, 328, 336; Little *v.* Hall, 18 How. 165. In the former case, Mr. Justice McLean said: "Does the question in this case arise under the copyright law? In the view above taken, the controversy arises out of the contract. The authorship of the complainant is not controverted, nor is it doubted that the copyright is vested in the defendants. There is no question, then, which can be said to arise under the act of Congress. On the construction of the contract alone, the rights of the parties depend. And in such a case I am inclined to think that the circuit court cannot exercise jurisdiction."

As to the nature of the contract in the two cases last cited, in which it was held that a State court was the proper tribunal in which to bring the action, see *ante*, pp. 355, 362. See also Gould *v.* Banks, 8 Wend. (N. Y.) 562; Willis *v.* Tibbals, 1 Jones & Sp. (N. Y.) 220; Carter *v.* Bailey, 64 Me. 458; which were actions growing out of contracts relating to copyrights, and were brought in a State court.

4967. Hence, redress for such wrong must be sought in a State court, unless a federal court has jurisdiction by reason of the citizenship of the parties.[1]

Statutory Penalties and Forfeitures must be Sued for in Court of Law. — It remains to consider whether matters relating to penalties and forfeitures are within the jurisdiction of a court of equity, or whether they belong exclusively to courts of law. This question is practically obsolete in England, where the distinction between law and equity tribunals is in effect abolished. But in the United States the subject has not lost any of its practical importance. Hence, it is necessary to examine the English as well as the American decisions on this point.

In Colburn *v.* Simms, decided in 1843, Vice-Chancellor Wigram said that he had never known of an instance in which a court of equity had ordered the forfeited copies to be delivered up, except one case before Lord Eldon, where the order had been made by consent. He held that since the House of Lords, in Donaldson *v.* Becket,[2] had declared that there could be no copyright in a published work, except by statute, a court of equity had no power in the case of a printed book to decree a delivery of copies on the principles of the common law; that such jurisdiction, if it existed, must be derived from an act of Parliament; and whether the statutes relied on in the case before the court had that effect, it was not necessary to decide, for the reason that the plaintiff was barred on other grounds from recovering the forfeitures.[3]

[1] Keene *v.* Wheatley, 9 Am. Law Reg. 33; Boucicault *v.* Hart, 13 Blatchf. 47. In considering the corresponding provision in the act of 1831, Shipman, J., said: "The jurisdiction of the courts of the United States is indeed confined by the 9th section of the act of February 3, 1831, to cases of threatened or actual printing and publication, and would probably not include the public performance of a manuscript play, unless indeed the parties should be citizens of different States. But the jurisdiction of the State courts, in suits to protect the owners of manuscripts, is complete in all other emergencies." Boucicault *v.* Fox, 5 Blatchf. 97.

For a fuller consideration of the provision of the statute for the protection of manuscripts, see *ante*, p. 124.

[2] 4 Burr. 2408.

[3] 2 Hare, 543, 553. The statutes referred to provided that the forfeited copies should be delivered to the owner of the copyright "upon order of any court of record." 54 Geo. III. c. 156, s. 4; 41 Geo. III. c. 107, s. 1. The statute now in force declares that the piratical copies of a book shall be the property of the owner of the copyright, who shall "sue for and recover the same, or damages for the detention thereof, in an action of detinue." 5 & 6 Vict. c. 45, s. 23. In Delf *v.* Delamotte, decided in 1857, the Court of

In the United States, the law may be regarded as settled that the penalties and forfeitures imposed by the statute must be sued for in a court of law. The statute of 1831 provided that in the case of a book the penalties and forfeited copies should "be recovered by action of debt in any court having competent jurisdiction thereof;"[1] and that in the case of "any print, cut, or engraving, map, chart, or musical composition," the penalties and forfeitures should "be recovered in any court having competent jurisdiction thereof."[2] In Stevens *v.* Gladding, wherein it was sought to recover the penalties and forfeitures prescribed by section 7 of the statute of 1831, for the piracy of a map, the Supreme Court of the United States held that it was not within the usual and ordinary jurisdiction of a court of equity to decree a payment of the penalties, or a delivery of the forfeited copies or plates. Such jurisdiction could be derived only from express statutory provision; and the only equitable jurisdiction in cases of copyright vested in the courts of the United States was that conferred by the act of 1819, which gave to such courts original cognizance, as well in equity as at law, of all cases arising under the copyright laws, and empowered them to grant injunctions according to the course and principles of courts of equity. "There is nothing in this act of 1819," said Mr. Justice Curtis, "which extends the equity powers of the courts to the adjudication of forfeitures; it being manifestly intended that the jurisdiction therein conferred should be the usual and known jurisdiction exercised by courts of equity for the protection of analogous rights."[3]

The law, as thus expounded by the Supreme Court in 1854, has not been changed by any statute since passed. The sections of the copyright law,[4] which impose forfeitures and penalties, do not specify in what court they shall be recovered. Section 629[5] of the Revised Statutes gives to the Circuit Courts of the United States original jurisdiction of all suits at law or in equity arising under the copyright laws; and section 4970 simply empowers circuit courts, and district courts having the jurisdiction of circuit courts, to grant injunctions to prevent

Chancery ordered the defendant to deliver to the plaintiff the forfeited copies. 8 Kay & J. 584.

[1] s. 6; 4 U. S. St. at L. 437.

[2] s. 7.

[3] 17 How. 447, 455.

[4] 4964, 4965.

[5] cl. 9.

the violation of copyright. No one of the statutory provisions above referred to, nor any other provision, gives to a court of equity jurisdiction over forfeitures and penalties.[1]

Forfeiture of Copies at Common Law. — The question has been raised whether a person, whose common-law rights in an unpublished work have been violated, is entitled to the piratical copies in the possession of the wrong-doer, and whether it is within the jurisdiction of a court of equity to order such copies to be delivered up.

In Prince Albert *v.* Strange, it appeared that the defendant had in his possession copies of etchings, taken from plates which had been surreptitiously obtained from the plaintiff. The original etchings, which had not been published, and the plates, were the property of the Queen and Prince Albert. The defendant had also prepared a descriptive catalogue of the etchings, and was intending to sell the catalogue and publicly to exhibit the etchings. Besides an injunction against such sale and exhibition, the bill prayed that the defendant be ordered to deliver to the plaintiff all copies of the etchings in his possession, and that the copies of the catalogue be delivered up to be destroyed. The relief asked was given by Vice-Chancellor Bruce,[2] and his judgment was affirmed on appeal.[3] In reply to the objection that the plaintiff was not entitled to a forfeiture of copies, the Vice-Chancellor said: "It is then said that neither the copies of the catalogue nor the impressions that have been taken can be delivered up, or be directed to be delivered up, inasmuch as the defendant contends that he is entitled to the property in the materials on which they are printed. With regard to catalogues, no such question, I think, arises. They must be either cancelled or destroyed; and without destruction they can hardly be cancelled. With regard to the impressions, it might possibly be right to attend to the defendant's claim had the impressions been upon a material of intrinsic value, upon a material not substantially worthless, except for the impressions, which, by the wrongful act of the

[1] In Drury *v.* Ewing, the Circuit Court of the United States, after the defendants had violated an injunction, ordered them to deliver to the court all the piratical copies in their possession as well as the plates on which they had been printed. 1 Bond, 554.

[2] 2 De G. & Sm. 652.

[3] 1 Mac. & G. 25.

defendant, have been placed there. That case, however, does not arise. The material here is substantially worthless, except for that in which the defendant has no property. There consequently can be no reason why the effectual destruction of the subject should not be directed by the court; in doing which, I repeat, I abstain from giving any opinion as to the particular mode of proceeding which the court ought to adopt in a similar case in all points except as to the intrinsic value of the material."[1]

It was here decided that the plaintiff was by the common law entitled to the piratical copies of his unpublished production, and that a court of equity had the jurisdiction to order them to be delivered to him. But the important principles involved in the case are either not mentioned or are merely referred to in the extended opinions of the judges. Admitting that the owner of an unpublished work is entitled to piratical copies wherever found, it is by no means clear on what principle the subject of their delivery is within the jurisdiction of a court of equity. "It is a universal rule in equity," says Story, "never to enforce either a penalty or a forfeiture."[2] It has been seen that both in Colburn *v.* Simms, and in Stevens *v.* Gladding, the latter decided by the Supreme Court of the United States, it was held that a court of equity has no jurisdiction in the case of forfeitures and penalties, unless such jurisdiction is expressly conferred by statute.[3]

"The general rule undoubtedly is," said the court in the former case, "that, where a party seeking equitable relief is incidentally entitled to the benefit of a penalty or forfeiture, the court requires him, as a condition of its assistance, to waive the penalty or forfeiture. If, therefore, this court is bound to order the delivery of the copies, the right to that relief must be found in some common-law right of the proprietor of the copy, independently of the penal provisions of the statutes, or it must be found in those words of the statute which relate to suits in equity.

"Now, I am not aware that the title of the plaintiff to the exercise of the jurisdiction of this court, to compel the delivery

[1] 2 De G. & Sm. 716.

[2] 2 Eq. Jur. § 1319. See also following sections.

[3] See also Monk *v.* Harper, 3 Edw. Ch. (N. Y.) 109.

up of the copies of the work in question to the proprietors of the copyright, has been, or can be, founded upon any common-law right anterior to or independent of the statute of Queen Anne. There would be great difficulty in applying to this subject the principles of the common law, which, in certain cases, give to the owner of an original material the right of seizing it, in whatever shape it may be found, if he can prove it to be his own, or which relate to what is termed confusion of goods, by which if one man voluntarily mixes his property with that of another, so that the two become inseparable, the entirety is held to belong to him whose property has been invaded. It may be true, that, if one writes or prints upon the paper of another, the writing or printing becomes his to whom the paper belongs; but it does not necessarily follow that the converse of that proposition would be true, — that one who writes or prints upon his own paper the composition of another, has thereby so mixed his property with the property of the author whose work he has copied, that he has lost his original title to the material which he has so employed. . . . I think, therefore, the case for the plaintiff on this point must be placed on another ground, and that his right to a decree of this court for the delivery up of the copies, if that right exists, must be found within the provisions of the statute, and not upon any common-law right independent of them."[1]

It is true that, both in Colburn *v.* Simms and in Stevens *v.* Gladding, the question related to the statutory penalties, and that, in the former suit, the Vice-Chancellor intimated that a different principle might perhaps be held to apply in a case governed not by the statute, but by the common law.[2] The statute, which imposes penalties and forfeitures, settles the question that the wronged person is entitled to the penalties and forfeitures. But unless the legislature has expressly declared in what tribunal they shall or shall not be recovered,

[1] Wigram, V. C., 2 Hare, 554, 555.

[2] Continuing the remarks quoted in the text, he said: "There might indeed have been some countenance for such a principle before the judgment of the House of Lords, in the case of Donaldson *v.* Becket, 4 Burr. 2408, had confined the exclusive right of authors within the limits prescribed by the statute, and thereby negatived the existence of that absolute common-law right in their works which had been previously supposed to exist, and which the decision in the Court of King's Bench, in the case of Millar *v.* Taylor, 4 Burr. 2303, had tended to affirm."

this question is left to be determined by the general principles which distinguish equity jurisdiction from that of courts of law. And, in the absence of such statutory direction, the jurisdiction of courts of equity, in the matter of penalties and forfeitures, is the same whether the right to them exists by the common law or is conferred by statute. Hence, if a court of equity, as was held in Colburn *v.* Simms, and Stevens *v.* Gladding, has no jurisdiction of statutory penalties and forfeitures, except by express authority of the legislature, it can have no cognizance of the same matter under the common law.

CHAPTER XIII.

COMMON-LAW PLAYRIGHT IN UNPUBLISHED DRAMAS.

Playright Defined. — A dramatic composition is capable of two distinct public uses. It may be printed as a book and represented as a drama. With respect to the former use, there is no distinction in law between a dramatic and any other literary composition. The exclusive right of multiplying copies is called copyright. But this does not embrace the right of representation. As these two rights are wholly distinct in nature, it is not only important but necessary that they should be distinguished in name. The property in a dramatic composition is often called dramatic copyright. But this expression is faulty and inaccurate. If it refers to the exclusive right of printing a drama, it would be equivalent to the name poetic copyright, prose copyright, or historical copyright, as applied to works in poetry, prose, or history. If its use is restricted to the right of representing a drama, it is not accurate; because this is not a right to multiply copies in the proper meaning of that expression, and cannot therefore strictly be called copyright. If it is intended as a name for both rights together, it can serve only to increase the confusion which should be wholly removed. The sole liberty of publicly performing a dramatic composition might more properly be called dramatic right or acting right. The expression, stageright, coined by Charles Reade, is not uncommon. But there are objections to this word with respect both to its formation and the purpose which it is required to serve. I have adopted playright as being, in my judgment, the best name for the purpose. It is a convenient euphonious word, and its formation is analogous to that of copyright. As the latter word literally means the right to copy a work, or the right to the copy, so playright means the right to play a drama, or the right to the play. And it may properly be used to mean

not only the right of representing a play, but also the right of performing a musical composition.

In the United States, playright is secured by the statute in published, and exists by the common law in unpublished, dramatic compositions. The English statute secures the right of performing both printed and manuscript dramas, and will probably be construed to have taken away common-law playright in unpublished as well as in published plays. In this chapter, the common-law rights of dramatists will be considered.

Are the Owner's Common-Law Rights Lost by the Public Performance of a Manuscript Drama?

It has been shown that the author of any intellectual production, whether it be a literary, dramatic, or musical composition, or a work of art, has in it by the common law a property which is absolute and complete until lost by some act of the owner or by the operation of some statute.[1] This property secures the owner in the exclusive enjoyment of any and every use of his production which does not in law amount to a forfeiture of his exclusive rights. The law has been settled to the effect that, by publication in print, the owner's common-law property is lost, and that in a work so published he has no other rights than those secured by statute. Hence, a dramatist may have a statutory but no common-law right to the exclusive representation of a drama which he has published in print. But the exclusive right of the owner publicly to represent a manuscript play exists by the common law, unless such public representation, by operation of the common law or by force of some statute, works an abandonment of the right.

The question, then, is raised whether the common-law property in a manuscript play is lost or prejudiced by the public performance of the play.

Public Performance not a Publication which Defeats Copyright. — It may be regarded as settled that the authorized public performance of a manuscript drama is not such a publication as will defeat a copyright afterward obtained.[2] Where it

[1] See Chap. 1.

[2] Boucicault *v.* Fox, 5 Blatchf. 87; Roberts *v.* Myers, 18 Monthly Law Reporter, 806; Keene *v.* Kimball, 16

appeared that Boucicault's Octoroon had been publicly represented in New York by the author from Dec. 6 to Dec. 12, 1859, before a copyright was applied for, it was held that such representation did not defeat the copyright, and could not "be regarded as any evidence of his abandonment of the manuscript to the public or to the profession of players." [1] So the representation of a manuscript opera in Paris was held to be no prejudice to the copyright, which was afterward secured by a first publication of the work in London.[2]

Is the authorized public performance of a manuscript drama an abandonment of the owner's common-law rights to the extent that any one without license may publish it in print or represent it on the stage? I shall first review the authorities, and then consider the true principles by which the question is to be determined.

Review of English Authorities. — The English cases which are frequently cited on this subject, but rarely with intelligence, lend but little aid to the solution of the problem. Since the 3 & 4 Will. IV. c. 15, was passed, in 1833, the right of representing manuscript as well as printed plays has been secured by statute in England; and since 1842 there has been a statutory provision declaring that the first public representation of a dramatic composition shall be equivalent to the first publication of a book.[3] The decisions in Boucicault *v.* Delafield[4] and Boucicault *v.* Chatterton,[5] in which it was held that an author forfeits his title to English playright in a manuscript drama by first representing it in a foreign country, were governed by the above and other statutory provisions. Hence, these authorities have no bearing on the question relating to the common-law rights of dramatists in the United States.

Four cases, decided before the 3 & 4 Will. IV. c. 15 was passed, are often cited on the question under consideration, but two of them have no bearing on the subject. Coleman *v.* Wathen, decided in 1793, was an action to recover the penalties, under the statute of Anne, for the unlicensed performance of

Gray (82 Mass.), 549; Boucicault *v.* Wood, 2 Biss. 34; Boucicault *v.* Hart, 13 Blatchf. 47.

[1] Boucicault *v.* Fox, 5 Blatchf. 97.

[2] D'Almaine *v.* Boosey, 1 Y. & C. Exch. 288, 299. See also Clark *v.* Bishop, 25 L. T. N. S. 908.

[3] 5 & 6 Vict. c. 45, s. 20.

[4] 1 Hem. & M. 597.

[5] 5 Ch. D. 267.

O'Keefe's Agreeable Surprise. This act secured copyright, but not playright; it prohibited unlawful printing, but not public representation. Hence, whatever may have been the common-law rights or remedies of the plaintiff, it is clear that he was not entitled to the statutory penalties, since the unlicensed performance of his play was not a violation of the right secured by the statute, and was not a thing prohibited by the statute. And this was the judgment of the court, which decided simply that representation was not publication within the meaning of the statute.[1]

In Murray *v.* Elliston, decided in 1822, the defendant was charged with representing on the stage an abridged version of Lord Byron's published tragedy, Marino Faliero, the copyright in which belonged to the plaintiff. The question was referred by Lord Eldon to the King's Bench, whose decision was that "an action cannot be maintained by the plaintiff against the defendant, for publicly acting and representing the said tragedy, abridged in manner aforesaid."[2] What weight the court gave to the consideration that it was an abridged version which had been represented cannot be determined. But this fact had no true bearing on the question involved. As the tragedy had been published in print, the plaintiff could have in it no exclusive rights, except under the statute securing copyright; and the representation complained of was not such a publication as was prohibited by the statute. Hence, there was no ground on which the defendant could be held guilty of piracy.

Macklin *v.* Richardson, decided in 1770, related to Macklin's farce, Love à la Mode, which had been publicly performed by the author, but had not been published in print by him. The defendant having employed a short-hand writer to make a report of the farce during the performance, published a part of the copy so obtained in a monthly magazine, with the announcement that the rest would appear in the next number. Such publication was rightly held to be piratical; but the court

[1] 5 T. R. 245. "The statute for the protection of copyright," said Lord Kenyon, "only extends to prohibit the publication of the book itself by any other than the author or his lawful assignees. It was so held in the great copyright case by the House of Lords. But here was no publication."

[2] 5 Barn. & Ald. 657, 661.

expressed no opinion on the question whether an unlicensed performance of the piece would have been unlawful.[1]

The latter question was directly raised in 1820, in Morris *v.* Kelly, on an *ex parte* application for an injunction to restrain the defendant from representing O'Keefe's Young Quaker. This comedy had been publicly represented by the author, but had not been printed by him.[2] It does not appear in what manner the defendant had obtained a copy. The injunction was granted by Lord Eldon; but his views of the legal principles involved do not appear in the report of the case.[3]

From this review, it will be seen that the only English authorities which bear on the question as to what effect the authorized public representation of a play has on the owner's common-law rights are Macklin *v.* Richardson, in which it was held that such representation does not entitle any one without authority to print a copy of the play got by stenography; and Kelly *v.* Morris, which is an authority in support of the doctrine that the owner's exclusive right at common law to represent a manuscript play is not lost by its public performance.

Review of American Authorities. — The question whether any person without license is at liberty to publish in print or to reproduce on the stage a manuscript play after its public performance by the owner has been judicially discussed in several recent American cases, and in none at greater length than in Keene *v.* Wheatley, where it was first raised in the United States Court in 1860.[4] This suit was brought by Miss Laura Keene, for the alleged invasion of her rights in Our American Cousin. She had bought the manuscript of this comedy from its author, Tom Taylor; and, after making in it material alterations, including additions suggested by Joseph Jefferson, an actor employed by her, she entered the title for copyright under the statute of the United States, but did not publish the play in print. It was first publicly performed at her theatre in New York in 1858. Soon after, it was brought out in Philadelphia by the defendants, William Wheatley and John S. Clarke, who were in possession of a copy of the original manu-

[1] Amb. 694.
[2] See *post*, p. 567, note 5.
[3] 1 Jac. & W. 461.
[4] 9 Am. Law Reg. 33.

script, which had been surreptitiously obtained in London, where the comedy had not then been performed. The changes and additions made by Miss Keene had been got by the defendants from Jefferson. It appeared, therefore, that the defendants, in representing the play, had derived no aid from any person who had witnessed its authorized performance. On these facts there were but two essential questions of law before the court: 1. Whether Miss Keene's statutory copyright was valid. 2. Whether the performance by her was an abandonment of her common-law rights, so as to entitle the defendants to represent the play through the means by which they were enabled to do so. The court held that the copyright was invalid, on the ground that the comedy was the production of a foreign author; that the question whether the use by the defendants of the manuscript surreptitiously obtained was not properly before the court, because this fact, though proved by the evidence, had not been alleged in the complainant's bill; but that, on the general principles of equity, independently of her property in the manuscript, the complainant was entitled to maintain the suit on the ground that the communication by Jefferson to the defendants of a material part of the play was a breach of the implied confidence between him and his employer.

Law Judicially Construed that any Person may Represent or Print Play obtained by Memory, but not by Writing, from Public Performance. — The consideration of the question whether any person without authority is entitled to print or to act a manuscript play which has been obtained from its authorized public performance was wholly extra-judicial in this case, since the defendant's representation had not been effected by this means. Nevertheless, the court entered into a long discussion of the subject, in which was advanced the novel theory that the exercise of memory is a lawful means of depriving the owner of his rights in a manuscript drama which he has caused to be publicly performed. The rule was laid down that the performance of a manuscript play before a public audience is a publication to the extent of conferring upon any spectator who has obtained it by "fair means" the right either to represent or to print it without the consent of the owner. The distinction was drawn between the exercise of memory and the

use of writing as a means of subsequent representation or publication; and the opinion was expressed that "the literary proprietor of an unprinted play cannot, after making or sanctioning its representation before an indiscriminate audience, maintain an objection to any such literary or dramatic republication by others as they may be enabled, either directly or secondarily, to make from its having been retained in the memory of any of the audience;"[1] but that no one, in order to get the play for representation, might lawfully make use of stenography, writing, notes, or any other except "fair means." And "the only fair means by which others could have obtained the words were, through their impression upon the memory of some person whose constant attendance at her performances of the play might at length enable him elsewhere to repeat or to write out its language."[2]

The language above quoted goes to the extent that it is not piratical either to represent on the stage or to publish in print a manuscript play obtained through the memory of any person who has witnessed its public performance.[3] This doctrine was afterward approved by the New York Superior Court in Keene *v.* Clarke, and appears to have been recognized by the Circuit Court of the United States in Crowe *v.* Aiken. But in neither of these cases did the decision turn on the question of memory. In Keene *v.* Clarke, the defendant was charged with unlawfully representing Our American Cousin, which he had got in the manner above described in considering Keene *v.* Wheatley. The case was brought before the General Term of the New York Superior Court on certain exceptions in law which made the views expressed by Chief Justice

[1] Cadwalader, J., 9 Am. Law Reg. 85.

[2] Ibid. 51.

[3] That the court approved the theory that the unlicensed printing of a manuscript play obtained by memory from its public performance is not violation of the owner's rights is also shown by the following language of the opinion: "In cases not legislatively provided for, the public circulation of a literary composition thus authorizes any person to republish it from any composition so circulated. If it is a dramatic composition, it may be republished either by reprinting it, or by theatrical representation. If we now recur to the case of a dramatic composition, which, though unprinted, has been publicly represented on the stage, we will see that the principle applicable must be the same, so far as this representation of it may have been the means of enabling ulterior publication to be made." Ibid. 92.

Robertson on the question here under consideration wholly extrajudicial.[1]

Crowe *v.* Aiken was brought in 1869 by the husband of the actress well known as Miss Kate Bateman, to restrain the unlicensed playing of the drama, Mary Warner, the manuscript of which Mrs. Crowe had bought from Tom Taylor. It was first brought out by her in London, in June, 1869, and in the following autumn in New York. There was no authorized publication of it in print. The defendant having, as he alleged, got a printed copy from Robert M. De Witt, a New York publisher of dramas, announced the play for performance at his theatre in Chicago. This was held to be a threatened invasion of the plaintiff's rights; and an injunction was accordingly granted. It did not appear by what means the play had been obtained for publication; but it was without the knowledge or consent of Mrs. Crowe or Mr. Taylor. The court had no doubt that "De Witt obtained the copy of the play of Mary Warner, which he furnished to the defendant in this case, either in whole or in part, through a short-hand reporter, or in some other unauthorized or wrongful way, and not by memory alone."[2] The question of memory, therefore, did not enter directly into the decision; but the court seems to have recognized the soundness of the distinction between memory and stenography, which had been advanced in Keene *v.* Wheatley, and approved in Keene *v.* Clarke.

Unlicensed Performance of Play Got by Memory Held Lawful. — In Keene *v.* Kimball, the Supreme Court of Massachusetts, in 1860, following the authority of Keene *v.* Wheatley, affirmed the doctrine that it is not unlawful to represent on the stage a manuscript play obtained through the memory of any one who has witnessed its public performance; but expressed the opinion that the unlicensed publication in print of a drama so obtained is piratical.[3] The play in controversy was Our American Cousin. The bill alleged that "the comedy, as produced at the Boston Museum, was produced in palpable imitation of the manner in which it was produced at the

[1] 5 Rob. (N. Y.) 38. See remarks of Monell, J., Palmer *v.* De Witt, 2 Sweeny, 543–545.

[2] 2 Biss. 208, 215.

[3] 16 Gray (82 Mass.), 545.

plaintiff's theatre; and that the defendant had sent his artists, or some one or more of them, or some person whom he engaged to instruct them in the proper manner of performing the comedy, to witness its representation at the plaintiff's theatre, in order that that representation might be copied by the artists in said representation at the Boston Museum." In the opinion of the court, this was no violation of the complainant's *rights*; and, as there was no allegation that the defendant had made use of stenography, or other "surreptitious means," in obtaining the play, it was held on demurrer that this omission was fatal to her suit, on the ground that "the representation by the defendant of a dramatic work, of which the proprietor has no copyright, and which she had previously caused to be publicly represented and exhibited for money, is no violation of any right of property, although done without license from such proprietor; and, as it does not appear to have been done in violation of any contract or trust, cannot be restrained by injunction."[1]

In Shook *v.* Rankin, decided in 1875 by the United States Circuit Court in the district of Minnesota, the defence of memorization was set up by the defendants, when charged with the unlawful representation of the Two Orphans. The court found that the play had not been obtained by this means, and granted an injunction; but District Judge Nelson, without expressly approving or disapproving the theory of memorization, seems to have given it some countenance.[2]

[1] Ibid. 552. I am informed that the defendant in this case was in possession of a written copy of the play, which had been obtained without the consent of Miss Keene; and that members of his company had attended her theatre merely for the purpose of learning the "stage business," &c., in order to imitate her performance of the comedy. But there was *nothing in the bill to show that* the defendant had not got the play through the memory of those who witnessed its authorized performances. On this point, the court said: "The counsel for the plaintiff in their argument have laid much stress upon the allegation that the defendant has availed himself of a surreptitious copy of the manuscript play. But there is no such allegation in the bill, and no such fact is admitted by the demurrer." Ibid. 551.

[2] 3 Cent. Law Jour. 210. The right to reproduce on the stage an unpublished opera, when obtained by memory from its public representation, was recognized *obiter* by Vice-Chancellor Bacon, in the recent case of Boosey *v.* Fairlie. "If there were no statute," he said, "he [defendant] would have been at liberty by the exercise of his memory — and some people have been so gifted — to recollect the notes of the

Unlicensed Performance of Play Obtained by Memory Held Piratical. — The same question was raised in the case of French *v.* Conolly, decided by the New York Superior Court in 1875. The defendants were charged with representing the unpublished play, Around the World in Eighty Days, which the plaintiffs had bought from the French authors, Verne and D'Ennery. The defendants pleaded that they had got the play by dramatizing Jules Verne's published story; *Le Tour du Monde en Quatre-vingts Jours.* The court found that this defence was not sustained by the facts.[1] It was shown by the plaintiff that one of the defendants had deposed in another case that he had produced the play from memory, after witnessing its authorized representation in Paris. The defendants now contended that this was no violation of the plaintiff's rights. The court held that this was not a good defence, and granted an injunction. After referring to the conflict of judicial opinion on this point, Judge Curtis said: "It would seem better to accord with justice and good morals, that the carrying away in the memory, or in the stenographic notes, of a spectator, of the contents of a play, unauthorized by the owner, is an infringement of his proprietary rights. It is a surreptitious mode of procuring the literary property of another; and, when done from motives of pecuniary gain, at the expense of the owner, is not defensible." [2]

This case is a direct authority in support of the doctrine that the unlicensed performance of a play, obtained by memory from its authorized performance, is piratical.

Unlicensed Printing of Play Got from Public Performance Held Piratical. — The question involved in Crowe *v.* Aiken, as to

airs, and perhaps more than the airs, the choruses and other things, and to have written them in music, and have had them sung and performed at his own instance. Indeed there is a very remarkable instance in the history of the theatre, when Beaumarchais' plays were exciting so much popularity in France. An English dramatist who happened to be in France, with the help of his friend, took down — not in short hand, for they could not write that, but took down — in their memories, the scenes in the *Mariage de Figaro,* and went out at the end of each scene or act and transcribed it, so that within a short period after the public representation of that play in Paris, the Marriage of Figaro was brought out on the English stage, no line of it having been printed, and no manuscript ever having been furnished to them. I say, if there was no statute, that might be done by anybody with Offenbach's music." 7 Ch. D. 309.

[1] See *post*, p. 580.

[2] N. Y. Weekly Dig. 197.

the right of any person to print a manuscript play got without license from its authorized public performance, was a direct issue in Palmer *v.* De Witt. The defendant had published without authority Robertson's Play, the manuscript of which, with the exclusive right of representation in the United States, had been bought from the author by the plaintiff. There had been no authorized publication of the comedy in print, either in the United States or in England; but it had been publicly represented by the author in London, and by the plaintiff in New York. The defendant alleged that he had obtained a copy through persons who had witnessed the performances in London, and maintained that these, as well as the representations in New York, were an abandonment of the work to the public. At the trial, the Special Term of the Superior Court of New York city, following the doctrine advanced in Keene *v.* Wheatley and Keene *v.* Clarke, decided in favor of the defendant.[1] This judgment was reversed by the General Term of the court.[2] In the opinion delivered by Judge Monell, who had dissented from the other two judges in Keene *v.* Clarke, it was maintained that the owner's rights in a manuscript play are not lost or prejudiced by its public performance; and that, no matter by what means a copy may be obtained, either unlicensed publication in print or representation on the stage is piratical.

The decision of the General Term, that the unlicensed printing of the play was an invasion of the plaintiff's rights, was affirmed by the Court of Appeals, which declared that "lectures and plays are not, by their public delivery or performance in the presence of all who choose to attend, so dedicated to the public that they can be printed and published without the author's permission. It does not give to the hearer any title to the manuscript or a copy of it, or the right to the use of a copy."[3] This language clearly expresses the true principle that the unlicensed publication in print of a play obtained from its public performance, by any means, whether writing or memory, is piratical. But the court seems to have given some weight to the consideration that there was no allegation or

[1] 7 Rob. (N. Y.) 530.
[2] 2 Sweeny (N. Y.), 530.
[3] 47 N. Y. 532, 543.

proof that the play in controversy had been secured through memory. "The fact is found," said Judge Allen, "that the defendant received the words of this comedy, and a description of the arrangement, general stage directions, division of acts and scenes, as printed by him, from one or more persons who had seen or heard the same publicly performed in England. It is not found that it was reported by the witnesses of the performance from memory; and it would be entirely consistent with the findings that copies of the play as performed, with the stage directions, &c., were surreptitiously obtained and put in the possession of the defendant." [1]

Theory of Restrictive Notice. — In Keene *v.* Clarke, the theory was judicially advanced, that the owner might reserve his rights in a manuscript play after public representation, by a restrictive notice to the spectators, which would prevent them from lawfully making any use of it to his injury. It was said that the effect of such notice was to create an understanding between the spectators and the owner of the play that they should not make any use of their remembrance of it to his prejudice, and that the violation of such understanding might, in the language of Chief Justice Robertson, who pronounced the opinion, "be restrained upon the same principle as any other betrayal of confidence; such as the disclosure of the secrets of a business, art, trade, or mystery agreed not to be divulged." Such understanding, it was further held, could not be implied as one of the ordinary terms of admission to the performance, but "might be created by indorsements on a ticket of admission, or notices publicly posted in the place of performance, or other modes. Such precautions are necessary to protect the exclusive right to an uncopyrighted production; otherwise, they would stand on the same footing as if they were copyrighted." [2]

In this country, the doctrine that restrictive notice is necessary to protect the rights of an owner in his manuscript play has met with no recognition outside the Superior Court of New York, where it was first announced in 1867. And, even there, its unsoundness was soon forcibly pointed out by Judge Monell in the following language: "Whatever means a prudent man may adopt to prevent his property from being feloniously taken

[1] 47 N. Y. 542.

[2] 5 Rob. (N. Y.) 61.

from him, it cannot, I think, be successfully contended that, if he chooses to take the risk, he may not leave it exposed without mark or other sign to designate it as his property; or that, by thus exposing it, he would lose his title, and could not afterwards recover it, or its value, from one who tortiously took it. A wrong-doer cannot get title to property, or escape the responsibility of his tortious or felonious act, merely because the owner has failed to give public notice or warning that it was not to be stolen. If carrying away in the memory of a spectator, or otherwise surreptitiously obtaining the contents of a play, is without the consent of, or unauthorized by, the owner, and therefore an infringement of his property in the play, the act is not excused by the omission of the owner to notify the audience that they will not be allowed or are forbidden to carry it away in that manner." [1]

It has also been declared unsound in the United States Circuit Court by Mr. Justice Drummond, who said that "it is not easy to see, however, how a notice can have any effect upon the rights of the owner or of the auditor. If the latter had the right to carry away the play in his memory, or take it down phonographically, and in either case to use or publish it, the notice prohibiting it could not affect or change that right." [2]

Result of Authorities. — It has now been shown that, although the novel theory relating to memory has been approved or recognized in several recent American cases, yet in every one, excepting Keene *v.* Kimball, the approval was wholly extra-judicial. In Keene *v.* Wheatley, and Keene *v.* Clarke, it was expressly shown that the authorized performance was not the means of the alleged piratical representation. Neither in Crowe *v.* Aiken, nor in Palmer *v.* De Witt, did it appear that the defendant had been aided by the memory of any person in getting possession of the play; and, in both cases, the court

[1] Palmer *v.* De Witt, 2 Sweeny, 558.

[2] Crowe *v.* Aiken, 2 Biss. 212. In determining the effect of the public exhibition of an uncopyrighted painting on the owner's rights, the Irish Chancery Court gave much consideration to the inquiry whether there had been a restrictive notice; and on the existence of such notice and the fact that the exhibition had been for the qualified purpose of obtaining subscribers for an engraving of the picture was based the decision that exhibition was not such a publication as would destroy the owner's common-law rights. Turner *v.* Robinson, 10 Ir. Ch. 121, 510.

assumed that it had been obtained by other means. There is, then, no direct authority in support of the theory that any person may publish in print a dramatic composition obtained by memory from its authorized public performance; and none that unlicensed representation on the stage under such circumstances is not piracy, except the single case of Keene *v.* Kimball, decided by the Supreme Court of Massachusetts in 1860. Against this authority is the judgment of the New York Superior Court, in French *v.* Conolly.

What is settled by the American authorities is: 1. The public performance of a manuscript dramatic composition by the author is not such a publication as will defeat a copyright afterward secured.[1] 2. No person without leave may publish in print or publicly represent the play, if obtained by fraud or through a breach of contract or confidence,[2] or if got from its lawful performance by any other means than memory.[3]

Refutation of the Theory that the Right to Use a Play may be Acquired by Means of Memory.

Of all the vagaries and erroneous notions that have gained judicial currency in construing the law of literary property, the most absurd is the theory that the unlicensed publication or representation of a manuscript play is lawful when effected by means of the memory of any witness of its authorized performance. Proclaiming it for the first time in this country, the Court said, in Keene *v.* Wheatley, that "the doctrine of the *dictum* of Buller, J., as to repetition from the memory of the audience, may be regarded as established," and that "Macklin *v.* Richardson, if to be followed as an authority, is decisive of the present case. A like remark might be made as to Morris *v.* Kelly."[4] At that time, there was no decision in the English or American reports to give the shadow of support to this theory. On the contrary, Vice-Chancellor McCoun, of New York, had declared as early as 1843, "that to

[1] See *ante*, p. 554.

[2] Keene *v.* Wheatley, 9 Am. Law Reg. 33, 101; Keene *v.* Kimball, 16 Gray (82 Mass.), 551, 552; Keene *v.* Clarke, 5 Rob. (N. Y.) 38, 61.

[3] Conceded by all the authorities on this point.

[4] 9 Am. Law Reg. 90, 95.

carry off a manuscript drama, with intent to perform the piece on the stage against the author's will, was an invasion of his common-law rights."[1] So far from being settled in England, the question had neither arisen nor been discussed. No reference to it was to be found in any reported English opinion, except the ambiguous *dictum* of Judge Buller in the obscurely reported case of Coleman *v.* Wathen, decided, under the statute of Anne, in the last century.[2] In Macklin *v.* Richardson, it was expressly found that the farce had been obtained by stenography ;[3] and there is nothing in the report of Morris *v.* Kelly[4] to show that the performance complained of was due to the memory of any person, while there are sufficient reasons for believing that it had been effected solely by means of an unauthorized printed copy.[5] Mr. Justice Hoar rightly said in 1860, after the decision in Keene *v.* Wheatley had been made, "the precise question which the case at bar presents has never been determined, so far as we are aware, in any reported case."[6]

The theory is as unsupported by principle or reason as it is by authority. No reasonable grounds have been given in its support, and it is difficult to conceive any. In Keene *v.* Wheatley, it was said that "the manager of a theatre may prevent a reporter from noting the words of such a play phonographically or stenographically or otherwise. As one of the audience, he would, in doing so, transgress the privileges conceded in his admission. But the privileges of listening and of retention in the memory cannot be restrained. Where the audience is not a select one, these privileges cannot be limited in either their immediate or ulterior consequences."[7] In Keene *v.* Kimball, the court said that Miss Keene had "em-

[1] Jones *v.* Thorne, 1 N. Y. Leg. Obs. 409.

[2] "Reporting any thing from memory can never be a publication within the statute. Some instances of strength of memory are very surprising; but the mere act of repeating such a performance cannot be left as evidence to a jury that the defendant had pirated the work itself." 5 T. R. 245.

[3] Amb. 694.

[4] 1 Jac. & W. 461.

[5] O'Keefe says: "My five Haymarket pieces, locked up in manuscript, have been repeatedly printed and published surreptitiously;" also, that the Agreeable Surprise and Young Quaker were not printed by authority. Recollections of the Life of John O'Keefe, written by himself. (2 vols. in one, Phila. 1827), Vol. II., pp. 167 200.

[6] 16 Gray (82 Mass.), 550.

[7] 9 Am. Law Reg. 85.

ployed actors to commit the various parts to me· ry; and, unless they are restrained by some contract, express or implied, we can perceive no legal reason why they might not repeat what they have learned before different audiences and in various places. If persons, by frequent attendance at her theatre, have committed to memory any part or the whole of the play, they have a right to repeat what they heard to others. We know of no right of property in gestures, tones, or scenery, which would forbid such reproduction of them by the spectators as their powers of imitation might enable them to accomplish."[1] The Chief Justice argued, in Keene *v.* Clarke, that "where the audience is not limited, as in the case of a public theatrical performance, the public are held entitled to make use of that faculty, which is necessarily addressed by such representation, to wit, the memory, for the purpose of repeating the contents of the play, even in performing it elsewhere, when the owner has laid no restraint upon such use of the knowledge so obtained and retained by memory only. . . . Remembering to a certain extent is the natural consequence of hearing, and using such recollection naturally flows from possessing it. The right of taking notes is not one of the privileges necessarily conceded by a public performance, and the use of any such artificial aids to, or substitutes for, memory may be restrained by a court as a violation of the terms of admission, or may be made part of the police of the place of performance, so as to justify not only its prevention, but even the expulsion of the offender."[2]

The effect of this reasoning is that, memory being given to man to be used, any use which can be made of it is legitimate, and that, if a spectator at a public performance is able to carry away in his memory the contents of a play unrestrained by "police" arrangements, he has acquired a lawful right to make any use of such play he chooses, however harmful it may be to the owner. This fallacy is too apparent to need serious consideration. It would be as wise to argue that because a man has hands for legitimate uses he is justified in putting them into his neighbor's pockets. Memory may be employed as a means of improvement, enjoyment, and profit, but not to

[1] 16 Gray (82 Mass.), 551. [2] 5 Rob. (N. Y.) 59, 60.

invade the rights of another, or to acquire, without consideration, title to the property of another. In paying for admission to a public performance, a spectator is entitled to such instruction and enjoyment as he may derive from witnessing and hearing the performance and from recollecting it. In other words, he is entitled to just what he pays for. This is the consideration for the price of admission. But there is no agreement express or implied, no consideration, no understanding, that the spectator shall acquire any title to the property in the play, or make of it any use against the rights of the owner. To argue that a lawful title to a play may be acquired through the exercise of memory, but not by the use of writing, on the ground that any one of the audience, by taking notes during the performance, "would transgress the privileges conceded in his admission," but that "the privileges of listening and of retention in the memory cannot be restrained," is the shallowest sophistry. In admitting the public to a dramatic performance, the owner no more transfers or concedes to any one of the audience the right to exercise his memory in getting possession of the play for subsequent use, than he does the privilege of using stenography. Nor is it easy to understand why writing notes in a theatre, even to the extent of reporting by short-hand the language of the play, is any more unlawful than exercising the memory; or why the manager has any more authority to prevent a person from taking notes during the performance, or to put him out of the theatre for so doing, than he has to exercise the same powers in the case of any one found writing a criticism of the acting or an original poem. The unlawful act is to be found in the actual or attempted use of the play; and, until unlawful use is shown to have been made or threatened, no rights have been violated. But even conceding that taking notes in a theatre may be prohibited, the fact that a spectator cannot be prevented, by police arrangements or otherwise, from retaining in his memory a knowledge of the contents of a play, does not invest him with a right of property in it, and is no reason why a court should not restrain him from taking such property of another to which he has acquired no title, or should not require him to make good the damage caused by such unlawful appropriation.

The absurdity of this distinction between the exercise of memory and the use of the pencil becomes still plainer when we consider that it is within the range of practicability to get a copy of a play from its public performance as promptly, and as effectually, by the former as by the latter method. Instances of memories remarkable by nature are not rare; and the memory, not less than the hand, can be trained to do wonders. Older than the system of stenography, and as old as Simonides, who lived about 500 B. C., is the art of mnemonics, whose teachers have shown it capable of wonderful results.[1] With entire success can the memory be so trained as to become the means of securing a copy of a play from its public performance with the promptness and ease of a stenographer. Wherein then is the principle different, whether in getting the play one person uses this means or another his skilful hand? The mnemonic faculties of actors are in constant practice; and it is practicable for a rival manager to enlist in his service men and women whose trained memories would enable them to reproduce a play after witnessing its performance but two or three times. But does this give them the right to do so? Can the ownership of valuable property be thus acquired? The proposition should need no refutation.[2]

[1] About 1609, Lambert Schenkel astonished all classes in France, Germany, and the Netherlands, by his mnemonic performances, which were so wonderful that they were pronounced by some the devil's doings.

[2] The following instances of remarkable memories are cited by Sir William Hamilton: "For intellectual power of the highest order, none were distinguished above Grotius and Pascal; and Grotius and Pascal forgot nothing they had ever read or thought. Leibnitz and Euler were not less celebrated for their intelligence than for their memory, and both could repeat the whole of the *Æneid*. Donellus knew the *Corpus Juris* by heart, and yet he was one of the profoundest and most original speculators in jurisprudence. Muratori, though not a genius of the very highest order, was still a man of great ability and judgment; and so powerful was his retention, that, in making quotations, he had only to read his passages, put the books in their place, and then to write out from memory the words. Ben Jonson tells us that he could repeat all he had ever written, and whole books that he had read. Themistocles could call by their names the twenty thousand citizens of Athens; Cyrus is reported to have known the name of every soldier in his army. Hortensius, after Cicero the greatest orator of Rome, after sitting a whole day at a public sale, correctly enunciated from memory all the things sold, their prices, and the names of the purchasers. Niebuhr, the historian of Rome, was not less distinguished for his memory than for his acuteness. In his youth he was employed in one of the public offices of Denmark; part of a book of accounts having been destroyed, he restored it

The distinction making the acquisition of a drama by stenography unlawful, but proclaiming it the legitimate spoil of

from his recollection." Lectures on Metaphysics and Logic (ed. by Mansel and Veitch, 4 vols Edinburgh, 1870–74), Vol. II., p. 223.

The story narrated by Muretus in his *Variæ Lectiones* of the wonderful memory of a young Corsican who had gone to Padua to study civil law is thus told by Hamilton: "He was a frequent visitor at the house and gardens of Muretus, who, having heard that he possessed a remarkable art, or faculty of memory, took occasion, though incredulous in regard to reports, of requesting from him a specimen of his power. He at once agreed; and, having adjourned with a considerable party of distinguished auditors into a saloon, Muretus began to dictate words, Latin, Greek, barbarous, significant and non-significant, disjoined and connected, until he wearied himself, the young man who wrote them down, and the audience who were present; 'we were all,' he says, 'marvellously tired.' The Corsican alone was the one of the whole company alert and fresh, and continually desired Muretus for more words, who declared he would be more than satisfied if he could repeat the half of what had been taken down, and at length he ceased. The young man, with his gaze fixed upon the ground, stood silent for a brief season; and then, says Muretus, '*Vidi facinus mirificissimum.* Having begun to speak, he absolutely repeated the whole words in the same order in which they had been delivered, without the slightest hesitation; then, commencing from the last, he repeated them backwards till he came to the first. Then, again, so that he spoke the first, the third, the fifth, and so on; did this in any order that was asked, and all without the smallest error. Having subsequently become familiarly acquainted with him, I have had other and frequent experience of his power. He assured me (and he had nothing of the boaster in him) that he could recite in the manner I have mentioned to the amount of thirty-six thousand words. And what is more wonderful, they all so adhered to the mind, that after a year's interval he could repeat them without trouble. I know, from having tried him, he could do so after a considerable time (*post multos dies*). Nor was this all, Franciscus Molinus, a patrician of Venice, was resident with me, a young man ardently devoted to literature, who, as he had but a wretched memory, he sought the Corsican to instruct him in the art. The hint of his desire was enough, and a daily course of instruction commenced, and with such success that the pupil could, in about a week or ten days, easily repeat to the extent of five hundred words or more in any order that was prescribed.'" Ibid. 219.

Fauvel-Gouraud tells the story that when Voltaire was at the Court of Frederick the Great, he spoke enthusiastically to the king one evening of a new poem of considerable length on which he was at work. On its completion, the brilliant literary society of Berlin was assembled at the Prussian court to hear the new poem read by its author. When the reading was finished, the king was as lavish with his praises as were his learned guests, but laughingly remarked to the philosopher that the same composition had been submitted to his criticism a few months before by one of his officers. Here the king summoned a young officer, and asked for the manuscript. He replied that it had been lost, but that he could recite the poem from memory, which he did with strict accuracy, to the great astonishment of the company and the confusion of Voltaire. Frederick now explained to the French wit that the officer, stationed behind a curtain, had heard the poem read by the author, and was thus enabled to repeat it. Phreno-Mnemotechny (N. Y. 1845), 35. In the same book, other instances of remarkable memories are given.

tenacious memories, is one merely between the modes or means of getting a play; and it is not easy to see why one method should give a better title than the other, since both are without consideration, and without the authority or consent of the owner. The simple manner of getting the play, as long as it is without consideration or authority, cannot affect the fundamental principle at issue. There is a principle of justice, older than the written law, that property can rightly be acquired only by a good consideration. Either the public representation of a play is a publication, so as to work an abandonment of the owner's rights of property therein, or it is not; and in either case the mode of obtaining it is immaterial, as affecting the owner's rights or the invader's wrong, as long as there is no consideration and no agreement.

There is, then, no foundation for the distinction which has been judicially recognized between the different means employed in obtaining a play from its public performance,—making one mode lawful and the other unlawful. The real question is, whether the public performance of a play not published or copyrighted is *per se* an abandonment of the owner's rights; and whatever may be the true solution, the principle is not affected by the means of reproduction, or by the presence or absence of a restrictive notice. This question may be regarded as virtually settled. It is conceded that the public performance of a manuscript play is not a publication prejudicial to the rights of the owner, except as far as others may become possessed of a copy through the agency of memory. As there is no sound distinction in principle between memory and any other unauthorized means of getting a copy, the doctrine of the courts, carried to its natural and logical extent, must be that, whether the play be obtained by the use of writing or the exercise of memory, or any other means without the consent of the owner, representation is not a publication destructive of the owner's common-law rights. This is the true doctrine. It was affirmed, as has been seen, by the New York Superior Court, in French *v.* Conolly,[1] and it will doubtless be adopted by the courts hereafter.[2]

[1] See *ante*, p. 562.

[2] Monell, J., gave expression to the following sound views on this subject, in delivering the opinion of the General

Common-Law Rights in United States not Prejudiced by Public Performance of Play. — The true principle which governs the question relating to the effect of public representation on the owner's exclusive rights in a manuscript dramatic composition has been wholly overlooked in the recent judicial discussions

Term of the New York Superior Court in Palmer *v.* De Witt: —

"It seems to me that any surreptitious procuring of the literary property of another, *no matter how obtained*, if it was unauthorized and without the knowledge or consent of the owner, and obtained before publication by him, is an invasion of his proprietary rights, if the property so obtained is made use of to his injury. Each of the learned justices admits that a play cannot be lawfully taken down by a short-hand writer from the lips of the actors during a public performance. If taken thus by a stenographer, is it different, in its legal effect and resulting consequences, from committing to memory and afterwards writing it out? In principle it is not. They are only different modes of doing the same thing, and, if without the author's consent, are alike injurious to his interests. The objection is not to the committing a play to memory, for over that no court can exercise any control, but in using the memory afterwards as the means of depriving the owner of his property. Such use, it seems to me, is as much an infringement of the author's common-law right of property, as if his manuscript has been feloniously taken from his possession. I can see no difference. . . . Upon a careful consideration, therefore, of the subject, I have not been able to appreciate the distinction which the learned judges, in Keene *v.* Wheatley and Keene *v.* Clarke and Crowe *v.* Aiken, have attempted to draw between different modes of obtaining the contents of a manuscript play from its public performance. They are equally objectionable, and are merely different modes of depriving an author of his literary property; and therefore any *mode* which effectuates that purpose is unlawful." 2 Sweeny, 557, 559.

And so in Boucicault *v.* Fox, although the question as to the distinction between memory and writing was not raised, Mr. Justice Shipman took the strong ground that "there can be no evidence of abandonment to the public of any rights growing out of the authorship of a manuscript drawn from the mere fact that the manuscript has, by the consent and procurement of the author, been read in public by him or another, or recited or represented by the elaborate performances and showy decorations of the stage. If the reading, recitation, or performance is conducted by his direction, by his agents, for his benefit and profit, with the sanction of the law, how can it be said to be evidence of his intention to abandon his production to the public? Suppose Mrs. Kemble were to read in her unrivalled manner a drama of her own production, would the reading be a dedication to the public, and authorize any elocutionist to read it, who could obtain a copy, against the consent of the author? How would it change the matter, if she should, instead of reading the play, have it brought out by a company at Wallack's or the Winter Garden, with all the embellishments which the stage can lend? The true doctrine is, that the literary property in the manuscript continues in the author so long as he exercises control over it, or has the right to control it; and, until its publication, no one has a right to its use, or that of its contents, without his consent. Therefore any special use of it by him in public, for his own benefit, is a use perfectly consistent with his exclusive right to its control, and is no evidence of abandonment." 5 Blatchf. 98.

of the subject. If such rights are lost, restricted, or prejudiced by public representation, it must be either by force of the common law or by operation of some statute. It has been shown elsewhere in this work that by the common law no rights in an intellectual production are forfeited by a publication of any kind. The property in a literary work is not, by the common law, prejudiced even by its publication in print. As far as the common law is concerned, the owner's rights are the same after publication in print as they were before. The now settled doctrine that there can be no copyright after publication except under the statute is based on the ground, not that publication is by the common law an abandonment of the author's rights, but that the common-law property in a published work is taken away by operation of the statute.[1]

It is then clear, both on principle and authority, that the property in a manuscript play is not injuriously affected by authorized public representation, unless by the operation of some statute. Now, in the United States, there is no statute which can have this effect, because there has been no legislation relating to manuscript dramatic compositions. Statutory playright is secured in published compositions alone, and representation is not publication within the meaning of the statute. When a dramatic composition is published in print, the owner's common-law rights are destroyed by operation of the statute, to which he must look for protection. But property in a manuscript play is governed exclusively by the common law, and is in no wise affected by any statute. Hence, in the United States, the owner's rights in a manuscript play are not prejudiced by its authorized public representation.

Representation made Equivalent to Publication by English Statute.—In England, the question is affected by other considerations. Parliament has granted the exclusive right of representing not only printed, but also manuscript, dramatic pieces.[2] The latter, equally with the former, are brought within the operation of the statute. Moreover, it is expressly declared that the public representation of a dramatic composition shall be equivalent to the publication of a book.[3] There

[1] See *ante*, p. 116. [2] 3 & 4 Will. IV. c. 15. [3] 5 & 6 Vict. c. 45, s. 20.

can be little doubt that statutory playright in a manuscript play can be secured only on the conditions imposed or implied by the statute, one of which is that the first public performance of the piece shall be in the United Kingdom.[1] Hence, where it appeared that a manuscript drama had been first publicly represented in a foreign country, it was held that the title to English playright was thereby forfeited.[2]

Has Common-Law Playright been taken away by English Statute? — It is an important question whether the exclusive right of representing a manuscript play has existed by the common law in England since it was secured by the 3 & 4 Will. IV. c. 15, passed in 1833. There is no doubt that the common-law right was in full force until the act of William was passed, and it still remains unless it has been taken away by the operation of that statute or the 5 & 6 Vict. c. 45. This question has not been judicially considered, and I have found no discussion of it. *It should have been, but was not, raised in Boucicault v.* Delafield and in Boucicault *v.* Chatterton.[3] In each of these cases, the plaintiff claimed the exclusive right of representing a manuscript drama which he had caused to be performed in the United States before its public representation in England. There was little doubt that by the first performance of the play in a foreign country he had forfeited his claim to protection under the English statute; and it was so held by the court. But the question whether the common-law property in the play had been lost was not referred to in either case.

The settled doctrine that there is no copyright by the common law in a book after its publication is based on the reasoning that in securing the right by statute the legislature intended to take away the right recognized by the common law. In other words, the statutory was given as a substitute for the

[1] See *post*, p. 604.

[2] Boucicault *v.* Delafield, 1 Hem. & M. 597; Boucicault *v.* Chatterton, 5 Ch. D. 267. These two cases were decided under section 19 of the International Copyright Statute 7 & 8 Vict. c. 12, but they might have been properly decided without any reference to this act. See *ante*, p. 294, and p. 295, n. 3. There is little doubt that, independently of this provision, public representation of a manuscript play in a foreign country would be held to defeat the exclusive rights conferred by 3 & 4 Will. IV. c. 15, and 5 & 6 Vict. c. 45. See *post*, p. 604.

[3] *Supra*.

common-law right. When a manuscript is published within the meaning of the statute, the common-law right ceases, and the statutory copyright vests, provided there has been a compliance with the conditions of vestment. The soundness of this reasoning is open to criticism, and it has been criticised in that part of this work where it is maintained that the statute cannot rightly be construed to have destroyed the common-law property in a literary production.[1] But whether sound or unsound, the reasoning which has been applied to the copyright statute is equally applicable to the statute which secures playright. Applying to the latter act the same principles of construction which have been held to govern the former, it will follow that in granting the exclusive right to represent a manuscript play the legislature intended to supersede the common-law right; and that when a play is published within the meaning of the statute the common-law right ceases, and the statutory right attaches on certain conditions. Now, within the meaning of the statute which secures playright, a manuscript dramatic composition is published when it is publicly represented; because not only is the relation which representation bears to playright analogous to that which publication bears to copyright, but the statute expressly declares that the public performance of a dramatic composition shall be equivalent to the publication of a book.[2] Hence, the conclusion to which we are brought is that, in England, the common-law right to the exclusive representation of a manuscript play is lost by the public performance of the piece, and that thereafter the only protection to which the owner is entitled is that given by the statute. This construction is in harmony with that which has been given to the copyright statute, and it is probable that it is the view which will be adopted when the question shall be presented for judicial determination.

General Principles Governing Property in Unpublished Plays.

Acquiescence in Unlicensed Performances. — The principle has been recognized that the owner's common-law property in a

[1] See *ante*, p. 20, *et seq.*

[2] 5 & 6 Vict. c. 45, s. 20.

play may be forfeited by acquiescence in its unlicensed use. No general rule can be given as to how long or by how many persons or in how many places the unlicensed representations of a play, without objection on the part of the owner, must be shown in order to prejudice his rights. But it would seem that a general and long-continued unlicensed use should be made to appear, and there is no doubt that the owner must be shown to have had knowledge of this fact.[1]

Common-Law Rights Lost by Authorized, but not Unauthorized Publication. — When a dramatic composition is published in print, by authority, all common-law rights in it are lost.[2] The composition becomes public property unless a valid copyright is secured under the statute. And this is equally true whether the publication be made in one country or in another; whether in the United States or in Europe.

But only an authorized publication works an abandonment of common-law rights. These are not prejudiced when a play is published without the consent of the author or owner.[3] In Crowe *v.* Aiken, the defendant pleaded that it was by printed

[1] See consideration of this subject in the case of published works, *ante*, p. 504 *et seq.* See also Boucicault *v.* Wood, 7 Am. Law Reg. N. S. 550; S. C. 2 Biss. 40; Keene *v.* Clarke, 5 Rob. (N. Y.) 66, 67. In his dissenting opinion in Keene *v.* Clarke, Monell, J., said: "I cannot concur in the opinion that the plaintiff lost her literary property in the play, merely because it was acted from a manuscript, made up from memory, at various times and places, without the sanction or knowledge of the plaintiff, nor even if it was thus acted with her knowledge, but without her consent. I do not think the title to literary property is divested, or the right to its exclusive possession lost, by merely suffering infringements of such rights to pass unnoticed. An owner is not obliged to involve himself in expensive litigation with every wrong-doer, for the purpose of preserving or protecting his right ultimately to assert his title; and certainly, without proof of some actual dedication, nothing that falls short of a long-continued acquiescence in surreptitious performances of a play would be sufficient to imply a dedication. The infringements in this case, as disclosed by the evidence, were, as far as it appears, without the plaintiff's knowledge, and certainly without her consent. I cannot, therefore, yield to the conclusion that, under such circumstances, the presumption could be justified that the plaintiff intended to dedicate her property in the play to the public. At most, to authorize such presumption, the surreptitious performances must have been so long continued, in so many different places, and under such circumstances, as to reasonably imply knowledge in the owner and therefore assent; otherwise knowledge, coupled with such continued performance, must be affirmatively shown." 5 Rob. (N. Y.) 70.

[2] Boucicault *v.* Wood, 2 Biss. 34. See authorities in the case of books cited, *ante*, p. 101, note 4.

[3] Boucicault *v.* Wood, 2 Biss. 34, 39; Crowe *v.* Aiken, Ibid. 208, 211; Palmer *v.* De Witt, 2 Sweeny (N. Y.), 530, 551, on ap. 47 N. Y. 532; Shook

copies that he was enabled to represent the drama in controversy; but this defence was overruled when it appeared that these copies had been published without license, and that there had been no authorized publication of the play.[1]

In the recent case of Shook *v.* Neuendorff, in the New York Supreme Court, the plaintiffs claiming by purchase from the authors, Alexandre Dumas and Pierre de Newsky, the exclusive right of performing *Les Danicheffs* in the United States, sought to prevent the defendant from bringing out a German version. In defence, it was alleged that a German translation of the play had been published in Austria by authority of the person to whom the authors had sold the right of representation in that country, and that it was this translation that the defendant was intending to represent. The court held, at the special term, that it was not enough to prove that the play had been published abroad in print; but that such publication must be shown to have been authorized by the authors of the drama. The injunction, therefore, was granted.[2]

v. Neuendorff, 11 Daily Reg. (N. Y.) 985. See also views of Monell, J., *ante*, p. 577, note 1.

In Boucicault *v.* Wood, Drummond, J., said: "The fact that the two unpublished plays, after having been entered here, were published in England, would make no difference [in the plaintiff's rights], unless that publication was with the consent of the plaintiff. No one would have the right to import and use them. Such consent, however, would be an abandonment of his rights, under our laws, and place him simply in the position of an ordinary English dramatist, who had published his plays in his own country; but this consent must be affirmatively proved." 2 Biss. 39. See *ante* p. 512.

[1] 2 Biss. 208, 211.

[2] In the opinion as reported in the N. Y. Tribune, Feb. 7, 1877, Mr. Justice Donohue said: "Where, as in this case, a defendant sets up no title other than the abandonment by its author of the play to the public, sets up no equitable title to it, he must be prepared to show an authorized use beyond any doubt of the play which he claims the right to perform. This, it seems to me, the defendant has not done in this case. The principal ground he puts his case on is that what he proves as an abandonment could not have existed without such being the fact. Unfortunately, too many instances of unauthorized use of other people's property exist to make the presence of such use proof of its being rightful, and on the ground of such abandonment or permission I find against him. The claim that the plaintiffs themselves do not pretend that they will lose money by the defendant's performance, and so are not entitled to an injunction, is without weight, because, should plaintiffs not enjoin this defendant from acting, it will be an evidence to others that plaintiffs have permitted the public use of the play and will so destroy their right. Some other party will come forward, and, as a defence to the use of the play in English, will show the defendant's performance, and argue, as defendant now does, that it must have been authorized, or it would not have occurred."

This judgment was affirmed on appeal by the General Term of the Supreme Court.[1]

In this case, and in Boucicault *v.* Wood,[2] it was held that the burden of showing an authorized publication was on the defendant.

In Palmer *v.* McDonough, application was made in the United States Circuit Court to restrain the defendant from performing After Dark, the right of representing which in the United States the plaintiff had bought from the author, Boucicault. The bill alleged that the play had not been printed. It appeared, from affidavits made on the part of the defendant, that, before its representation in New York, printed copies of the play had been on sale in London; that the defendant had obtained one of these copies; and that printed copies had been offered for sale in New York. In denying the motion for a preliminary injunction, Nelson, J., said: "Now, although there is no direct evidence that the printed publications in London were prior to the assignment to the complainant, or that they were made with the assent of the author, yet taking into account the fact of the printed copy being on public sale in the city of New York, where the complainant resides, we are of opinion that, as it respects the complainant himself, who is the party exclusively interested in this country, a case has not been made that would justify us in granting a preliminary injunction. Some explanation in a more authentic form than can be made by affidavits should be made of the several printed copies on sale, as is shown both in London and the city of New York. And for this reason the injunction should be withdrawn till the hearing on the pleadings and proofs."[3]

[1] 11 Daily Reg. (N. Y.) 985. In delivering the opinion, Davis, P. J., said: "The defendants did not establish on the trial to the satisfaction of the court below, that the German translation of the play had been published or used by the authority of the authors, and it was held that, in the absence of such authority, the defendant acquired no right to use the play in the United States by reason of its unauthorized publication in German. . . . It may be made to appear on the trial that the publication in German was with authority, in which event the case may assume a different aspect; but, as it now appears before us, we think the decision of the court below was correct for the reasons assigned in the opinion of Judge Donohue."

[2] 2 Biss. 34, 39–40.

[3] This opinion is published in the N. Y. Times and the Tribune, Aug. 12, 1869. I have not found it reported in any authoritative report, or in a more accessible publication than the above.

Dramatizations, Adaptations, and Translations. — The same principle which governs original plays is equally applicable to dramatizations, adaptations, and translations. When unpublished, these are protected by the common law, although the original from which the translation or adaptation has been made is a published work. But when the stage version itself is published in print, the common-law rights therein are lost, as in the case of an original drama. In the United States, a dramatist is entitled under the common law to protection for his own unpublished translation of a published foreign play, or his own unpublished dramatization or adaptation of a novel published in a foreign country. In such case, the published drama or story is common property in this country, and may be translated, dramatized, or adapted for the American stage by any person. Each dramatist will have exclusive rights in his own production. But no one will be entitled to represent the version made by another.

In the case of Tompkins *v.* Duff, which came before the New York Supreme Court in 1878, the plaintiffs claimed the exclusive right of representing The Exiles, of which Victorien Sardou and Eugene Nus were the authors. The play, however, was not original with these dramatists, but had been founded on or produced from the novel *Fonctionnaires et Boyards*, written by Prince Joseph Lubomirski. And when it appeared that the defendants had not taken the plaintiff's adaptation, but were in possession of a dramatization made by George Fawcett Rowe, from the published novel, the injunction which had been granted was dissolved.[1] The law in this case was clear. No person without authority had the right to use the version owned by the plaintiffs. But any person was free to represent an independent dramatization of the published romance.

In French *v.* Connolly, decided by the New York Superior Court in 1875, it appeared that Jules Verne had published in France a story called *Le Tour du Monde en Quatre-vingts Jours*. With the aid of the French dramatist D'Ennery, he afterward wrote a play bearing the same name as the story. The two

[1] See N. Y. Tribune, March 1, 3, 14, 1878; also 13 Daily Reg. (N. Y.) 421, 493.

productions were in many respects alike; but the drama contained some characters, incidents, and scenes not found in the story. The play was not published in print. An English translation was made with the title Around the World in Eighty Days; and the exclusive right of representation in the United States was sold to the plaintiffs. When the defendant was charged with invading the plaintiffs' common-law rights, he pleaded that he had obtained the play by dramatizing the published story. If this defence had been true in fact, it would have been good in law. The published story was common property in this country, and its *bona fide* dramatization would not have infringed any rights in the unpublished play. But the fact was found by the court that the defendant's version contained "what is not found in the original story, but is found in the plaintiff's play; and, unless adapted from the latter, it could not be very satisfactorily accounted for." An injunction was therefore granted.[1]

Immoral Plays. — The courts will not protect any person in the exclusive right of representing an immoral play.[2]

Foreign Dramatists. — The common law makes no distinction between a native and a foreigner.[3] In nearly all of the cases wherein the American courts have protected the common-law property in unpublished plays, the plaintiffs have been the assignees of foreign dramatists.

Transfer of Playright. — The owner's rights, either in whole or in part, in an unpublished play, may be transferred by parol.[4]

When two persons claim by purchase from the author the exclusive right of representing a manuscript play, he will be

[1] 1 N. Y. Weekly Dig. 196. See also French *v.* Maguire, 55 How. Pr. (N. Y.) 471, and Shook *v.* Rankin, *post*, p. 583; also *post*, p. 596.

[2] In Shook *v.* Daly, 49 How. Pr. (N. Y.) 368, the defence was set up that the unpublished play in controversy, Rose Michel, was immoral. "If this play," said Curtis, J., "or any literary production, is of that character, it is no part of the office of this court to protect it by injunction or otherwise. The rights of the author are secondary to the right of the public to be protected from what is subversive of good morals. But the examination of the original manuscripts fails to show that either version is amenable to this charge." See also Martinetti *v.* Maguire, 1 Deady, 216; Keene *v.* Kimball, 16 Gray (82 Mass.), 548–549.

[3] See *ante*, p. 106.

[4] See *ante*, p. 104.

protected who shows the better title, provided, of course, his title is good.[1]

Important questions may arise as to the rights of a person who has acquired not the absolute property in a play, but a limited right or interest. The law on this point has not been fully and clearly expounded by the courts; but the principles governing the subject are tolerably clear. When a person, native or foreigner, owns the absolute property in an unpublished drama, he is entitled to the exclusive right of representing it in the United States. He may license one or more persons to perform it anywhere, without giving to any one the exclusive right of representation. In this case no licensee, but only the owner, may complain of unauthorized performances. The owner may grant the exclusive right of representation for any named part of the country, as any State or city. Within such territory, no one without the consent of the grantee has the right to use the play.[2]

What are the rights of a person who is not the owner of the entire property in an unpublished drama, but has acquired the exclusive right of representation in the United States? Let us suppose a case. A French dramatist writes an original play, which is performed in Paris, but is not published in print. He sells to one person the exclusive right of representation in Great Britain, and to another the exclusive right of representation in the United States. To each buyer is given a copy of the French original; and each, independently of the other, prepares a translation or version, for use in his own country. While the American owner is thus vested with the sole right of representation throughout the United States, the play is produced on the stage by another person, who pleads that he is representing, not the American, but the English version, which he has obtained from the English assignee. Is this a good defence?

This question is not settled by direct authority. It must be treated on principles. It is clear that the original author, though a foreigner, has in the United States a perfect right to

[1] See Wallack *v.* Daly, 1 N. Y. Weekly Dig. 198; Shook *v.* Daly, 49 How. Pr. (N. Y.) 366; also Widmer *v.* Greene, 14 Daily Reg. (N. Y.) 529.

[2] See Roberts *v.* Myers, 13 Monthly Law Reporter, 396.

the exclusive representation of the play as long as it remains unpublished, and until he parts with that right. When he transfers the exclusive right of performance in the United States to any person, such person becomes vested with all the author's common-law rights in this country, and the author becomes divested of them. The author then has no right himself, and hence cannot confer upon any third person the right, to represent the play in this country. In like manner, the English assignee has and can confer no rights in this country. The play being nowhere published in print, the American owner's common-law right of representation in the United States is as complete as it would be if he were the original author and absolute owner of the play. And that right is invaded when any person without the consent of the American owner represents the same play, or any translation, adaptation, or version, which is a substantial copy of the original. For the American owner bought not merely a particular translation or adaptation of the original for use in the United States, but the play itself. His rights extend, as far as the United States is concerned, to all copies and versions which are in substance the same as the original.

In the case above supposed, the English version could not, in my judgment, be lawfully represented in the United States, without the consent of the American owner. Of course, when the original play is anywhere published in print by authority of the author, it becomes common property in this country at least, and may be translated or adapted by any person.

Facts somewhat similar to those above supposed were presented in Shook *v.* Rankin, decided in 1875 by the United States Court in the Northern District of Illinois. The plaintiffs alleged that D'Ennery and Cormon, the French dramatists, had sold to N. Hart Jackson the exclusive right of representing The Two Orphans in the United States; that this play had been performed in Paris, but had not been published in print; that Jackson had prepared and copyrighted in the United States an English version, and had then transferred all his rights to the plaintiffs. The defendants claimed to be in possession of an adaptation of the play, which they alleged had been made by John Oxenford, for use in England, with the

consent of the authors. The court restrained the defendants from representing the Jackson translation; but refused to enjoin them from using the Oxenford version, and afterward decided that they were free to use it.[1]

Neither the essential facts nor the precise questions decided can be satisfactorily ascertained from the report of the case. The suit was decided under the copyright statute, and not the common law. But the report throws little light on the vital question whether the Jackson translation had been published in print. If it had, there was no common-law property in it; if it had not, the statutory copyright was not valid. Assuming that it had been published in print, and that there was a valid copyright in it, there is no doubt that the plaintiffs had the exclusive right under the statute to represent that translation. It is equally clear that they could not prevent the defendant from performing the Oxenford version. For the original play being the production of foreign authors, the statutory copyright secured to the plaintiffs the sole right of performing only their own translation; and this having been published in print, whatever common-law rights they had in the play were clearly gone. The case was further complicated by the fact that a story founded on the drama, and entitled The Two Orphans, had been published in print by authority of the complainants. What effect this publication had on the statutory rights of the complainants in their play, it is not material here to consider. But, as far as the story was substantially the same as the play, the publication of the former was destructive of the common-law property in the latter. As neither of the parties was a citizen of the State in which the suit was brought, the court had no jurisdiction of any common-law question.

The decision, then, determines nothing concerning the question whether the use of the Oxenford adaptation would have been an invasion of the common-law property in the Jackson translation. But, if the play was unpublished, and the story founded on it had not appeared in print, the plaintiffs' common-law rights would have been complete, and would have been

[1] 6 Biss. 477, 482, note.

violated, according to the above reasoning, by the unlicensed performance of the Oxenford version.[1]

Remedies for Violation of Playright. — The common-law remedies for the violation of playright are, in equity, the injunction, account of profits and discovery,[2] and, in law, the action for damages. Redress must be sought in a State court, unless a federal court has jurisdiction by virtue of the citizenship of the parties.[3]

At common law, there is no prescribed limit, as under the statute, to the amount of damages which may be recovered for the piratical use of a play. The extent of the damage sustained by the plaintiff is a question of fact to be determined on the evidence by the jury.[4]

[1] Shook & Palmer of the Union Square Theatre, New York, obtained tiff, restraining the defendant, who was a citizen of California, but who had been served with the summons and injunction order while temporarily in New York, from representing a play in San Francisco in violation of the plaintiff's rights. 55 How. Pr. (N. Y.) 471. in several western courts, state and federal, injunctions restraining McKee Rankin from performing The Two Orphans. See 3 Cent. Law Jour. 201. But most of these cases are not reported in any accessible publication. The report of Shook *v.* Rankin, Ibid. 210, in which an injunction was granted in St. Paul, Minn., by United States District Judge Nelson, throws little light on the questions considered in the text. An injunction was refused on technical grounds by the United States Circuit Court in Boston, in Tompkins *v.* Rankin, Ibid. 443.

[2] See Chap. XI.

[3] See Chap. XII. In French *v.* Maguire, decided by the special term of the New York Supreme Court in August, 1878, Daniels, J., held that the court had jurisdiction to grant an injunction in favor of a resident plain-

[4] In Boucicault *v.* Wood, Drummond, J., said to the jury: "But you will see that under this branch [common law] of the case there is no limit as in the statute to the amount of damages; but it simply then comes, if you believe that the defendant is responsible in damages for the representation of these plays, to the question as to the damages which the plaintiff has actually sustained by the use of the plays by the defendant. That is a question of proof, to be determined by the evidence in the case and in relation to which you are to form your own conclusions." 7 Am. Law Reg. N. S. 550.

CHAPTER XIV.

WHAT IS A DRAMATIC COMPOSITION WITHIN THE MEANING OF THE STATUTE.

The 3 & 4 Will. IV. c. 15, gives to the author of "any tragedy, comedy, play, opera, farce, or other dramatic piece or entertainment," the sole liberty of representing it. This right is affirmed by 5 & 6 Vict. c. 45,[1] which further declares that "the words 'dramatic piece' shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment."[2] This definition is little more than an enumeration of certain things which are commonly recognized as dramatic productions. It does not afford a satisfactory test by which may be determined, in all cases, what is a dramatic piece within the meaning of the law. The statute of the United States[3] grants to the owner of a copyrighted "dramatic composition" the exclusive right of publicly representing it, but does not indicate more specifically what kinds of productions are entitled to this protection.

The important question is presented, therefore, what is a dramatic composition within the meaning of the law? This question has not been solved by the legislature or the courts, although some light is thrown on it by several decisions. On the one hand, it may be contended that the legislature used the words "dramatic composition" in their ordinary and popular meaning; which is that of a production, such as a tragedy, comedy, farce, opera, which has been expressly written and adapted for public performance. But even here a difficulty arises. A work not intended for the stage may be in substance a drama, and may be easily adapted for representation. Is it excluded from the operation of the statute because it is not, in

[1] s. 20. [2] s. 2.
[3] U. S. Rev. St. s. 4952.

form and name, a drama? Again, if fitness for public performance is the test of a dramatic composition, are songs within the purview of the statute? These are hardly dramatic compositions in the ordinary meaning of the expression; yet they are often more valuable for public singing than for printing. On the other hand, it may be maintained that any production which has the essential elements of a drama, and which is a dramatic composition in any true meaning of the word, however comprehensive, must be taken to be embraced within the operation of the statute.

Let us first try to ascertain what are the essential characteristics of a dramatic composition in a broad sense, and what are the general boundaries separating dramatic from other productions.

Comprehensive Meaning of Dramatic Composition.

Drama, from the Greek *δρᾶμα*, action, *δρᾶν*, to do or act, is usually defined as a literary composition in which the action is not narrated or described, but represented.[1] This definition is faulty, at least for the purposes under consideration, and it is hardly possible to give one which will be concise, intelligible, and accurate. The depiction of action is an essential and distinguishing feature of a dramatic composition. A production without this quality, as a description of scenery or a treatise on mataphysics, is without the essence of a drama. The manner in which the subject is treated is also a prominent characteristic of the dramatic form. In the drama, events real or imaginary are represented as actually occurring. Characters are introduced as living, speaking, and acting. By their words, expression, and action, the story is told, the plot unfolded, emotions and passions expressed, character portrayed. Thus,

[1] "Poem accommodated to action; poem in which the action is not related, but represented." Johnson. "A poem or prose composition in which the action or narrative is not related, but represented." Worcester.

Bacon divides poetry into narrative, representative and allusive. "The narrative is a mere imitation of history, with the excesses before remembered; choosing for subjects commonly, wars and love, rarely state, and sometimes pleasure or mirth. Representative is as a visible history; and is an image of actions as if they were present, as history is of actions in nature as they are (that is) past." Advancement of Learning, Book II., Poesy.

what is real or supposed to be real in life, what has been said or done, or supposed to have been said or done, is directly imitated by persons representing the original actors. The reader of the drama or the spectator of its performance is supposed to see and to hear the real characters, and to be a witness of events actually occurring.

When the subject-matter is not thus represented, but is given in the form of narrative or description, the composition is usually regarded as not a drama. But all productions in which actions are described or narrated cannot be excluded from the class of dramatic compositions, at least according to the meaning which must be given to that expression in law. In many dramas, important scenes are represented on the stage by action without words, and hence can only be described in written language. A pantomime or a ballet may be a drama.[1] The acting of either is a dramatic representation; the written description or directions for the actors is a dramatic composition in which the action or story is narrated. Indeed, many scenes or occurrences constituting, in themselves, dramas or material parts of dramas can be represented on the stage by action alone; in language they can only be described. Yet they are dramatic productions.

A drama should also have dramatic unity and interest enough to make its representation on the stage practicable, and to some degree effective. A prosy history of events, filling a long series of years, or occurring in times and places widely distant from one another, would be wholly unsuited for public performance, and could not be regarded as a dramatic composition. But a record of important deeds, showing unity of time, place, and action, may be at once a history and a drama.

A play is usually in the form of dialogue spoken by two or more persons; but there may be a dramatic composition in which but one character is represented. In the earliest form of the Greek drama but one actor appeared. It was not till the time of Æschylus that a second actor and dialogue were

[1] In his *Des Ballets Anciens et Modernes*, the Jesuit, Le Père Menestrier (Claude François), says: "Ballets are dumb comedies, which should be divided into acts and scenes, like other theatrical pieces. Recitations divide them into acts, and the *entrées* of dancers are equal in number to the scenes."

introduced. Whether a production is called a poem or a tragedy, a novel or a comedy, a history or a drama, or whether its author did or did not intend it for public representation, is immaterial in ascertaining whether it is a dramatic composition. This question is determined by the character of the work, and not by what it is called, or the purpose for which the author has intended it. So also it is immaterial whether the words of a drama are spoken or sung; whether they are or are not accompanied with instrumental music. An opera, not less than a play without music, is a drama.

Nor is it essential that a literary creation, in order to be considered a dramatic composition, shall be in the precise form best adapted for stage representation. A work of fiction, or even a history, may have all the requisites of a play, and be capable of dramatic representation substantially as written. It is true, alterations and omissions may be necessary to adapt it for the most effective and successful performance. But, while the drama is improved, it is not created, by such changes. It exists in the original work of which it constitutes an essential part. The change affects the form, and not the essence; and is made, not because the work is incapable of representation in its original form, but because its fitness for this purpose admits of improvement. The greater part of a novel may be, and often is, in dramatic form. Does the original lack the requisites of a dramatic composition, because a part is omitted in the representation, or because slight alterations are made in the rest? So one or more chapters of a work of fiction may make a complete play. Is the character of a dramatic composition to be denied to the whole, which thus contains within itself a complete drama? In such cases, the essence of the play, and, to a great extent, its form, are found in and taken from the original work, which must, therefore, be regarded as a dramatic composition.

If adaptation to successful and effective performance were an essential attribute of a dramatic composition in the meaning of the law, not a few undisputed dramas would lack this requisite. The changes necessary to adapt a play for effective performance are sometimes greater than are required to dramatize a novel. After Tennyson's drama, Queen Mary, had

been published, radical and extensive changes were made to prepare it for public performance. Composed as a drama, it was necessary to dramatize it for the stage. The test, then, is not whether changes are necessary to fit a work for successful and effective performance; but whether it is capable of representation, either with or without alteration in form. If it can be made capable of performance by changes which do not destroy its character, or create another work, it is a dramatic composition.

What Meaning should be Given to Dramatic Composition as Used in Statute? — I have tried to point out as clearly and as definitely as the nature of the subject will admit the essential and distinguishing characteristics of a drama in its true and comprehensive meaning. It is not denied that the boundaries here marked out embrace a larger class of productions than what are ordinarily and popularly known as dramatic compositions. The question now arises whether the legislature used the words "dramatic piece" and "dramatic composition" in their broad or their restricted meaning.

It is a general rule that words in a statute should be taken in their plain and ordinary sense. But governing this is the principle that the true construction of a statute is that which will most truly give effect to the intention of the legislature, and will most effectively secure the objects for which the law was passed. Hence, in interpreting "book" in the copyright statutes, the courts have rightly given to the word a meaning far more comprehensive than that in which it is ordinarily used. The legislature was supposed to have legislated for the protection of all literary productions, and not merely for those popularly known as books; hence, it was necessary to construe the language of the statute liberally, in order to give effect to the intent of the legislature. So, in the case under consideration, the objects intended by the legislature will be best secured by adopting the liberal rather than the restricted meaning of dramatic composition.

Before playright was secured by statute, there was a marked and unjust defect in the laws for the protection of literary property. Authors had only the exclusive right of printing their works. In many cases, intellectual productions were val-

uable for other purposes than printing, but there was no statute to secure the owner in the enjoyment of such uses. The inefficiency and the injustice of the law were specially apparent in the case of works useful and valuable for dramatic purposes. It is a narrow and illiberal construction of the statute passed to meet this want to hold that it was intended to embrace dramatic compositions only in a restricted sense. What was needed was protection for all works capable of dramatic uses, and not merely for those popularly known as dramas. It was just and expedient that the benefits of the law should be extended to the former, and there is no reason to suppose that the legislature intended to protect only the latter.[1] The intention of the legislature may fairly and properly be taken to have been to secure in the full enjoyment of the fruits of his literary labor every author whose production is useful and valuable for dramatic purposes. The construction that only what are popularly known as compositions of this kind are within the law will exclude many productions which are essentially dramatic, which are not less entitled to protection than what are strictly dramas in name and form, and which it is reasonable to suppose the legislature intended to protect.

Judicial Interpretation of Dramatic Composition.

Broad Meaning given by English Courts. — In the cases which have arisen the courts have plainly indicated that the boundaries of dramatic literature within the meaning of the law are to be drawn with great liberality. The judicial construction given to "dramatic piece," as used and defined in the English statute, is broad enough to embrace every composition

[1] "After the decision of Murray *v.* Elliston, 5 Barn. & Ald. 657," said Lord Denman, "it seems to have been considered that publication to an audience was not within the provision of the acts relating to copyright; consequently statute 3 & 4 Will. IV. c. 15, was passed, and, in respect to dramatic literary property, gave to authors the profits arising from publication by representing the piece on the stage. As there appears no reason for favoring one kind of literary property more than another, it is probable that this protection was intended for all productions adapted to this mode of publication. Now the use of the production in question, both by the plaintiff and the defendant, shows that it is so adapted and is supposed to be profitable to those who publish it." Russell *v.* Smith, 12 Q. B. 236.

which is dramatic in character and is suitable to be performed, recited, read, or sung for the entertainment of an audience. A single song, a poem of a few stanzas, a short descriptive composition, may be a dramatic piece; and singing, reciting, or reading it in public may be a dramatic representation.

A song founded on the loss of the Kent by fire in the Bay of Biscay, and representing a storm at sea, the burning of the ship, and the rescue of the passengers by another vessel, was held to be a dramatic composition, although almost entirely descriptive, and sung by one person. Citing the statutory definition of a dramatic piece, Lord Chief Justice Denman said: "These words comprehend any piece which could be called dramatic in its widest sense; any piece which, on being presented by any performer to any audience, would produce the emotions which are the purpose of the regular drama, and which constitute the entertainment of the audience. They comprehend, therefore, the production in question, the nature of which in this respect was above pointed out. In holding this production to be a dramatic piece, we give effect to the intention of the legislature, as we collect it from the series of statutes relating to literary property; namely, to give to authors the profits from the publication of their works." [1]

In a more recent case, the court held the song Come to Peckham Rye, which has little, if any, of the dramatic character to be a dramatic piece.[2] It should be noted, however, that, by the English statute, playright is expressly extended to musical

[1] Russell *v.* Smith, 12 Q. B. 236. "The song in question," said the Chief Justice, "is stated in the bill to be founded on the loss of the Kent by fire in the Bay of Biscay. It represents a storm at sea, the burning of the ship and an escape by boat to another ship, and so a safe return to land. It moves terror and pity and sympathy, by presenting danger and despair and joy, and maternal and conjugal affection. A witness of great experience in publishing music deposed that this was considered a dramatic song, and published with the title of a dramatic and descriptive song; and there was no evidence that any one considered it not dramatic. Thus the nature of the production places it rather in the representative than the narrative class of poetry, according to Lord Bacon's division of dramatic from epic (Advancement of Learning, Book II. Poesy); and the evidence states it to be known as dramatic among those who are conversant with such things." Ibid. 235. See also Russell *v.* Bryant, 8 C. B. 836; Planché *v.* Braham, 8 Car. & P. 68, on ap. 4 Bing. N. C. 17.

[2] Clark *v.* Bishop, 25 L. T. N. S. 908.

compositions generally,[1] and that dramatic piece is defined to include every "musical or dramatic entertainment."[2] It is not improbable that the statute will be judicially construed to embrace any song, whatever may be its character. But, in Russell *v.* Smith, Lord Denman said that it was not necessary in that case to determine whether all songs were entitled to protection. The judgment of the court was based on the sole ground that the song in question was a dramatic piece.

A pantomime is a dramatic composition, within the meaning of the law.[3]

United States. — There is no reason why the liberal construction given to the English statute should not be accepted in this country to the extent that the words dramatic composition rightly include any production which is dramatic in character, and which, in the language of Lord Denman, "on being presented by any performer to an audience would produce the emotions which are the purpose of the regular drama."[4]

It is not easy to determine how far the American courts will, or should, go in the direction of holding that songs nearly or quite destitute of dramatic qualities are entitled to protection as dramatic compositions. Does a song not dramatic in itself become a dramatic composition within the meaning of the law by being sung in public for the entertainment of an audience? If so, all songs may be regarded as dramatic compositions. If, on the other hand, only those dramatic in character, such as the Ship on Fire, are within the meaning of the law, it will be difficult, if not impracticable, to draw the line between those which are and those which are not entitled to protection. It would avoid confusion, and would be in accordance with justice, if the courts should declare that all songs are within the meaning of the law; but it remains to be seen whether they will go to this extent in the case of songs lacking in dramatic attributes. But they will be clearly justified in holding all dramatic songs to be within the purview of the statute.

In a recent American case, it was held that the written

[1] 5 & 6 Vict. c. 45, s. 20.
[2] Id. s. 2.
[3] Lee *v.* Simpson, 3 C. B. 871, 881; Daly *v.* Palmer, *post*, p. 594.
[4] See *ante*, p. 592.

description or directions for acting a scene designed to be represented on the stage wholly by action is a dramatic composition. It appeared that the "railroad scene" in Daly's play Under the Gaslight had been substantially reproduced, without authority, in Boucicault's After Dark. This scene was represented on the stage chiefly by action, but partly by dialogue. The law was correctly laid down by Mr. Justice Blatchford as follows: "A composition, in the sense in which that word is used in the act of 1856, is a written or literary work invented and set in order. A dramatic composition is such a work in which the narrative is not related, but is represented by dialogue and action. . . . A pantomime is a species of theatrical entertainment in which the whole action is represented by gesticulation without the use of words. A written work consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a dramatic composition designed or suited for public representation, as if language or dialogue were used in it to convey some of the ideas. The railroad scene, in the plaintiff's play, is undoubtedly a dramatic composition. Those parts of it represented by motion or gesture, without language, are quite as much a dramatic composition, as those parts of it which are represented by voice. This is true, also, of the railroad scene in After Dark. Indeed, on an analysis of the two scenes in the two plays, it is manifest that the most interesting and attractive dramatic effect in each is produced by what is done by movement and gesture, entirely irrespective of any thing that is spoken. The important dramatic effect, in both plays, is produced by the movements and gestures which are prescribed, and set in order, so as to be read, and which are contained within parentheses. The spoken words in each are of but trifling consequence to the progress of the series of events represented and communicated to the intelligence of the spectator, by those parts of the scene which are directed to be represented by movement and gesture." [1]

[1] Daly *v.* Palmer, 6 Blatchf. 264. After quoting the views of Lord Abinger in D'Almaine *v.* Boosey (see *ante*, p. 410, note 4), and citing their approval by Mr. Justice Nelson in Jollie *v.* Jaques (see *ante*, p. 411, note 2), Mr.

Spectacular Pieces. — In Martinetti *v.* Maguire, the Black Crook was held to be "a mere spectacle," and, therefore, not entitled to protection as a dramatic composition.[1] That some spectacular representations lack the essential attributes of a *dramatic composition*, and are *not worthy of protection*, is not denied. But all spectacular productions cannot rightly be excluded from the benefits of the statute. Not a few legitimate dramas are largely spectacular in character. Others contain important scenes of this kind. The spectacular may be an important and essential feature of the drama, and, as such, entitled to protection. A satisfactory general rule cannot be given for determining where the line shall be drawn in the cases under consideration between what is, and what is not, a proper subject of playright. But when the dramatic element, the dialogue, action, &c., is sufficient to sustain copyright, — and the requirements of the law in this respect are by no means exacting, — the playright does not fail because the literary ele-

Justice Blatchford said: "They are eminently sound and just and are applicable to the case of a dramatic composition designed for public representation. Such a composition when represented excites emotions and imparts impressions not merely through the medium of the ear, as music does, but through the medium of the eye as well as the ear. Movement, gesture, and facial expression, which address the eye only, are as much a part of the dramatic composition as is the spoken language which addresses the ear only; and that part of the written composition which gives direction for the movement and gesture, is as much a part of the composition, and protected by the copyright, as is the language prescribed to be uttered by the characters. And this is entirely irrespective of the set of the stage or of the machinery or mechanical appliances, or of what is called, in the language of the stage, scenery or the work of the scene painter." Ibid. 268.

[1] 1 Deady, 216. "The Black Crook," said Judge Deady, "is a mere spectacle, — in the language of the craft a spectacular piece. The dialogue is very scant and meaningless, and appears to be a mere accessory to the action of the piece, — a sort of verbal machinery tacked on to a succession of ballet and tableaux. The principal part and attraction of the spectacle seems to be the exhibition of women in novel dress or no dress, and in attractive attitudes or action. The closing scene is called Paradise, and, as witness Hamilton expresses it, consists mainly 'of women lying about loose,' a sort of Mohammedan paradise, I suppose, with imitation grottos and unmaidenly houris. To call such a spectacle a 'dramatic composition' is an abuse of language, and an insult to the genius of the English drama. A menagerie of wild beasts, or an exhibition of *model artistes* might as justly be called a dramatic composition. Like those, this is a spectacle; and, although it may be an attractive or gorgeous one, it is nothing more. In my judgment, an exhibition of women 'lying about loose,' or otherwise, is not a dramatic composition, and therefore not entitled to the protection of the copyright act." Ibid. 221.

ment is subordinate or accessory to the spectacular, or because the representation is largely of the latter character.

The judgment in Martinetti *v.* Maguire cannot be sustained on the ground that the Black Crook was "a mere spectacle." This piece was more than a spectacle. While ballets, marches, tableaux, dazzling scenes, &c., may have constituted its chief attractions, an important feature was the dramatic dialogue, plot, and characters, which clearly made the production a dramatic composition within the meaning of the law.

Scenic Effects. — The definition of dramatic piece, in the English statute, includes "scenic" entertainments.[1] Where it appeared that the defendant had taken from the plaintiff's play two scenes or situations, consisting more of scenic effects than of dialogue, it was held that the quantity copied was not enough to amount to piracy; but Mr. Justice Brett said: "Now, it was first said that the subject-matter of the action was not the subject-matter of copyright; that the act gives a property in words, and not in situations and scenic effects; but I think that these latter are more peculiarly the subject of copyright than the words themselves."[2]

Dramatic Composition must be Original and Innocent. — The same tests as to innocence, originality, &c., are to be applied to dramatic as to literary compositions.

An immoral play is not entitled to protection.[3]

In Hatton *v.* Kean, where it appeared that the defendant had designed a dramatic representation, consisting of one of Shakespeare's plays with certain alterations in the text, original music, scenic effects, and other accessories, the court did not doubt that the production, as a whole, was a proper subject of playright, although the play itself was, in its original form, common property.[4]

Dramatizations, Adaptations, and Translations. — A dramatization or an adaptation of a novel or other work, which the dramatist has a right to use, will receive the same protection accorded to an original drama. The same is true of a transla-

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

[2] Chatterton *v.* Cave, as reported 33 L. T. N. S. 256. See also Hatton *v.* Kean, 7 C. B. N. S. 268.

[3] Martinetti *v.* Maguire, 1 Deady, 216; Shook *v.* Daly, 49 How. Pr. (N. Y.) 366; Keene *v.* Kimball, 16 Gray (82 Mass.), 548.

[4] 7 C. B. N. S. 268.

tion of a foreign play. Any number of persons may dramatize or translate a work which is common property, or, with the consent of the owner, a copyrighted work. Whatever may be the similarity between two dramatizations, adaptations, or translations, each dramatist will have playright in his own version.[1] Whether any person without authority may dramatize for the stage a work protected by copyright is a question which is considered elsewhere.[2]

Test of Originality in Dramatization. — The validity of the copyright or playright in a dramatization is not affected by the fact that the dramatist has extensively, or even chiefly, retained the dialogue and monologue in the language of the work dramatized. In many cases this must be done to a large extent, and to do otherwise would be to lessen the merits of the play. The function of the dramatist is to select from the novel those parts which are best fitted for acting, to arrange them effectively with reference to swift action, dramatic situations, climaxes, &c., and generally to meet the requirements of dramatic composition and representation. A work of fiction not adapted to acting, as originally written, is thus reproduced in a new form, and is brought into a new and valuable use. Such a dramatization is regarded by the law as a new production, and as such is a proper subject of copyright. But a play which is not materially different from the novel, and which owes nothing substantial to the labors of the dramatist, is only a copy of the work claimed to have been dramatized. In such case, the adapter is a mere copyist, and shows nothing on which to base a claim for protection.

As the dramatization of a work of fiction is a proper subject of playright, it is clearly no objection in law to the originality of a drama that its characters and incidents are like those found in a previously published novel; provided, of course, there is no piracy of the novel.[3]

[1] **Br.** Planché *v.* Braham, 8 Car. & P. 68, on ap. 4 Bing. N. C. 17; Shepherd *v.* Conquest, 17 C. B. 427; Reade *v.* Conquest, 11 C. B. N. S. 459; Levi *v.* Rutley, Law Rep. 6 C. P. 523; Toole *v.* Young, Law Rep. 9 Q. B. 523; Chatterton *v.* Cave, Law Rep. 10 C. P. 572, 1st ap. 2 C. P. D. 42, 2d ap. 3 App. Cas. 483. **Am.** Shook *v.* Rankin, 6 Biss. 477; Shook *v.* Rankin, 3 Cent. Law Jour. 210; Benn *v.* Le Clercq, 18 Int. Rev. Rec. 94. See also Tompkins *v.* Duff, and French *v.* Conolly, considered *ante*, p. 580.

[2] See *ante*, pp. 456, 461.

[3] Boucicault *v.* Fox, 5 Blatchf. 87, 100–101.

Foreign Dramatists.— As the exclusive right of representing a dramatic composition is given by the statute only in case copyright has been secured for it, and as copyright is limited to the works of native authors, it follows that there is no statutory protection for the productions of foreign dramatists. But, as copyright will vest in the translation or adaptation of a foreign play, or the dramatization of a foreign novel, made by a resident or a citizen,[1] so the statute secures the exclusive right of representing such translation, adaptation, or dramatization.[2]

Musical Compositions.

Compositions Consisting of Words and Music.— It has been seen that some musical productions are dramatic compositions within the meaning of the law. In such case, there can be no reasonable doubt that the literary part, independently of the music, as the libretto of an opera, may be a complete dramatic composition.[3] But the playright cannot rightly be considered as vesting alone in the words of a musical composition; it must extend also to the music, which is a constituent part of the whole. Music is but a form of language by which expression is given to thoughts, emotions, passions, feelings, &c., whose communication is the province of all language. In a musical drama, poetry and music are co-ordinate means working toward the same results. Both are in harmony, and used to give expression to the same thoughts and feelings. The

[1] See *ante*, p. 232.

[2] Shook *v.* Rankin, 6 Biss. 479; Shook *v.* Rankin, 3 Cent. Law Jour. 210; Benn *v.* Le Clercq, 18 Int. Rev. Rec. 94. In the first-named case, Drummond, J., said: "D'Ennery and Cormon were the [foreign] authors of a drama in the French language, called *Les Deux Orphelines;* Jackson translated it into English and adapted it to representation on the stage. This was with the consent of the authors. After this was done, he applied under the law for a copyright; and the question is, whether there was any valid objection to his obtaining a copyright for the play thus translated into English. I do not see that there was. He was the translator of the play. He adapted it to representation on the stage, and was in the sense of the law the author of that for which he obtained a copyright. No one could complain of this except the authors of the play in French, and it affirmatively appears that they assented to this action on the part of Mr. Jackson. Then I do not see why he was not protected under the law for his translation and adaptation of the work to the stage, and of which he was in one sense the author."

[3] Planché *v.* Braham, 8 Car. & P. 68, on ap. 4 Bing. N. C. 17.

music is not a meaningless accompaniment, intended simply to please the ear. Its true function is to emphasize, to intensify, the meaning of the poet.

Hence, in a musical dramatic composition, whether it be a grand opera or a simple song, both words and music must be considered as constituting the dramatic essence. And, as the playright attaches to the whole and the constituent parts, it must extend to the music as well as to the words.[1]

Instrumental Music. — In a broad sense, music, as well as literature, is susceptible of classification into that which is and that which is not dramatic. But what is communicated definitely and with clearness by written or spoken language can be expressed only vaguely by music without the aid of words. Music designed to be interpreted by instruments alone, as a symphony, can hardly be considered a dramatic work within the meaning of the law. As the American statute does not secure the exclusive right of performing any piece of music which is not a dramatic composition, it follows that in this country there is no statutory property in other instrumental music excepting the right of publication in print.

Section 20 of 5 & 6 Vict. c. 45, secures the sole liberty of performing musical compositions on the same conditions and for the same term as are prescribed in the case of dramatic compositions. The meaning of this provision has not yet been judicially interpreted. But dramatic musical compositions were already protected by the 3 & 4 Will. IV. c. 15,[2] and they are expressly included in the definition of dramatic piece contained in the statute of Victoria. Hence, the provision expressly extending protection to musical compositions has neither object nor meaning, unless it be taken to refer to the right of playing instrumental music. It is reasonable to assume, then, that it embraces all kinds of music, whether dramatic compositions or not, and whether vocal or instrumental.[3] If this construction is right, the owner of a purely

[1] The music of an opera, independently of the words, was protected in the recent English case of Boosey *v.* Fairlie, 7 Ch. D. 301.

[2] Planché *v.* Braham, 4 Bing. N. C. 17.

[3] In Russell *v.* Smith, it was contended that only dramatic musical compositions were within the purview of the statute. To which Erle, J., replied: "Why should the legislature have intended to protect these rather than oratorios and other strictly musi-

instrumental piece, whether written for the orchestra, organ, piano, or other instrument, may have in it not only copyright, but playright; not only the exclusive right of printing it, but the sole liberty of playing it in public.[1] And, as in the case of dramatic compositions, statutory playright is secured not only in printed, but also in manuscript musical compositions.

cal works?" 12 Q. B. 231. In Russell *v.* Smith, in chancery, 15 Sim. 181, 182, Vice-Chancellor Shadwell said that "the words of the songs were protected by the former copyright acts and the music of them by the act of Victoria." This language implies that the music of a dramatic composition was not protected by 3 & 4 Will. IV. c. 15. But this does not appear to be the natural construction of that statute.

[1] See Hatton *v.* Kean, 7 C. B. N. S. 268; Wallenstein *v.* Herbert, 15 L. T. N. S. 364, on ap. 16 Id. 453.

CHAPTER XV.

STATUTORY PLAYRIGHT IN DRAMATIC AND MUSICAL COMPOSITIONS.

Playright and Copyright Distinguished. — Under the statute, playright and copyright are treated as two independent and distinct rights. The former is secured only in dramatic or musical compositions. In a printed production of this kind, both rights may exist together; and, in general, the principles governing the vesting and the ownership of each are the same. But an invasion of one right is not a violation of the other, and the penalties of piracy prescribed in one case are different from those in the other. Copyright may be infringed by publication in print, but not by public performance; playright, by representing but not by printing the play. The copyright in a dramatic composition is in no respect different from the copyright in any other literary production.

In England, the statute grants the exclusive right of publicly performing both printed and manuscript plays. In the United States, the right is secured only in published compositions; the statute affords no redress for the unlicensed representation of manuscript plays.

Great Britain.

Duration of Playright in Printed and Manuscript Compositions. — The first statute giving to dramatists the exclusive right of performing their plays was the 3 & 4 Will. IV. c. 15, passed in 1833. By this act and the 5 & 6 Vict. c. 45, passed in 1842, British playright is now governed. The first section of the statute of William declares that the author of any unpublished tragedy, comedy, play, opera, farce, or other dramatic piece or entertainment shall have the sole liberty of representing it at any place of dramatic entertainment in Great Britain; and

that the author of a published production of this kind shall have the same right for twenty-eight years from the time of publication. Protection is here provided for two classes of compositions, — 1. Manuscript. 2. Those published in print. The statute plainly declares that playright in printed plays shall begin at the time of publication and continue for twenty years. But there is nothing in the act showing when the right in an unpublished play shall begin or when it shall end. The term of protection is in no wise limited. The only sound construction of which the statute is capable is that the owner of a manuscript play, provided he does not publish it in print, and complies with the conditions on which protection is granted, has for ever the exclusive right to perform it in public, and is entitled to the statutory remedies provided for the invasion of that right.

It is now necessary to inquire what changes have been made in the provisions of this statute by the 5 & 6 Vict. c. 45. Section 20 of the latter act, after citing the 3 & 4 Will. IV. c. 15, and declaring that "it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that act to the full time by this act provided for the continuance of copyright," and also to provide protection for musical compositions, enacts, "that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns, for the term in this act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect to the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly 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."

This language taken in connection with the statute of 1833 is confusing, and its effect on playright as governed by that statute is doubtful. The declared object of section 20, just

cited, is to extend the term of protection granted by the act of William. But we have seen that the latter statute makes a distinction between manuscript and published plays, and that in the case of the former the term of protection is unlimited, and hence incapable of extension. The preamble, therefore, of section 20 of 5 & 6 Vict. c. 45, is intelligible only when applied to printed plays. It may be contended with much reason that, in the absence of language expressly or by clear implication repealing or restricting the unlimited duration of playright in unpublished productions granted by the statute of William, that right must remain unchanged. But the important distinction drawn by the statute of William between published and unpublished plays has been wholly overlooked or disregarded in the enacting part of section 20 of 5 & 6 Vict. c. 45; and it may be urged that the provisions of that section are such that they cannot reasonably be construed as applying exclusively to printed plays.

Whether this section must be interpreted as making the duration of playright in both published and unpublished compositions the same as that of copyright in a book, or as leaving it unlimited in manuscript dramas, as it was under the statute of William, is a question which has been carelessly left in much doubt for judicial determination.

Conditions on which Playright may be Secured. — The correct reading of 5 & 6 Vict. c. 45, appears to be that the same conditions and requirements prescribed concerning the registration of copyright were intended to be applied to playright. But the courts have held that registration is essential neither to the vesting of playright nor to the right of the owner to maintain an action for infringement.[1]

[1] Russell *v.* Smith, 12 Q. B. 217; Clark *v.* Bishop, 25 L. T. N. S. 908. See also Lacy *v.* Rhys, 4 Best & S. 873; Marsh *v.* Conquest, 17 C. B. N. S. 418. This construction of the statute is open to criticism. There is nothing concerning registration in 3 & 4 Will. IV. c. 15. Section 20 of 5 & 6 Vict. c. 45, enacts that "the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition," except that the first performance of a play shall be equivalent to the publication of a book. Then follows a provise prescribing how dramatic and musical compositions in manuscript may be registered. Section 24 then enacts that no action for the infringement of copyright in a book shall be maintained unless the book has been registered before the

The statute of William mentions no requirement to be performed by the author or owner of a dramatic composition in order to secure playright; and none are prescribed by the act of Victoria, except that relating to registration. The latter statute declares 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."[1] It cannot be determined with certainty precisely what effect this provision was designed to have, or what judicial construction will or should be given to it. It was doubtless intended to apply to compositions not published in print. The relation which the public performance of a manuscript drama has to the playright therein is analogous to that which the publication of a book bears to the copyright in it. Printing and acting are but different modes of publication. It would seem that Parliament intended simply to affirm this principle.

Applying to publication by representation the same general principles which are recognized as governing publication by printing, and giving effect to the statutory provision above cited, it will follow that, as copyright in a book dates from the time of first publication, so playright in a manuscript play begins with its first public performance. As first publication of a book in the United Kingdom is a condition precedent of copyright, so the first representation of a manuscript drama must be in the United Kingdom in order to secure playright.[2] As an alien author may acquire copyright by being on English soil when his work is published in Great Britain, so playright may be secured by a foreign dramatist who is anywhere within the

beginning of the suit, and contains a proviso "that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the act passed in the third year of the reign of his late Majesty King William the Fourth, to amend the laws relating to dramatic literary property, or of this act, although no entry shall be made in the book of registry aforesaid."

The meaning of these provisions concerning registration in the case of playright is worse than bewildering, unless the language last quoted be taken to refer exclusively to compositions in which rights had already vested under the statute of William, and to mean that such rights only were not to be defeated by want of registration.

[1] s. 20.

[2] Boucicault *v.* Delafield, 1 Hem. & M. 597; Boucicault *v.* Chatterton, 5 Ch. D. 267.

British realm when his manuscript drama is first acted in the United Kingdom. As protection in the case of a book in which copyright has vested extends throughout the British empire, so protection in the case of playright in a production not printed is guaranteed in a coextensive territory. In other words, the general conditions which govern the vesting of copyright, and the beginning and territorial extent of protection, apply in the case of playright in manuscript compositions. Playright, then, may be secured in a manuscript drama, on the sole condition that its first public representation be in the United Kingdom, and that the author, if a foreigner, be on English soil at the time of such representation. The right, if not perpetual, will last for forty-two years, or for the life of the author, and seven years after his death, whichever may be the longer period.

If the above views are correct, there can be no statutory playright in a manuscript dramatic composition which has not been publicly represented.

Publication and Representation Considered with Reference to Playright in Great Britain.

While the validity and the beginning of the playright in a manuscript play are thus governed by the time and place of its first public representation, there can be little doubt that the same questions in the case of a dramatic composition, which is published in print before it is publicly performed, are governed by the publication in print, and not by the representation. In such case, copyright and playright vest together and on the same conditions, and last for a like period, or they fail together. Assuming this to be the true principle, it follows: I. That, when playright has been thus secured, it cannot be affected by any subsequent representation of the drama. Thus, if first publication be in Great Britain, both copyright and playright vest at the same time, and the latter right cannot be lost by a first representation of the play made afterward in a foreign country. II. Failure of the title to copyright involves a failure of the title to playright. Thus, a prior publication of the play in print in a foreign country would defeat the claim, not only to copyright, but also to playright, so that the latter right could

not be secured, though the first representation of the play should afterward be given in England.

But difficult questions arise in the case of a published drama, whose public representation has preceded its publication in print. In such case, it is clear that the validity and duration of the copyright are governed, not by the representation, but by the publication. The copyright dates from publication, and it cannot be defeated or affected by any public performance of the play, no matter when or where made.[1] But does the playright begin with and depend on the first public representation, or the publication in print? Suppose that, after a dramatist has enjoyed for years the exclusive right of representing a manuscript play, he publishes it in print, and secures the copyright in it. Such copyright will date from the publication in print, and will last for forty-two years. But is the duration of the playright forty-two years from first publication in print, or from first representation? If the latter, copyright may continue after playright has expired in a printed composition in which both have vested; and cases may arise in which copyright, but not playright, will vest in a published production. The most natural construction of the statute in this case would seem to be that the playright, when it vests in a printed composition, will begin to run from the publication in print.

Does the failure of the title to playright in a manuscript composition involve the failure of the title to playright in the same composition when published? Thus, by first representing an unpublished drama abroad, the owner forfeits his claim to the exclusive right of representing that unpublished drama in England. As prior representation in a foreign country is no bar to the vesting of copyright, he may afterward obtain copyright by first printing the composition in England. But is the right of representation also thereby secured?

Again: when playright has once vested in a manuscript play, is it affected by a subsequent publication of the composition in print, so that, if the title to copyright is forfeited by such publication, the playright already secured is defeated?

[1] See D'Almaine *v.* Boosey, 1 Y. & C. Exch. 288, 299; Clark *v.* Bishop, 25 L. T. N. S. 908.

In other words, to preserve the right of representation, is it necessary either to keep the composition in manuscript, or to protect it by copyright, if it is published as a book?

The above are important questions, which are likely to arise at any time, and on which little light is thrown, either by the statutes or by the decisions. Without attempting to determine the principles which govern the law in all of the cases which have been suggested, I shall simply offer my opinion on some of the questions which I have raised without going fully into the reasons.

When the title to playright in an unpublished production has been forfeited, as by first representation in a foreign country, it would seem that it cannot be recovered by afterward publishing the composition, and thereby securing a copyright for it; for the playright has become common property.

After playright has once vested in a manuscript composition, it may be lost by such a publication in print as will amount to an abandonment of the copyright. The right of representing a manuscript play rests on the condition that the composition is not published in print. After it has been so published, it passes from the class of manuscript to that of printed plays, and becomes subject to the conditions on which playright will vest in published plays. The playright then becomes subordinate to the copyright, and the validity of the former is dependent on that of the latter right. An abandonment of the copyright, which is the greater right, involves an abandonment of the lesser playright. When the title to copyright is forfeited, the work becomes public property as far as printing copies is concerned; and this would seem to make it public property as far as representing it is concerned. If this be true, the copyright covers the playright, and the former must be secured in order to preserve and protect the latter.

The principle that copyright may be lost after it has been secured is recognized by the law of the United States. Section 4962 of the Revised Statutes makes it essential to copyright that the notice of entry shall appear in every copy of a book published. Hence, after the copyright has been enjoyed for years, it may be lost by publishing copies without the required notice.

In the recent case of Boosey *v.* Fairlie,[1] the plaintiffs claimed under the International Copyright Act, the exclusive right of representing in Great Britain *Vert-vert*, a comic opera composed by Offenbach. The opera was first represented March 10, 1869, in Paris. On the 28th of that month, an arrangement for the piano-forte made by Soumis, with the consent of Offenbach, was published in Paris. Soon after, another authorized arrangement for piano and voices was made by Soumis, and published in Paris. At various places in this arrangement were inserted the names of certain orchestral instruments "which," as the court said, "if the piano-forte arrangement were to be converted into a full operatic score, would afford some indication of the instruments to be used." In June of the same year, Offenbach sold the exclusive right of printing and representing the opera in Great Britain to the plaintiffs, to whom he delivered a manuscript copy of the score. On June 9, the plaintiffs registered the opera under the 7 & 8 Vict. c. 12, s. 6, in the name of Offenbach, as composer and owner. The time and place of the first publication of one of the piano-forte arrangements were also entered in the registry, and a copy of this publication was deposited with the officer of the Stationers' Company. Afterward, on the same day, the assignment to the plaintiffs was registered. At this time there had been no publication of the opera in print, other than that of the two piano-forte arrangements. On August 9, 1869, four of the orchestral parts of the opera; viz., those for first and second violins, violincello and contra basso, were printed for sale in Paris, by authority of Offenbach. This publication was not registered in London. In May, 1874, the defendant brought out at the St. James's Theatre in London, an *opéra bouffe* called *Vert-vert.* A material part of the music was substantially the same as that composed by Offenbach. It had not, however, been copied from the latter's orchestral score, but it had been taken from one of the piano-forte arrangements made by Soumis, and had been arranged for the orchestra by a musician employed by the defendant. The plaintiffs now sought to restrain this representation as an infringement of their rights.

[1] 7 Ch. D. 301.

Vice-Chancellor Bacon ruled that there had not been a valid registration either of the opera itself or of the piano-forte arrangement, and dismissed the bill.[1] The Court of Appeal held that the registration of the unpublished score of the opera was good, and hence secured to the plaintiffs the exclusive right of representation; that there had been no lawful registration of the piano-forte arrangement, which consequently was not protected; but that the performance of the music obtained from either of the arrangements was a violation of the right of representing the opera secured to the plaintiffs.[2]

Assuming that the Court of Appeal was right in holding that the registration of the opera, but not of the piano-forte arrangement, was valid, it becomes necessary to inquire what right was secured by such registration, and whether it was complete or sufficient to prevent an unauthorized representation of the music obtained from the unregistered piano-forte arrangement. The plaintiffs' rights in this case were governed by section 6 of 7 & 8 Vict. c. 12, which makes registration of works first published in a foreign country a condition of securing protection in England. This act and the order in council made in pursuance of it give a foreign author of a dramatic or musical composition two privileges; viz., the exclusive *right of printing* and the sole *liberty of representing* it. The latter right may be secured either for a printed or for a manuscript composition, and section 6 of 7 & 8 Vict. c. 12, prescribes the mode of registration for each case. If the work has been published in print, the time and place of such publication, as was conceded in Boosey *v.* Fairlie, must be registered, and in default thereof no right is secured. If it has not been published in print, but has been publicly represented, then it is enough to give the time and place of such representation. When an opera or a play is registered as an unpublished work, the registration is valid only on condition that it is true that the work has not been published. If a part of it has been published, the registration can be good only to the extent of the unpublished matter. Thus, if one of the three acts of an opera has been printed, the registration of the whole as

[1] 7 Ch. D. 307. [2] *Ibid.* 311.

a manuscript would protect only the two acts which have not been published.[1] So, the registration of the unpublished orchestral parts covers those parts, but not any other arrangement which may be published in print without being registered. Hence, to secure and preserve his rights in an opera which is registered as an unpublished work, the owner must either not publish any part or any arrangement of it, or he must secure protection for that part or arrangement by complying with the requisites prescribed in the case of printed compositions.

In the case under consideration, the opera itself, which had not been published in print, was registered as an unpublished work; the time and place of its first representation being given. The registration was valid only as to what was then unpublished, viz., the original score; and it secured the right of representing this alone. No one without authority might use this score or a copy of it without violating the right secured. But, at the time this was registered, two arrangements for the piano-forte had been published in print, and afterward four orchestral parts were so published, and none of these publications was registered. The court admitted that no right in these had been secured, and that they had become common property. It was not claimed that any person was barred from publishing them in print. They were not less common property with respect to the right of representation. If any person might print them, any person might represent them. But the Court of Appeal, following the reasoning used in Reade *v.* Conquest,[2] held that, while the piano-forte arrangement was entitled to no protection, its use was an indirect appropriation of the original opera, and hence a violation of the right therein secured. In considering the judgment in Reade *v.* Conquest, I tried to show that this doctrine is in conflict with a fundamental principle of the theory of copyright, which prevents unlawful copying only from the work protected, and not from any source which is open to all.[3] In Boosey *v.* Fairlie, the plaintiff was bound to

[1] The same principle was recognized in Low *v.* Ward, Law Rep. 6 Eq. 415, where copyright was held to vest in that part of a book which had been first published in England, but not in that part which had been previously published in the United States.

[2] 11 C. B. N. S. 479.

[3] See *ante*, p 458.

show that the work protected had been copied. He was not entitled to prevent any person from using substantially the same production if got from a common source. The pianoforte arrangement of which the defendant made use was common property, and hence there was nothing to bar him from using it in any manner.

It was judicially conceded, in Boosey *v.* Fairlie, that if, at the time of registration, there had been a complete publication in print of the original opera, that is, of all the orchestral parts, the right of representation could have been secured only by registering the work as a printed composition. Both copyright and playright would then have vested in it. But suppose that the right of representation had been secured by registering the unpublished opera, could this right have been defeated by a subsequent publication in print, of which no registration was made? This question was raised in Boosey *v.* Fairlie. It was contended for the defendant that whatever rights had been secured by the registration of the manuscript score were lost by the subsequent publication and non-registration of the four orchestral parts. The court, without deciding what effect a complete publication of the entire work would have on the right secured, held that this was not such a publication.[1]

The opinion has already been expressed in this work that playright, once secured in a manuscript composition, may be lost by a subsequent complete publication in print, which works an abandonment of the copyright; and that, when the publication is not complete, the right secured may be defeated to the extent of the publication. If this principle is sound, the

[1] "Assuming the original registration of proprietorship to be valid, it has been urged on behalf of the defendant: first, that, under the convention of 1851, the protection given by the registration became subsequently inoperative in consequence of the plaintiffs' not having delivered to the officer of the Stationers' Company a copy of the four instrumental parts published on the 9th of August, 1869. . . . Upon the first point, it is unnecessary to decide whether, supposing a dramatic piece or musical composition in manuscript to have been registered so as to give protection to the right of representing it, or performing it, the subsequent printing and publication of such piece or composition, if not followed by a deposit of a copy at Stationers' Hall, can be held to take away that right; for in the present case it appears to us that the publication of the four instrumental parts does not constitute a publication of Offenbach's opera within the meaning either of the convention or of the statute under which that convention was made." Thesiger, L. J., Boosey *v.* Fairlie, 7 Ch. D. 816.

publication without registration of the four orchestral parts of Offenbach's opera made those parts common property, and to that extent defeated the right of representation.

UNITED STATES.

Playright Given only in Case of Copyrighted Composition. — The first American statute on the subject under consideration was that of 1856, which gave to dramatists the exclusive right of publicly performing their plays. But the provisions of this act were limited to those compositions in which copyright had vested, or should thereafter be acquired, under the statute of 1831.[1] Playright is now governed by the Revised Statutes, which enact that the author or owner of any book, dramatic or musical composition, &c., shall have the sole liberty of publishing it in print; "and, in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others."[2] The statute further prohibits the unlicensed representation of any dramatic composition "for which copyright has been obtained."[3]

Playright is thus expressly limited to dramatic compositions for which a copyright has been secured. The former right is embraced within, and cannot exist independently of, the latter. A dramatist has no claim under the statute, to the exclusive right of representing any play which is not protected by copyright.

No Statutory Playright in Unpublished Dramas. — It is settled that copyright cannot exist in a work until it is published, and that the public performance of a play is not a publication within the meaning of the statute.[4] Hence, it follows that there can be no statutory playright in a manuscript drama. This vital principle has been strangely overlooked or disregarded in not fewer than five cases decided by the Circuit Court of the United States.

In Boucicault *v.* Wood, the plaintiff claimed, under the

[1] Roberts *v.* Myers, 13 Monthly Law Reporter, 390; Keene *v.* Wheatley, 9 Am. Law Reg. 33, 45; Boucicault *v.* Fox, 5 Blatchf. 96–98; Boucicault *v.* Wood, 2 Biss. 36–38.

[2] s. 4952. [3] s. 4966. [4] See *ante*, pp. 284, 285.

statute of 1856, the exclusive right of representing the Octoroon and the Colleen Bawn, two manuscript dramas of which he was the author. The title-page of the former had been deposited in conformity with the law on Dec. 12, 1859, and of the latter on March 23, 1860. Both plays had been repeatedly represented in public, with the consent of the author; but neither had been published in print, and there had been no compliance with the provisions of the statute requiring the delivery of copies, and the printing of the copyright notice. The performances complained of had taken place in 1864, 1865, and 1866; from four to six years after the recording of the title-pages. The principle is well established, and was affirmed in this case, that the exclusive right of representing a dramatic composition was given by the statute of 1856 only in cases wherein copyright had been secured under the act of 1831. The vital question, therefore, was whether valid copyright had vested in the compositions in question. The court held that, under the act of 1831, "an action at suit in equity, but *at law*, could be maintained before the publication of the work, for the benefit of any party aggrieved;" and that, under this act, and that of 1856, the plaintiff was entitled to maintain an action for the unlicensed performance of his plays, notwithstanding there had been no publication, and no compliance with two of the three statutory requisites relating to copyright.[1]

The law had been construed to the same effect in Roberts *v.* Myers,[2] decided in 1860, and in Boucicault *v.* Fox,[3] in 1862, in each of which the validity of the copyright in the Octoroon, one of the dramas above mentioned, was upheld.

The same principle appears to have been applied in two cases brought by Shook against Rankin in 1875, in which the statutory copyright in the play of the Two Orphans was held to be valid.[4] The plaintiffs had bought a copy of the unpublished

[1] 2 Biss. 34.

[2] 13 Monthly Law Reporter, 396.

[3] 5 Blatchf. 87. In Keene *v.* Wheatley, 9 Am. Law Reg. 44, the court appears to have taken the same view of the law. In Roberts *v.* Myers, the objections were raised and overruled that the play had not been published, and that no copy had been deposited as required by law. These vital questions are not referred to in the opinion in Boucicault *v.* Fox, though the controlling facts and principles were the same in both cases.

[4] 3 Cent. Law Jour. 210; 6 Biss. 477.

French drama, *Les Deux Orphelines*, with the exclusive right of representation in the United States, and had caused a translation to be made. They alleged that they had copyrighted this translation, but it does not appear that they had complied with any other requirement of the statute than filing a copy of the title. The vital question whether the play, that is the translation, had been published in print as a step to secure the copyright, or whether it was then unpublished, cannot positively be determined from the report of either case, or both reports together. But it may fairly be assumed that the play had not been published.[1] In both cases protection was claimed under the copyright statute, and, as neither party was a citizen of the State in which the suit was brought, the court had no jurisdiction except under that statute. Hence, in granting the injunctions, the court upheld the validity of the statutory copyright, and if the play had not been published, as has been here assumed, affirmed the principle that a manuscript drama is within the protection of the statute. Nor was either of the decisions based on the ground that an unreasonable time for publication had not passed after the filing of the title. The fact that the play had not been published appears not to have been referred to in either case. Moreover, it appeared from the pleadings that the title had been filed more than seven months before one and more than eight months before the other suit was brought;[2] whereas, in Boucicault *v.* Hart, about four months was held to be an unreasonable time to pass without publication after the recording of the title.[3]

The law, as applied by the court in the five cases above reviewed, is wholly indefensible, and is against the entire cur-

[1] The remark made by Drummond, J., in his opinion, "has the defendant infringed his [plaintiff's] rights by performing this unpublished drama?" implies that there had been no publication in print. 6 Biss. 480. The entire opinion of Judge Nelson appears to proceed on the assumption that the play was an unpublished one. 3 Cent. Law Jour. 210.

[2] The plaintiff alleged that the title had been filed Feb. 1, 1875. 6 Biss. 478. One suit was brought in September, and the other in October following.

[3] 13 Blatchf. 47. In July, 1876, Lowell, J., held in the United States court in Boston, that the copyright in The Two Orphans was not valid, on the ground that the copyright notice in the printed copy of the play was not in the precise form prescribed by the statute. Tompkins *v.* Rankin, 8 Cent. Law Jour. 443. No satisfactory report of this case has been published.

rent of authorities, which affirm the principle that there can be no copyright without a compliance with the requisites prescribed by the statute.[1] The true doctrine was affirmed by the Circuit Court of the United States in the recent case of Boucicault *v.* Hart, though it is noticeable that the court in its opinion, though citing and in effect overruling Roberts *v.* Myers, Boucicault *v.* Fox, and Boucicault *v.* Wood, did not comment on these authorities.[2] Boucicault *v.* Hart, as well as the two cases of Shook *v.* Rankin, was governed by the statute now in force; but its provisions on the point under consideration are substantially the same as those of the acts of 1856 and 1831, under which the three other cases were decided. The controlling facts and principles were essentially the same in all of the cases. In Boucicault *v.* Hart, the plaintiff claimed to be entitled under the statute to the exclusive right of representing the Shaughraun, of which he was the author. The title-page of this play had been duly recorded on Oct. 26, 1874, after which the piece was publicly represented by the author. It was, how-

[1] The opinion of the court, in Boucicault *v.* Wood, seems to have been based chiefly on the construction of section 6 of the act of 1831, which imposes penalties on any person who "from and after the recording the title of any book" shall publish such book without due authority. But this section did not enable a person to maintain an action at law for the violation of copyright until that right had been completely secured. See *ante*, p. 267.

In Roberts *v.* Myers, Sprague, J., said: "The third objection is that no copy of this book was ever deposited in the clerk's office. The statute requires that such copy shall be deposited within three months after publication. That time has not arrived. There has been no publication." 18 Monthly Law Reporter, 396. In answer to the objection that the drama had not been printed, the court, having quoted the language of the first section of the act of 1831, which provides that a copyright may be secured for any book "which may now be made or composed, and not printed or published, or shall hereafter be made or composed," said: "Here it is clearly expressed that a book may exist without printing; and such book, when made or composed, is to be entitled to copyright. The objection, therefore, cannot prevail." Ibid. 399.

It is plain that the court failed to comprehend the true meaning of the language quoted from the statute. It was not that a book might be protected by copyright while in manuscript; but that copyright might be obtained only for such books as had not been published, excluding all those which were published before being copyrighted. The object of the statute was to provide protection for unpublished works, but it contemplated their publication as a condition precedent to copyright. The language above quoted is not used in the act now in force.

[2] Boucicault *v.* Hart appears not to have been reported when the two later cases of Shook *v.* Rankin were decided.

ever, kept in manuscript, and the bill, verified in February, 1875, did not allege any publication of the composition, or any delivery or copies as required by the statute. The law was rightly interpreted by Mr. Justice Hunt of the United States Supreme Court, to the effect that there could be no exclusive right under the statute of representing a dramatic composition, unless it was protected by copyright; and that valid copyright could not be secured without publication of the piece in print, and a compliance with the requisites prescribed by the statute. "I hold," he said, "that to secure copyright of a book, or a dramatic composition, the work must be published within a reasonable time after the filing of the title-page, and two copies be delivered to the librarian. These two acts are by the statute made necessary to be performed, and we can no more take it upon ourselves to say that the latter is not an indispensable requisite to a copyright, than we can say it of the former."[1] As the plaintiff had not complied with these conditions, his title was held to be invalid.

How Playright is Secured.—To acquire under the statute the exclusive right to perform a play in public, the owner

[1] 18 Blatchf. 47, 54. "Any person," said Mr. Justice Hunt, "shall be entitled to a copyright, who, before publication, first, shall deliver to the librarian a printed copy of the title of the book, and second, shall, within ten days after the publication thereof, deliver to the librarian two copies of the same. The book may not be printed or published when the title-page is filed, and some right (inchoate perhaps) seems intended to be secured as of that date, although an actual printing or publication is not then made. But the expression 'before publication' is based upon the idea that a printing or publishing will soon occur. This is put into clear meaning by the next clause of the section, that the author shall not be entitled to copyright, unless, 'within ten days from the publication' he shall deliver two copies to the librarian. It is not a fair interpretation of this section to hold, that the filing of the title entitles to a copyright fully and absolutely, and that this may be defeated by a publication and failure to deliver two copies, but, as long as there is no publication, although it continue indefinitely, there is no lapse of the right. This construction is not permitted either by the idea which secures benefits to the author or inventor, upon the theory that the public is to be benefited, as well as himself, by his works, or by the principle pervading all this branch of the laws of patents, trade-marks, and copyrights, that an author or inventor must put his claim into the form of a well-defined specification, work or composition, and so place it upon record that he cannot alter it to suit circumstances, and so that other authors may know precisely what it is that has been written or invented." Ibid. 54.

This authority was followed in Carillo *v.* Shook, 22 Int. Rev. Rec. 152. See also Benn *v.* Le Clercq, 18 Id. 94.

must first publish and copyright it as a literary composition. Playright can be secured in no other way. Copyright in a dramatic composition carries with it playright. No special conditions or requirements are prescribed for securing playright. If the production be a "dramatic composition," copyright and playright attach simultaneously in the same manner and on the same conditions. Both rights begin with publication in print, and continue for the same term. Neither is affected by public performances of the play before its publication in print.[1] If the copyright be valid, the playright is valid. The owner of the copyright has the sole liberty both of publishing the composition and of representing it in public. If the copyright fails, the playright fails with it.

Transfer of Playright. — Great Britain.

Held, that Assignment must be in Writing. — The mode of transmitting the right to print a dramatic or musical composition, that is the copyright, is not different from that to be observed in the case of a book. But a conveyance of the right to publish a dramatic or musical composition does not necessarily carry the right to represent or perform it. The mode of transferring playright is, however, regulated by the same general principles that govern in the case of copyright. Hence, in England, the construction given to the 8 Anne, c. 19, and the 54 Geo. III. c. 156, has been applied to the 3 & 4 Will. IV. c. 15; and accordingly it has been held that an assignment of the right to represent or perform a dramatic or musical composition must, under the last-named statute, be in writing,[2] though it need not be attested[3] nor sealed.[4] This is the law as it has been judicially interpreted. But it is open to the same criticisms that have been made on the law relating to the assignment of copyright.[5]

[1] Roberts *v.* Myers, 13 Monthly Law Reporter, 396; Boucicault *v.* Fox, 5 Blatchf. 87; Boucicault *v.* Wood, 2 Biss. 84; Boucicault *v.* Hart, 13 Blatchf 47.

[2] Shepherd *v.* Conquest, 17 C. B. 427.

[3] Cumberland *v.* Copeland, 1 Hurl. & C. 194.

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

[5] See *ante*, p. 304, *et seq.*

Is Law Settled that Assignment must be in Writing? — The law regulating the transfer of playright cannot rightly be determined without considering what effect, if any, the 5 & 6 Vict. c. 45, has on this question. Can this statute be construed to govern the mode of transferring the right of representing a dramatic composition, so that, if copyright may be passed by parol, playright may be assigned in the same manner? This important question does not appear to have been judicially considered. It has been shown in another part of this work that the question whether copyright may be assigned by parol, under the statute of Victoria, cannot be regarded as judicially settled; but the opinion has been expressed that the weight of authority is in favor of the construction that an assignment is not required to be in writing.[1]

In Cumberland *v.* Copeland, the Exchequer Chamber, overruling the judgment of the Court of Exchequer,[2] held that an unattested writing was *sufficient*, under the statute of William;[3] but the question whether a writing was necessary was not before the court. Moreover, the assignment in controversy had been made before the statute of Victoria was passed. And so, in Marsh *v.* Conquest, the court simply decided that the assignment need not be by deed.[4] Shepherd *v.* Conquest is the only case yet reported in which it has been directly held that an assignment of playright must be in writing.[5] This judgment was based on the construction of 3 & 4 Will. IV. c. 15, and it does not appear that the court considered the bearing of 5 & 6 Vict. c. 45, on the question. The doctrine affirmed in this case was questioned in Lacy *v.* Toole, where a letter was held to be a valid assignment of the property in a play.[6] These decisions cannot rightly be regarded as settling what form of transfer is admissible under the statute of Victoria.

Section 20 of this act, after securing to the author and his assigns the sole liberty of representing or performing a dramatic or musical composition, for the same term as that provided for copyright in books, declares that "the provisions herein-

[1] See *ante*, pp. 311–316.
[2] 7 Hurl. & N. 118.
[3] 1 Hurl. & C. 194.
[4] 17 C. B. N. S. 418.
[5] 17 C. B. 427.
[6] 15 L. T. N. S. 512. See language of Byles, J., *ante*, p. 811, note 1.

before enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition," except as otherwise provided. The object and effect of this section, considered in connection with the general scope of the entire statute, appear to be to put playright on the same footing as copyright, as far as the vesting and the ownership of the rights are concerned. Moreover, the definition of assigns contained in section 2 doubtless gives the meaning of that word wherever used in the statute, and hence is as applicable to an assignee of playright as to one of copyright. It would seem, therefore, that any mode of transferring copyright recognized by the statute would be equally available in the case of playright; that, if the former may be assigned by parol, so may the latter; and that a writing, if required in one case, is essential in the other.

Transfer before Playright Secured. — It has been maintained elsewhere that, whatever may be the proper form of assignment after the copyright has been secured, the statute cannot rightly be construed to regulate transfers made before the statutory right has vested.[1] The statutory right of representation in the case of a manuscript dramatic composition attaches when the play is first publicly performed. Assuming the principle just expressed to be sound, the rights in a manuscript drama which has not been publicly performed may be passed by a verbal agreement; for in such case the form of transfer is governed by the common law.

But it should be borne in mind that the questions here raised have not been determined by the courts; hence the law remains for judicial interpretation.

Registration. — Nor has it been decided whether section 13 of 5 & 6 Vict. c. 45, which provides for the transfer of copyright by registration, but does not mention playright, and section 25, relating to the transmission of copyright by bequest and in case of intestacy, are applicable to the right of representation. But, for the reasons given above, it would seem that they are. This view in the case of transfer by registration appears to be confirmed by section 22 of the statute of Victoria.

[1] See *ante*, pp. 306, 307.

By this section, it is enacted "that no assignment of the copyright of any book, consisting of or containing a dramatic piece or musical composition shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment." It has been said [1] that this section was enacted to correct the law as expounded in Cumberland *v.* Planché,[2] where it was held that an assignment of the copyright in a farce carried the right of representation; and that Parliament intended to declare that a general assignment of copyright should not be construed to have that effect, unless the assignment should be registered, and the intention to transfer the right of representation clearly expressed. The provision applies, however, only to cases where the copyright in a dramatic or musical composition is assigned without any mention of the playright, and where, consequently, it may be doubtful whether the latter right was intended to be passed. When the playright alone is assigned, or when in the instrument that conveys the copyright it is expressly declared that the right of representation is also passed, registration is not required.[3] Thus, it was not necessary to register an assignment of "the whole copyright and acting right without reservation," since the intention to pass both rights was here plain.[4]

There is no reason why the same rule should not apply to cases wherein the assignment of the copyright shows unmistakably the intent of the assignor to convey also the playright, although the latter right is not expressly named in the instrument. Thus, an absolute conveyance in general terms of all the author's "right, title, and interest" in a dramatic composition can only mean, in the absence of words or circumstances to the contrary, that the parties agreed that the entire property, playright as well as copyright, should pass.[5]

[1] See Lacy *v.* Rhys, 4 Best & S. 883.

[2] 1 Ad. & El. 580.

[3] Lacy *v.* Rhys, *infra;* Marsh *v.* Conquest, 17 C. B. N. S. 418.

[4] Lacy *v.* Rhys, 4 Best & S. 878.

[5] It is not clear whether the above provision of the statute was intended to apply to all assignments of the copyright in dramatical and musical compositions, by whatever mode effected, or only to those made by registration.

Transfer of Playright. — United States.

In the United States, the statutory right of exclusive representation can exist only in a dramatic composition which has been copyrighted as a book. To this extent, playright is dependent on copyright. But there appears to be no reason why the two rights in the same composition may not be held separately by different persons, or why one right may not be transmitted with or without the other.

Mode of Transfer. — In considering the question whether copyright may be assigned by parol, or whether a writing is necessary, it has been shown [1] that the only provisions in the Revised Statutes which can be cited in favor of the latter view are sections 4955, which enacts that "copyrights shall be assignable in law, by any instrument of writing;" and section 4964, which imposes a penalty on any person who shall republish a book without the written consent of the owner of the copyright, signed by two witnesses. The latter section clearly does not apply to the performance of a play. Unlicensed representation is prohibited by section 4966, which declares that any person who publicly performs a dramatic composition without the consent of the owner shall be liable to damages; but it does not require such consent to be in writing. There is nothing in the statute which can rightly be construed as regulating the mode of assigning playright, excepting section 4955. This mentions assignments of "copyright" alone. As the statute does not expressly prescribe any form of transferring the right of representing a dramatic composition, it might be claimed that the question is governed by the common law, and hence that a parol transfer is good. But it is more probable that the courts will hold that, as playright is embraced within the grant of copyright, any regulations prescribed concerning the transfer of the latter right are by implication equally applicable to the former. If this view shall be adopted, and section 4955 This question has not been judicially considered. It may be urged with much reason that, in making the provision, Parliament had in view only those assignments made by entry in the register at Stationers' Hall, since this is the only mode of assigning copyright expressly prescribed by the statute; and that the effect of a transfer otherwise made should be left to judicial construction.

[1] See *ante*, pp. 813–821.

be construed to require an assignment of copyright to be in writing, it will follow that the same form must be observed in assigning playright.

Transfer before Playright Secured. — When a play is sold in manuscript, and the buyer afterward secures the statutory copyright and playright in his own name, there is nothing in the statute requiring the assignment, thus made before the statutory right attaches, to be in writing.[1]

Does Assignment of Copyright Carry Playright? — The question may arise, whether a general assignment of the author's rights in a copyrighted dramatic composition will carry both the right of publication and that of representation; and whether an assignment of the "copyright" without mention of the playright will impliedly embrace the latter. This would doubtless depend on the agreement, and the intention of the parties to be determined by the words of the contract, and such facts and circumstances as would be admissible to show its meaning. An absolute conveyance of all the author's "right, title, and interest" in a play would, in the absence of controlling circumstances to the contrary, be naturally understood to pass the entire property, including the rights both of publication and of representation.[2] And so an assignment in which the copyright, but not the playright, is mentioned may be shown to have the same effect; or its meaning may be properly restricted to the former right. It is a question of construction depending on the agreement and the circumstances in each case. But a clear intention to transfer both rights should be shown in order to give the agreement that effect.

Limited Assignment of Playright. — It has been shown that copyright cannot be regarded as divisible with respect to locality on account of the impracticability of such division.[3] But this difficulty does not exist in the case of playright. The impracticability of there being several exclusive publishers of a book in the same country, and of each restricting the circulation and sale of his publication to a prescribed area, is obvious. It is equally plain that no serious inconvenience will necessarily

[1] See *ante*, p. 819.
[2] As in Cumberland *v.* Planché, 1 Ad. & El. 580.
[3] See *ante*, p. 385.

result from one person exercising the exclusive right to represent a play in one State or city and another person in another State or city. There is, then, no reason why the owner of a drama, whether it be in manuscript, or printed and copyrighted, may not make an absolute assignment of the right to represent it in any named part of the country, in any State or States, or in any city or cities. The ownership of the playright may thus be divided among many owners, each having the exclusive right of representation within certain boundaries. In Keene *v.* Wheatley, the court seems to have entertained the contrary opinion.[1] But in the following case of Roberts *v.* Myers, the law was more correctly expounded to the effect that playright may be transferred independently of the copyright in the same composition, and that the former may be assigned for any part of the country.[2]

[1] "The author's proprietary rights for England and Scotland," said Mr. Justice Cadwalader, "had never been transferred to her [the complainant]. The statutes of the United States for the protection of authors do not, like those for the benefit of inventors, expressly sanction transfers of limited local proprietorships of exclusive privileges. A writing, which is in form a transfer by an author of his exclusive right for a designated portion of the United States, would therefore, *at law*, even under the statutes of copyright, operate as a *mere license*, and would be ineffectual as an assignment." 9 Am. Law Reg. 46.

This is true of copyright, but not of playright. Miss Keene had bought from an English dramatist the exclusive right of representing the play in the United States. It was held that as the play had not been published, she was entitled to maintain a suit in equity for the protection of her common-law rights; but that the transfer to her "cannot be regarded otherwise than as only a partial assignment upon which a suit could not be maintained at law in her own name." Ibid. The doctrine expressed in the language quoted is clearly erroneous. The very essence even of a limited assignment is that the ownership and the legal title for the time or territory embraced within the assignment must pass to the assignee; otherwise the agreement is but a license. A good assignment for the United States had been made to Miss Keene. She thereby became vested with the legal title and the absolute ownership in this country, and hence was fully entitled to maintain an action at law as well as a suit in equity.

[2] 13 Monthly Law Reporter, 396. In this case it appeared that an assignment had been made to the plaintiff of the exclusive right of representing a play for one year, in all parts of the United States excepting certain cities. The defendant contended that such agreement was not an assignment, but a license, and therefore that the suit could not be maintained in the name of the plaintiff. Mr. Justice Sprague said: "Whatever force this objection might have at law, it cannot prevail in equity. The statute of 1834 sanctions assignments of copyright, by prescribing the instrument by which they are to be made and a mode of recording them. It does not say what interest may be assigned. But there is no sufficient reason for preventing the author from conveying a distinct portion of his right. Divisibility as well as

In this case, the court also expressed the opinion that playright might be assigned for any time less than the full term. But the question whether a transfer of the exclusive right of representation for a limited time will amount in law to an assignment which will vest the assignee with the legal title during that term is attended with the same doubt and difficulties which were pointed out in treating of the limited assignment of copyright.[1]

Joint Authorship — Authors Employed. — The questions as to who is the owner of a play claimed to have been written by two persons jointly, and of a dramatic or musical composition which has been produced by one person in the employment of another, have already been considered.[2]

assignability enhances the value of his property, for he may find a purchaser able and willing to pay for a part, but not for the whole, of his copyright. The exclusive right of acting and representing is distinct from that of printing and publishing, created indeed by a new statute, which superadds it to those pre-existing rights; and there is no good reason why it should not be assignable, and that too for a limited time." Ibid. 401. See also Martinetti *v.* Maguire, 1 Deady, 216.

[1] See *ante*, p. 337.

[2] See as to joint-authorship, Levi *v.* Rutley, *ante*, p. 237; French *v.* Maguire, 55 How. Pr. (N. Y.) 471. As to rights of employer and person employed, see Hatton *v.* Kean, *ante*, p. 249; Wallenstein *v.* Herbert, *ante*, p. 251; Boucicault *v.* Fox, *ante*, p. 257; Shepherd *v.* Conquest, 17 C. B. 427.

CHAPTER XVI.

INFRINGEMENT OF PLAYRIGHT.

THE remedies for the unlawful performance of a dramatic composition are of two kinds: those in equity and those at law. The unlicensed representation of a play may be prevented or restrained by injunction; and an action at law lies for the damages sustained by such performance. The remedies in equity, including the injunction, account of profits and discovery, are governed by the same general principles which have been considered in the case of copyright.[1]

Statutory Remedies for Violation of Playright different from those for Invasion of Copyright. — The remedies in law prescribed by the statute for the violation of playright are different from those provided for the infringement of copyright. The modes of violating the two rights are entirely distinct Statutory copyright is infringed by publication, but not by any oral use of the composition. Playright is invaded by performing the play, but not by printing it or selling printed copies. The 3 & 4 Will. IV. c. 15, secures no other right and prohibits no other act than that of representation. The right secured by this statute is reaffirmed, its duration enlarged, and its application extended to musical compositions, by section 20 of 5 & 6 Vict. c. 45. But the remedies prescribed by the latter statute for the unlawful publication of a book do not apply, and are not extended, to the unlicensed representation of a play. For the latter wrong, the penalties given by the statute of William are re-enacted by section 21 of 5 & 6 Vict. c. 45. The only remedies then provided by any English statute for the protection of playright are those prescribed by 3 & 4 Will. IV. c. 15, and these do not apply to the unlawful printing of a play. Of course, a dramatic composition may be copyrighted as a book

[1] See Chap. XI.

under the statute of Victoria; and, in that case, unlawful printing is a violation of the copyright. But copyright vests only in printed books, while playright is secured in both published and manuscript productions. Hence, in England, a dramatist has no statutory remedy for the unlicensed printing of an unpublished play.

In the United States, playright, as well as copyright, is secured by the statute only in published works. When a dramatic composition is printed without authority, the wrong must be treated as an infringement of copyright. When the complaint is of unlicensed performance, the only remedies are those prescribed for the invasion of playright. Section 4967 of the statute, which prohibits the unauthorized publication of a manuscript, applies to the printing, but not the public performance, of an unpublished play.[1]

Remedies Prescribed by English Statute. — In England, the statutory remedies for the violation of playright are provided by section 2 of 3 & 4 Will. IV. c. 15, which declares that if any person shall "represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment," any dramatic piece entitled to protection, or any part thereof, "every such offender shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages."

Remedies Prescribed by American Statute. — The statute of the United States provides that "any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns, shall be liable to 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."[2]

[1] Boucicault *v.* Hart, 13 Blatchf. 47; Keene *v.* Wheatley, 9 Am. Law Reg. 33; Boucicault *v.* Fox, 5 Blatchf. 97.

[2] U. S. Rev. St. s. 4960.

What is an Unlawful Performance.

Public and Private Performances Distinguished. — The statute of the United States prohibits only unlicensed public performances. The word public or its equivalent is not used in the English act. But there can be no reasonable doubt that a strictly private performance is not within the prohibition of either statute. Cases may arise in which it will not be easy to determine whether the representation is a public or a private one. That it is called private does not make it so. Without regard to what it is called, or where it may be given, that may generally be regarded as a public performance which is open to the public without discrimination. But it would seem that a representation may also be regarded as a public one, although the privilege of admission is denied to the general public, and is extended only to certain persons. "Private theatricals" are sometimes given by amateur performers in a place of public amusement, to which a charge is made for admission. Only invited persons, or members of a certain society or class, are privileged to buy tickets of admission. There appears to be no reason why such entertainments should not be treated as public performances within the meaning of the law, notwithstanding the public indiscriminately are not admitted.

In a case of doubt as to whether an entertainment is a public or a private one, the fact that no charge is made for admission may aid in removing the doubt. But when it is found that a performance is public, the penalty of piracy cannot be escaped by the fact that the audience were admitted without charge. The purpose of the law is to protect the lawful owner of a dramatic composition from injury. Ordinarily, no injury will arise from the strictly private representation of a play. But a performance, nominally private, but in reality public, with a charge imposed on those admitted, or public performances to which persons are admitted free of charge, may be harmful to the owner of the drama represented, who thereby becomes entitled to the protection of the law.

Scenery, Costumes, &c., not Essential. — Neither scenery, appropriate costumes, nor any of the usual resources of a theatre,

are essential to a dramatic performance within the meaning of the statute. "We should take away a part of the protection conferred on authors," said Chief Justice Denman, "if we held that there could be no public representation without these accompaniments." [1]

Place of Performance. — Nor is it necessary that the representation shall be given in a theatre. The English statute prohibits unlicensed performances "at any place of dramatic entertainment." According to the judicial interpretation given to this language, any place where a public dramatic representation is given is a "place of dramatic entertainment" within the meaning of the law. "As a regular theatre may be a lecture-room, dining-hall, ball-room, and concert-room, on successive days, so a room, used ordinarily for either of those purposes, would become, for the time being, a theatre, if used for the representation of a regular stage play." [2]

Plurality of Actors not Essential. — A plurality of actors is not essential to a dramatic representation. In the meaning of the law, the performance is complete when the dialogue or monologue of the drama is repeated with appropriate expression and action before a public audience.[3] It cannot be material whether the various characters in the play are assumed by as many different actors, or are represented by one person appearing in ordinary dress in any place of public entertainment. The whole or a material part of a drama is frequently given as a "dramatic reading" by one person, on a lecture platform, and without special costume or other stage resource. The dialogue is thus recited with appropriate expression and action by a

[1] Russell *v.* Smith, 12 Q. B. 236.

[2] Denman, C. J., Ibid. 237. In the same case, Patteson, J., remarked that "the street where Punch is performed is for the time being a place of dramatic entertainment." Ibid. 232. In Russell *v.* Briant, 8 C. B. 836, the court did not doubt that a room in the Horns Tavern was a place of dramatic entertainment. See also Russell *v.* Smith (in equity), 16 Sim. 181.

[3] "When a dramatic composition is represented, in dialogue and action, by persons who represent it as real, by performing or going through with the various parts or characters assigned to them generally, the composition is acted, performed, or represented, and, if the representation is in public, it is a public representation. To act, in the sense of the statute, is to represent as real, by countenance, voice, or gesture, that which is not real. A character in a play who goes through with a series of events on the stage without speaking, if such be his part in the play, is none the less an actor in it than one who, in addition to motions and gestures, uses his voice." Blatchford, J., Daly *v.* Palmer, 6 Blatchf. 264.

single person, who represents the various characters as speaking and acting. Such a reading must be regarded as a dramatic performance within the meaning of the statute. In England, it has been held that the singing in public of a dramatic song, by one person sitting at a piano, is a dramatic representation.[1]

Public Reading may Amount to Performance. — There is no reason why the public reading or recital of any dramatic composition may not amount to a performance within the meaning of the law. The object of the statute may rightly be taken to be to secure to the owner the profits arising from all public uses of a dramatic composition. It is manifest that the property in the play may be injured, and the owner be deprived of profits to which he is entitled, if he is powerless to prevent the unlicensed use of his production for public readings.

But this right does not vest in a literary production which is not a dramatic composition. For in this case only the exclusive right of printing and selling is given by the statute, and only the unlawful printing or circulation of copies is prohibited. Hence, the author has no remedy against any person who publicly reads or recites such production. Of course, this rule applies only to published works. The unauthorized public reading of any unpublished production, whether a dramatic composition or not, is a violation of the owner's common-law rights therein.

Who are Liable.

Under the English statute, any person is made liable to the penalties who shall unlawfully represent, or "cause to be represented," a dramatic piece.[2] The words above quoted are not used in the American act, which prohibits "any person publicly performing or representing any dramatic composition,"[3] in violation of the provisions of the statute. This variation in language does not affect the uniformity of the intent and object of the two statutes. In this respect, they are to be construed alike.

[1] Russell *v.* Smith, 12 Q. B. 217. See also Russell *v.* Briant, 8 C. B. 886; Clark *v.* Bishop, 25 L. T. N. S. 908.

[2] 3 & 4 Will. IV. c. 15, s. 2.

[3] U. S. Rev. St. s. 4966.

Whether the part taken by a person in the representation of a play is such as will render him liable to an action for the penalties or damages, is a question sometimes attended with difficulties. Where the defendant had let a room or hall in his tavern, and had furnished the platform, benches, and lights for a public performance, and had allowed bills to be put up in the tavern, and tickets to be sold at the bar, it was held that these facts "afforded no evidence that the defendant represented, or caused to be represented, the musical composition in question within the meaning of the statute;" and that a person is not liable, "unless, by himself or his agent, he actually takes part in a representation which is a violation of copyright. And if it were to be held that all those who supply some of the means of representation to him who actually represents are to be regarded as thereby constituting him their agent, and thus causing the representation, within the meaning of the act, such a doctrine would, we think, embrace a class of persons not at all intended by the legislature."[1]

In Lyon *v.* Knowles, it appeared that the defendant had let his theatre to Dillon for certain dramatic performances, paid for the printing and advertising, and furnished the lights, door-keepers, scene-shifters, supernumeraries, and musicians. Dillon engaged and paid the company, selected the plays, and had the entire management of the performance, and exclusive control of all persons employed in the theatre. The money paid for admission was taken at the doors by servants of the defendant, who retained one half of the gross receipts as his remuneration for the use of the theatre, &c., and gave the other half to Dillon. On these facts, it was held that the defendant had transferred to Dillon, for the time, the entire control and management of the theatre; that the arrangement between them did not amount to a partnership; and hence that the latter, and not the former, was the person who had caused the representation.[2] This judgment was affirmed on appeal.[3]

[1] Russell *v.* Briant, 8 C. B. 836, 848.

[2] 3 Best & S. 556.

[3] 5 Id. 751. "If Dillon," said Chief Justice Cockburn in the lower court, "and his company could be in any sense regarded as the company of the defendant, he might be considered as representing, or causing to be represented, the piece in question. But the facts are quite otherwise. As I understand the evidence, the defendant made over to Dillon the use of this theatre,

The facts in Marsh *v.* Conquest showed that the defendant was the owner and manager of the Grecian Theatre in London; and that, for £30, he had let for one night to his son, who was stage-manager, the use of the theatre, company, and all persons employed. The son selected and brought out a play, for whose representation the court held the defendant liable.[1] This judgment was based on the fact, whether assumed or proved does not appear from the report, that the defendant had the control and management of the theatre and the company during that performance. If such was the fact, the law was doubtless interpreted correctly. But it may be doubted whether the circumstances and the relations of the parties warranted that assumption. The natural inference would be that, by the letting of the theatre and the company for one night, the entire control and management for that time passed to the lessee; and, to perform therein with his company such pieces as he should be minded to represent there. All that the defendant did was to stipulate that his servants should receive the proceeds, in order that the remuneration which he contracted for should be secured to him. But the theatre with its accessories, lights, band, &c., was under the direction and control of Dillon, and the defendant had divested himself both of the right to interfere in the choice of the piece to be represented, and of any veto to be exercised by him as to providing, acting, or representing any particular piece. The defendant is nothing more than the proprietor of the theatre, who has transferred for the time the exercise of all his rights in it as such to Dillon.

"It therefore appears to me that Dillon is the person who represented any pieces represented there while he had the sole possession. If it had been made out that there was a joint action or control over the performances by the defendant and Dillon, so that they could be considered partners, that might have been a very different matter. But here there was nothing in common between them except that the gross proceeds were shared. Does that make them partners? In order to constitute a partnership between two persons, there must be a participation of profits between them as such, whereas here the stipulation was that the defendant should have half of the gross profits of the theatre in lieu of being paid any sum as rent for the use of it." 3 Best & S. 562.

[1] 17 C. B. N. S. 418. "I think," said Erle, C. J., "the defendant is responsible for that representation. He was the proprietor of the theatre, and had entire control over the establishment and all belonging to it; and what was done by his son was done by his permission. The case of Lyon *v.* Knowles seems to me to recognize that distinction. There the defendant merely let his theatre with the scenery, scene-shifters, band, lights, &c., to Dillon, who brought his own company to represent pieces of his own selection, the plaintiff having no control whatever over any person employed in the representation. Here, however, the piece is performed by the defendant's own *corps dramatique*, his son being one of them; and the performance takes place for the defendant's profit to the extent of 80*l*. I think, therefore, it is impossible to say that the defendant did not cause the piece to be represented." Ibid. 431.

in that case, the defendant was no more liable for the representation than was the defendant in Russell *v.* Briant, or in Lyon *v.* Knowles.[1]

In Daly *v.* Palmer, the court ruled that the unlicensed sale of the infringing drama, "with a view to its public representation, makes the seller a participant in causing the play to be publicly represented;" and the defendants were enjoined, not only from performing the play, but also from selling it for public representation.[2]

What Amounts to Piracy.

In the case of playright, piracy is determined by the same general principles that govern in the case of copyright. The unauthorized performance, not only of the whole, but of a material part of a dramatic composition, will amount to piracy.[3]

[1] In Lyon *v.* Knowles, Blackburn, J., said: "I do not think that, by furnishing servants to another, a man can be said to do all that is done by those servants while under the command of that other. A familiar example may be found in the case of a man letting a ready-furnished house, leaving an old servant in it. Suppose the tenant gave a dinner, which was cooked by that servant, who also attended on him at it, and for which the plates and furniture of the landlord were used, no one could say that in any sense of the words the landlord gave that dinner." 3 Best & S. 564.

[2] 6 Blatchf. 256, 271.

[3] Br. Planché *v.* Braham, 8 Car. & P. 68, on ap. 4 Bing. N. C. 17; Reade *v.* Conquest, 11 C. B. N. S. 479, 492; Boosey *v.* Fairlie, 7 Ch. D. 301; Chatterton *v.* Cave, Law Rep. 10 C. P. 572, 1st ap. 2 C. P. D. 42, 2d ap. 3 App. Cas. 483. Am. Daly *v.* Palmer, 6 Blatchf. 256; Shook *v.* Rankin, 6 Biss. 477.

In Chatterton *v.* Cave, Lord Coleridge, C. J., said: "I concur in the opinion of the rest of the court. What I meant to convey by my finding was that in two points or situations there had been an imitation of the plaintiff's drama by the defendant. These points so copied were not parts of the dialogue or composition of the plaintiff's drama, but were in the nature of dramatic situations or scenic effects. It appeared to me that, looking to the general character of the two dramas respectively, the extent to which the one was taken from the other was so slight, and the effect upon the total composition was so small, that there was no substantial and material taking of any one portion of the defendant's drama from any portion of the plaintiff's. Therefore, though I felt bound to find that there was a taking of these two small points, I decided to enter the verdict for the defendant, and the question now is whether I was entitled to do so in point of law."

After considering Planché *v.* Braham, Bramwell *v.* Halcomb, Bradbury *v.* Hotten, and D'Almaine *v.* Boosey, he continued: "All these authorities satisfy me that the answer to the question whether there has been an infringement of copyright, does not follow as a necessary logical consequence from

Offender Liable to Penalties under English Statute when Material Part Taken. — The 3 & 4 Will. IV. c. 15, s. 2, by express words, subjects to the penalties prescribed any person who shall unlawfully represent the whole or "any part" of a dramatic piece. But a person is not liable to the penalties, unless a material part has been taken. "The question in every case," said Lord O'Hagan, "must be a question of fact; and a jury cannot be constrained to find every infinitesimal taking to be the taking of a 'part' of a dramatic production within the purview of the statute. 'Part,' as was observed, is not necessarily the same as 'particle;' and there may be a taking so minute in its extent, and so trifling in its nature, as not to incur the statutable liability."[1] When the part taken is material, the plaintiff, according to the opinion expressed by Chief Justice Tindal, in Planché *v.* Braham, is not bound to prove actual damage. "The positive enactment," said that Judge, "that every offender shall be liable to an amount not less than 40*s.*, *or* to the full amount of the benefit derived or loss sustained, shows that damage to the plaintiff is not the test of the

the mere fact of there having been a taking from a previous work, but that it is a question of fact and of common sense, whether the part taken is of such a substance and value, or used in such a way, as to amount to an infringement of the plaintiff's right. Here the plaintiff's play was taken from a French original, and the plaintiff would have a literary copyright in the translation and the right of representing it; but this could not prevent another person from going to the original and making another version in which he also would have a copyright. The defendant had made what in all but two points was an entirely distinct and independent version of the original drama. The two points in question related to two appearances of the Wandering Jew. I must confess that there is a difficulty to my mind in referring the substance of the two points taken to the original French drama as my learned brethren have done. In the French drama these appearances of the Jew form part of the prologue and epilogue respectively, and have not much reference to the action of the drama. They are introduced into the English dramas more as part of the machinery or story of the play than in the French original. The end of the French play is quite different from that of the English, and the appearance of the Jew in the latter at the end of the play is connected with the alteration of the plot. I think that the idea of these appearances was not taken by the defendant from the French original, but from the plaintiff's play. But notwithstanding this I think the effect of them is so very small on the total result of the play, and they form such an utterly unimportant part of the scenic representation as a whole, that the defendant's drama cannot be said to be taken in any material or substantial part from the plaintiff's." Law Rep. 10 C. P. 580–582.

[1] Chatterton *v.* Cave, 3 App. Cas. 483, 498. See also same case in lower courts, 2 C. P. D. 42, Law Rep. 10 C. P. 572.

defendant's liability, but that 40*s.* is to be paid, even if there be no actual damage."[1]

How Far Offender Liable under American Statute when only Part Taken. — The statute of the United States prohibits the unlicensed performance of "any dramatic composition," and fixes a minimum limit to the assessment of damages.[2] Above this limit, the amount is left to the discretion of the court.[3] The question may be raised whether the minimum of damages specified by the statute is not in the nature of a penalty;[4] and, if so, whether such penalty may be recovered for the unlawful performance of a part of a play.[5] But there can be no doubt that the unlawful performance of a material part of a dramatic composition will amount to piracy, against which an injunction will be granted, and for which an action for the damages sustained may be maintained.[6]

Substantial Identity Test of Piracy. — It is not essential that the representation complained of shall be an exact copy of the whole or part of a protected play. Substantial identity is enough to constitute piracy.[7]

[1] 4 Bing. N. C. 19. This opinion was cited with approval by Lord Cairns in Chatterton *v.* Cave, 3 App. Cas. 498. But in the same case Lord Hatherley seems to have thought that some damage must be shown in order to subject the defendant to the penalties. He said: "The minimum of damages, to be awarded when the fact of damage and the right to damages have been once established, was no doubt fixed because of the difficulty of proving with definiteness what amount of actual damage had been sustained, by perhaps a single performance at a provincial theatre of a work belonging to a plaintiff, whilst at the same time his work might be seriously depreciated if he did not establish his right as against all those who infringed upon it." Ibid. 492. See *ante*, p. 478, note 2.

[2] U. S. Rev. St. s. 4966.

[3] In considering the statute of 1856, Mr. Justice Drummond said: "That law prescribes a particular penalty for the unauthorized performance of a play: in the first instance, not less than $100, and for every subsequent performance, $50; leaving a certain discretion with the court upon that subject, 'as to the court having cognizance thereof shall appear to be just.' In other words, it does not necessarily follow that in all cases the precise penalty fixed to the violation of the law shall be given, but the court is to exercise a certain discretion in relation to the matter." Boucicault *v.* Wood, 7 Am. Law Reg. N. s. 549.

[4] See *post*, p. 639.

[5] This question in the case of copyright is considered *ante*, p. 488.

[6] Daly *v.* Palmer, 6 Blatchf. 256; Shook *v.* Rankin, 6 Biss. 477.

[7] **Br.** Reade *v.* Conquest, 11 C. B. N. s. 479; Chatterton *v.* Cave, Law Rep. 10 C. P. 572, 1st ap. 2 C. P. D. 42, 2d ap. 3 App. Cas. 483; Boosey *v.* Fairlie, 7 Ch. D. 301. **Am.** Daly *v.* Palmer, 6 Blatchf. 256; Boucicault *v.* Wood, 2 Biss. 34; Martinetti *v.* Maguire, 1 Deady, 216.

The decision in Daly *v.* Palmer affords an instructive illustration of what has been held to be a substantial identity sufficient to constitute piracy in the case of a dramatic representation. The matter alleged to have been pirated was the "railroad scene" in Daly's play Under the Gaslight. In this scene is represented a surface railroad and a signal-station shed, in which a woman, at her own request, is locked by the signal man, who then disappears. Next are seen two men, one of whom binds the other with a rope, fastens him to the railroad track, and leaves him to be killed by an expected train. From a window in the shed the woman sees what is done, hears the noise of the approaching train, breaks open the door with an axe, and frees the intended victim an instant before the train rushes by.

This scene was reproduced, but with noticeable variations, in Boucicault's drama After Dark. One of the characters, from a wine vault where he had been thrown, sees, through a door into an adjoining vault, two persons pass through a hole in the wall the body of a man who had been made unconscious by drugs. With an iron bar, he enlarges an orifice in the wall of the vault which opens on an underground railway, and sees lying insensible on the track the person whose body had just been put there by the two men in the adjoining vault. Hearing the noise of a coming locomotive, he quickly makes his way through the opening in the wall and moves the body from the track just in time to prevent it from being run over by the passing train.

In Under the Gaslight this incident occupies the third scene of the fourth act, and, during its progress, there is considerable conversation between the several characters on the stage. In After Dark, it is represented in three scenes of the third act, chiefly by action, but partly by monologue spoken by one of the characters after he has seen the body on the track. In laying down the law applicable to these facts, Mr. Justice Blatchford said: —

"The series of events so represented, and communicated by movement and gesture alone to the intelligence of the spectator, according to the directions contained in parentheses, in the two plays in question here, embraces the confinement of

A. in a receptacle from which there seems to be no feasible means of egress; a railroad track, with the body of B. placed across it in such manner as to involve the apparently certain destruction of his life by a passing train; the appearance of A. at an opening in the receptacle, from which A. can see the body of B.; audible indications that the train is approaching; successful efforts by A., from within the receptacle, by means of an implement found within it, to obtain egress from it upon the track; and the moving of the body of B., by A., from the impending danger, a moment before the train rushes by. In both of the plays, the idea is conveyed that B. is placed intentionally on the track, with the purpose of having him killed. Such idea is, in the plaintiff's play, conveyed by the joint medium of language uttered, and of movements which are the result of prescribed directions, while, in Boucicault's play, it is conveyed solely by language uttered. The action, the narrative, the dramatic effect and impression, and the series of events in the two scenes, are identical. Both are dramatic compositions, designed or suited for public representation. It is true that, in one, A. is a woman, and, in the other, A. is a man; that in one, A. is confined in a surface railroad-station shed, and, in the other, A. is confined in a cellar abutting on the track; that, in one, A. uses an axe, and, in the other, A. uses an iron bar; that, in one, A. breaks down a door, and, in the other, A. enlarges a circular hole; that, in one, B. is conscious, and is fastened to the rails by a rope, and, in the other, B. is insensible, and is not fastened; and that, in one, there is a good deal of dialogue during the scene, and, in the other, only a soliloquy by A., and no dialogue. But the two scenes are identical in substance, as written dramatic compositions, in the particulars in which the plaintiff alleges that what he has invented, and set in order, in the scene, has been appropriated by Boucicault. . . .

"All that is substantial and material in the plaintiff's railroad scene has been used by Boucicault, in the same order and sequence of events, and in a manner to convey the same sensations and impressions to those who see it represented, as in the plaintiff's play. Boucicault has, indeed, adapted the plaintiff's series of events to the story of his play, and, in doing so, has

evinced skill and art; but the same use is made, in both plays, of the same series of events, to excite, by representation, the same emotions, in the same sequence. There is no new use, in the sense of the law, in Boucicault's play, of what is found in the plaintiff's railroad scene. The railroad scene in Boucicault's play contains every thing which makes the railroad scene in the plaintiff's play attractive as a representation on the stage. As, in the case of the musical composition, the air is the invention of the author, and a piracy is committed if that in which the whole meritorious part of the invention consists is incorporated in another work, without any material alteration in sequence of bars; so, in the case of the dramatic composition, designed or suited for representation, the series of events directed in writing by the author, in any particular scene, is his invention, and a piracy is committed if that in which the whole merit of the scene consists is incorporated in another work, without any material alteration in the constituent parts of the series of events, or in the sequence of the events in the series.

"The adaptation of such series of events to different characters who use different language from the characters and language in the first play is like the adaptation of the musical air to a different instrument, or the addition to it of variations or of an accompaniment. The original subject of invention, that which required genius to construct it and set it in order, remains the same in the adaptation. A mere mechanic in dramatic composition can make such adaptation, and it is a piracy, if the appropriated series of events, when represented on the stage, although performed by new and different characters, using different language, is recognized by the spectator, through any of the senses to which the representation is addressed, as conveying substantially the same impressions to, and exciting the same emotions in, the mind, in the same sequence or order. Tested by these principles, the railroad scene in Boucicault's play is, undoubtedly, when acted, performed, or represented on a stage or public place, an invasion and infringement of the copyright of the plaintiff in the railroad scene in his play." [1]

[1] 6 Blatchf. 265–270.

Dramatizations. — As each of two or more independent dramatizations of a common original is entitled to protection, one is not a piracy of another, unless there has been unlawful copying.[1]

Intention and Ignorance. — It is no defence to an action for the violation of playright that the defendant has not knowingly or intentionally committed piracy.[2]

Registration. — In England, it has been held that an action for the penalties or a suit for an injunction may be maintained, although the dramatic piece alleged to have been infringed has not been registered.[3]

Consent in Writing. — The English statute imposes penalties on any person who shall represent a dramatic piece "without the consent in writing of the author or other proprietor first had and obtained."[4] Such consent need not be in the handwriting of the author or proprietor. It may be given by an agent.[5] The American statute does not require the consent to be in writing.[6]

Limitation of Actions. — The 3 & 4 Will. IV. c. 15, requires that actions and suits for infringement of playright shall be brought within twelve months after the cause of action arose.[7]

The American statute provides that "no action shall be maintained in case of forfeiture or penalty under the copyright laws, unless the same is commenced within two years after the cause of action has arisen."[8] This limitation seems to apply only to proceedings for forfeitures and penalties, and not to actions for damages or suits in equity.[9] Assuming this to be the sound construction, the question arises whether section 4966, which gives an action for damages and fixes a minimum limit to the assessment of the damages, is remedial or penal. If what is there prescribed is a penalty, it would seem that actions brought under that section must be begun within two years. But if a mere remedy in damages is provided by that

[1] See *ante*, pp. 433, 596.

[2] Reade *v.* Lacy, 1 Johns. & H. 524; Reade *v.* Conquest, 11 C. B. N. S. 479. See this subject considered *ante*, pp. 401–404.

[3] See *ante*, p. 608.

[4] 3 & 4 Will. IV. c. 15, s. 2.

[5] Morton *v.* Copeland, 16 C. B. 517.

[6] U. S. Rev. St. s. 4966.

[7] s. 3.

[8] s. 4968.

[9] See *ante*, p. 494.

section, the statutory limitation, according to the view above taken, does not apply to actions for the recovery of such damages. The sound view would seem to be that the provision under consideration is at once remedial and penal. It is remedial inasmuch as it gives an action for damages. It is penal with respect to the minimum of damages prescribed. If this is true, the amount of damages named is in the nature of a penalty, and actions for the recovery of that amount, without regard to the damages actually sustained, are governed by the statutory limitation of time. But such limitation would not apply to actions for purely remedial damages to be assessed irrespective of the minimum amount fixed by the statute. But if it shall be held that section 4966 is wholly penal, and that the statutory limitation of time applies equally to all actions for damages brought under it, then an action for damages or a suit in equity will lie independently of that section. For the principle is settled that where a right is secured by a statute, and penalties, but not the remedial action for damages, are prescribed, the common-law remedies both in law and in equity are available.[1] And such remedies are not lost by not being sought within the time prescribed by the statute for the recovery of penalties. The proper construction of the statute, then, would seem to be that when playright is invaded, an action for the damages actually sustained, or a suit in equity, is not barred by the fact that the relief is not sought within two years after the wrong has been done.

Jurisdiction. — In the United States, actions and suits for the piracy of statutory playright must be brought in a federal court.[2]

Music.

The view has been taken in this work that the English statute secures to the composer the exclusive right of performing every kind of music, whether it is or is not a dramatic composition, and whether it is vocal or instrumental.[3] Assuming this to be the true object of the statute, the owner of any musical composition has a right of action against any person

[1] See *ante*, p. 473. [2] See Chap. XI. [3] See *ante*, p. 599.

who causes it to be played in public without due authority. Piracy is governed by the same principles; and the remedies are the same in this case as in that of dramatic compositions.[1]

In the United States, the statute does not give to the composer the exclusive right of playing a piece of music, unless it be a dramatic composition. A work composed for instruments alone, as a symphony, concerto, &c., cannot be considered as a dramatic composition. Hence, there is no statutory remedy against any person who causes a work of this kind to be played in public without the consent of the owner.

The question may arise, whether the statute protects the music, as well as the words, of a musical dramatic composition. An opera, and sometimes a single song, is such a composition, consisting, as has been shown, of words and music allied. The unauthorized representation of the whole is a clear case of piracy. So, also, would be the performance of the libretto, or the recitation of the words, either alone, without music, or when set to music other than the original.[2] But has the owner of an opera any remedy against one who gives an operatic performance in which is used the music, but not the libretto, of the protected composition? Has the author of a dramatic song any lawful means of preventing another from singing in public the melody with other words? The true doctrine may be reached by applying two established principles: 1. The statute protects the whole and every substantial part of a dramatic composition. 2. The unlicensed performance of the whole or of a material part is piracy. The music forms an important and essential part of every musical dramatic composition. Hence, playing in public the music, though other words than the original be used, is the public performance of a material part of a dramatic composition, and must therefore fall within the statutory prohibition, and be piratical.

[1] In Boosey *v.* Fairlie, 7 Ch. D. 301, it appeared that the defendant had taken for public performance with his own libretto a material part of the music but not the words of the plaintiff's opera. This was held to be a violation of the playright in the opera secured to the plaintiff by the International Copyright Act. See *ante*, p. 608.

[2] Planché *v.* Braham, 8 Car. & P. 68, on ap. 4 Bing. N. C. 17.

STATUTES.

8 Geo. II. c. 13. Engravings 643
7 Geo. III. c. 38. ,, ... 645
15 Geo. III. c. 53. Universities and Colleges 647
17 Geo. III. c. 57. Engravings 651
54 Geo. III. c. 56. Sculpture 653
3 & 4 Will. IV. c. 15. Dramatic Compositions 656
5 & 6 Will. IV. c. 65. Lectures 658
6 & 7 Will. IV. c. 59. Engravings 660
5 & 6 Vict. c. 45. Books, Dramatic and Musical Compositions, 661
7 & 8 Vict. c. 12. International Copyright 675
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Act of 1874. Engravings, Copyright Notice, Fees, &c. . . . 704
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STATUTES.

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8 GEO. II. c. 13.

An Act for the Encouragement of the Arts of designing, engraving, and etching historical and other Prints, by vesting the Properties thereof in the Inventors and Engravers during the Time therein mentioned.

[2 REV. STAT. 399.] [1735.]

Preamble.

WHEREAS divers persons have by their own genius, industry, pains, and expence, invented and engraved, or worked in mezzotinto or chiaro oscuro, sets of historical and other prints, in hopes to have reaped the sole benefit of their labours: And whereas print-sellers and other persons have of late, without the consent of the inventors, designers, and proprietors of such prints, frequently taken the liberty of copying, engraving, and publishing, or causing to be copied, engraved, and published, base copies of such works, designs, and prints, to the very great prejudice and detriment of the inventors, designers, and proprietors thereof: For remedy thereof, and for preventing such practices for the future, may it please your Majesty that it may be enacted, and 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, that from and after the twenty fourth day of June, which shall be in the year of our Lord one thousand seven hundred and thirty five, every person who shall invent and design, engrave, etch, or work in mezzotinto or chiaro oscuro, or from his own works and invention shall cause to be designed and engraved, etched, or worked in mezzotinto or chiaro oscuro, any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same for

After 24 June, 1735, the property of historical and other prints vested in the inventor for fourteen years.

Proprietor's name to be affixed to each print.

the term of fourteen years, to commence from the day of the first publishing thereof, which shall be truly engraved with the name of the proprietor on each plate, and printed on every such print or prints; and that if any print-seller or other person whatsoever, from and after the said twenty fourth day of June one thousand seven hundred and thirty five, within the time limited by this Act, shall engrave, etch, or work as aforesaid, or in any other manner copy and sell, or cause to be engraved, etched, or copied and sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, or cause to be printed, reprinted, or imported for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him or them respectively in the presence of two or more credible witnesses, or, knowing the same to be so printed or reprinted without the consent of the proprietor or proprietors, shall publish, sell, or expose to sale or otherwise, or in any other manner dispose of, or cause to be published, sold, or exposed to sale or otherwise, or in any other manner disposed of, any such print or prints without such consent first had and obtained as aforesaid, then such offender or offenders shall forfeit the plate or plates on which such print or prints are or shall be copied, and all and every sheet or sheets (being part of or whereon such print or prints are or shall be so copied or printed) to the proprietor or proprietors of such original print or prints, who shall forthwith destroy and damask the same; and further, that every such offender or offenders shall forfeit five shillings for every print which shall be found in his, her, or their custody, either printed or published and exposed to sale, or otherwise disposed of contrary to the true intent and meaning of this Act, the one moiety thereof to the King's most excellent Majesty, his heirs and successors, and the other moiety thereof to any person or persons that shall sue for the same, to be recovered in any of his Majesty's courts of record at Westminster, by action of debt, bill, plaint, or information, in which no wager of law, essoign, privilege, or protection, or more than one imparlance shall be allowed.

Penalty on print-sellers or others pirating the same.

Not to extend to purchasers of plates from the original proprietors.

II. Provided nevertheless, that it shall and may be lawful for any person or persons who shall hereafter purchase any plate or plates for printing from the original proprietors

thereof, to print and reprint from the said plates without incurring any of the penalties in this Act mentioned.

Limitation of actions.

III. And be it further enacted by the authority aforesaid, that if any action or suit shall be commenced or brought against any person or persons whatsoever, for doing or causing to be done anything in pursuance of this Act, the same shall be brought within the space of three months after so doing; and the defendant and defendants in such action or suit shall or may plead the general issue, and give the special matter in evidence; and if upon such action or suit a verdict shall be given for the defendant or defendants, or if the plaintiff or plaintiffs become nonsuited or discontinue his, her, or their action or actions, then the defendant or defendants shall have and recover full costs, for the recovery whereof he shall have the same remedy as any other defendant or defendants in any other case hath or have by law.

General issue.

IV. Provided always, and be it further enacted by the authority aforesaid, that if any action or suit shall be commenced or brought against any person or persons for any offence committed against this Act, the same shall be brought within the space of three months after the discovery of every such offence, and not afterwards, anything in this Act contained to the contrary notwithstanding.

. . . . . .

Publick Act.

VI. And be it further enacted by the authority aforesaid, that this Act shall be deemed, adjudged, and taken to be a publick Act, and be judicially taken notice of as such by all judges, justices, and other persons whatsoever without specially pleading the same.

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7 Geo. III. c. 38.

An Act to amend and render more effectual an Act made in the Eighth Year of the Reign of King George the Second, for Encouragement of the Arts of designing, engraving, and etching Historical and other Prints; and for vesting in and securing to Jane Hogarth, Widow, the Property in certain Prints.

[2 Rev. Stat. 707.] [1766.]

Preamble, reciting Act 8 Geo. 2. [c. 13.]

Whereas an Act of Parliament passed in the eighth year of the reign of his late Majesty King George the Second, intit-

uled "An Act for the encouragement of the arts of designing, engraving, and etching historical and other prints, by vesting the properties thereof in the inventors and engravers during the time therein mentioned," has been found ineffectual for the purposes thereby intended: 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, that from and after the first day of January one thousand seven hundred and sixty seven, all and every person and persons who shall invent or design, engrave, etch, or work in mezzotinto or chiaro oscuro, or from his own work, design, or invention shall cause or procure to be designed, engraved, etched, or worked in mezzotinto or chiaro oscuro, any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, shall have and are hereby declared to have the benefit and protection of the said Act and this Act under the restrictions and limitations herein after-mentioned.

The original inventors, designers, or engravers, &c. of historical and other prints, and such who shall cause prints to be done from works, &c. of their own invention,

and also such as shall engrave, &c. any print taken from any picture, drawing, model, or sculpture; are entitled to the benefit and protection of the recited and present Act;

II. And be it further enacted by the authority aforesaid, that from and after the said first day of January one thousand seven hundred and sixty seven, all and every person and persons who shall engrave, etch, or work in mezzotinto or chiaro oscuro, or cause to be engraved, etched, or worked, any print taken from any picture, drawing, model, or sculpture, either ancient or modern, shall have and are hereby declared to have the benefit and protection of the said Act and this Act for the term herein after-mentioned, in like manner as if such print had been graved or drawn from the original design of such graver, etcher, or draughtsman; and if any person shall engrave, print, and publish, or import for sale any copy of any such print contrary to the true intent and meaning of this and the said former Act, every such person shall be liable to the penalties contained in the said Act, to be recovered as therein and herein after is mentioned.

and those who shall engrave, or import for sale, copies of such prints, are liable to penalties.

. . . . . .

Penalties may be sued for as by the recited Act is directed;

V. And be it further enacted by the authority aforesaid, that all and every the penalties and penalty inflicted by the said Act, and extended and meant to be extended to the several cases comprised in this Act, shall and may be sued for and recovered in like manner and under the like restrictions and

limitations as in and by the said Act is declared and appointed; and the plaintiff or common informer in every such action (in case such plaintiff or common informer shall recover any of the penalties incurred by this or the said former Act) shall recover the same, together with his full costs of suit.

and be recovered with full costs.

VI. Provided also, that the party prosecuting shall commence his prosecution within the space of six calendar months after the offence committed.

Prosecution to be commenced within 6 months.

VII. And be it further enacted by the authority aforesaid, that the sole right and liberty of printing and reprinting intended to be secured and protected by the said former Act and this Act, shall be extended, continued, and be vested in the respective proprietors for the space of twenty eight years to commence from the day of the first publishing of any of the works respectively hereinbefore and in the said former Act mentioned.

The right intended to be secured by this and the former Act, vested in the proprietors for the term of 28 years from the first publication.

VIII. And be it further enacted by the authority aforesaid, that if any action or suit shall be commenced or brought against any person or persons whatsoever, for doing or causing to be done anything in pursuance of this Act, the same shall be brought within the space of six calendar months after the fact committed; and the defendant or defendants in any such action or suit shall or may plead the general issue and give the special matter in evidence; and if upon such action or suit a verdict shall be given for the defendant or defendants, or if the plaintiff or plaintiffs become nonsuited, or discontinue his, her, or their action or actions, then the defendant or defendants shall have and recover full costs, for the recovery whereof he shall have the same remedy as any other defendant or defendants in any other case hath or have by law.

Limitation of actions.

General issue.

Full costs.

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15 GEO. III. C. 53.

An Act for enabling the Two Universities in England, the Four Universities in Scotland and the several Colleges of Eton, Westminster and Winchester, to hold in perpetuity their copy right in Books, given or bequeathed to the said Universities and Colleges for the Advancement of useful Learning and other purposes of Education; and for amending so much of an Act of the eighth year of the reign of Queen

Anne as relates to the Delivery of Books to the Warehouse keeper of the Stationers Company, for the use of the several Libraries therein mentioned.

[3 Rev. Stat. 81.] [1775.]

Preamble.

WHEREAS authors have heretofore bequeathed or given, and may hereafter bequeath or give, the copies of books composed by them, to or in trust for one of the two universities in that part of Great Britain called England, or to or in trust for some of the colleges or houses of learning within the same, or to or in trust for the four universities in Scotland, or to or in trust for the several colleges of Eaton, Westminster and Winchester, and in and by their several wills or other instruments of donation have directed or may direct that the profits arising from the printing and reprinting such books shall be applied or appropriated as a fund for the advancement of learning and other beneficial purposes of education within the said universities and colleges aforesaid: And whereas such useful purposes will frequently be frustrated unless the sole printing and reprinting of such books, the copies of which have been or shall be so bequeathed or given as aforesaid, be preserved and secured to the said universities, colleges and houses of learning respectively in perpetuity: May it therefore please your Majesty that it may be enacted, and 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, that the said universities and colleges respectively shall, at their respective presses, have for ever the sole liberty of printing and reprinting all such books as shall at any time heretofore have been or (having not been heretofore published or assigned) shall at any time hereafter be bequeathed or otherwise given by the author or authors of the same respectively, or the representatives of such author or authors, to or in trust for the said universities, or to or in trust for any college or house of learning within the same, or to or in trust for the said four universities in Scotland, or to or in trust for the said colleges of Eaton, Westminster and Winchester, or any of them, for the purposes aforesaid, unless the same shall have been bequeathed or given or shall hereafter be bequeathed or given for any term of years or other limited term, any law or usage to the contrary hereof in any-wise notwithstanding.

Universities, &c. in England and Scotland to have for ever the sole right of printing, &c. such books as have been or shall be bequeathed to them,

unless the same have been or shall be given for a limited time.

After June 24, 1775, persons printing or selling such books shall forfeit the same, and also 1*d.* for every sheet;

II. And it is hereby further enacted, that if any bookseller, printer or other person whatsoever, from and after the twenty-fourth day of June one thousand seven hundred and seventy-five, shall print, reprint or import, or cause to be printed, reprinted or imported, any such book or books, or, knowing the same to be so printed or reprinted, shall sell, publish or expose to sale, or cause to be sold, published or exposed to sale, any such book or books, then such offender or offenders shall forfeit such book or books, and all and every sheet or sheets being part of such book or books, to the university, college or house of learning respectively to whom the copy of such book or books shall have been bequeathed or given as aforesaid, who shall forthwith damask and make waste paper of them; and further, that every such offender or offenders shall forfeit one penny for every sheet which shall be found in his, her or their custody either printed or printing, published or exposed to sale, contrary to the true intent and meaning of this Act, the one moiety thereof to the King's most excellent Majesty, his heirs and successors, and the other moiety thereof to any person or persons who shall sue for the same; to be recovered in any of his Majesty's courts of record at Westminster, or in the Court of Session in Scotland, by action of debt, bill, plaint or information, in which no wager of law, essoin, privilege or protection, or more than one imparlance shall be allowed.

one moiety to his Majesty and the other to the prosecutor.

Nothing in this Act to extend to grant any exclusive right longer than such books are printed at the presses of the universities.

III. Provided nevertheless, that nothing in this Act shall extend to grant any exclusive right otherwise than so long as the books or copies belonging to the said universities or colleges are printed only at their own printing presses within the said universities or colleges respectively, and for their sole benefit and advantage; and that if any university or college shall delegate, grant, lease or sell their copy rights, or exclusive rights of printing the books hereby granted, or any part thereof, or shall allow, permit or authorise any person or persons, or bodies corporate, to print or reprint the same, that then the privileges hereby granted are to become void and of no effect, in the same manner as if this Act had not been made; but the said universities and colleges as aforesaid shall nevertheless have a right to sell such copies so bequeathed or given as aforesaid, in like manner as any author or authors now may do under the provisions of the statute of the eighth year of her Majesty Queen Anne.[1]

Universities may sell copyrights in like manner as any author.

[1] 8 Anne, c. 19, repealed by 5 & 6 Vict. c. 45, s. 1.

No person subject to penalties for printing, &c. books already bequeathed, unless they be entered before June 24, 1775.

IV. And whereas many persons may through ignorance offend against this Act unless some provision be made whereby the property of every such book as is intended by this Act to be secured to the said universities, colleges and houses of learning within the same, and to the said universities in Scotland, and to the respective colleges of Eaton, Westminster and Winchester, may be ascertained and known: Be it therefore enacted by the authority aforesaid, that nothing in this Act contained shall be construed to extend to subject any bookseller, printer or other person whatsoever to the forfeitures or penalties herein mentioned for or by reason of the printing or reprinting, importing or exposing to sale, any book or books, unless the title to the copy of such book or books which has or have been already bequeathed or given to any of the said universities or colleges aforesaid be entered in the register book of the Company of Stationers kept for that purpose, in such manner as hath been usual, on or before the twenty-fourth day of June one thousand seven hundred and seventy-five, and of all and every such book or books as

All books that may hereafter be bequeathed must be registered within two months after such bequest shall be known.

may or shall hereafter be bequeathed or given as aforesaid be entered in such register within the space of two months after any such bequest or gift shall have come to the knowledge of the vice chancellors of the said universities, or heads of houses and colleges of learning, or of the principal of any of the said four universities respectively; for every of which entries so to be made as aforesaid the sum of sixpence shall be paid, and no more; which said register book shall and may, at all seasonable and convenient times, be referred to and inspected by any bookseller, printer or other person, without any fee or reward; and the clerk of the said Company of Stationers shall, when and as often as thereunto required, give a certificate under his hand of such entry or entries, and for every such certificate may take a fee not exceeding sixpence.

6d. to be paid for each entry in the register book, which may be inspected without fee.

Clerk to give a certificate, being paid 6d.

If clerk refuse or neglect to make entry, &c.,

V. And be it further enacted, that if the clerk of the said Company of Stationers for the time being shall refuse or neglect to register or make such entry or entries or to give such certificate, being thereunto required by the agent of either of the said universities or colleges aforesaid, lawfully authorised for that purpose, then either of the said universities or colleges aforesaid, being the proprietor of such copy right or copy rights as aforesaid (notice being first given of such refusal by an advertisement in the Gazette), shall have

proprietor of such copy right to have like benefit as if such entry had been

the like benefit as if such entry or entries, certificate or certificates had been duly made and given; and the clerk so refusing shall for every such offence forfeit twenty pounds to the proprietor or proprietors of every such copy right, to be recovered in any of his Majesty's courts of record at Westminster, or in the Court of Session in Scotland, by action of debt, bill, plaint or information, in which no wager of law, essoin, privilege, protection, or more than one imparlance shall be allowed.

made, and the clerk shall forfeit 20*l*.

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VII. And be it further enacted by the authority aforesaid, that if any action or suit shall be commenced or brought against any person or persons whatsoever for doing or causing to be done anything in pursuance of this Act, the defendants in such action may plead the general issue and give the special matter in evidence [*a*]; and if upon such action a verdict or, if the same shall be brought in the Court of Session in Scotland, a judgment be given for the defendant, or the plaintiff become nonsuited and discontinue his action, then the defendant shall have and recover his full costs, for which he shall have the same remedy as a defendant in any case by law hath.

Evidence and costs in actions.

VIII. And be it further enacted by the authority aforesaid, that this Act shall be adjudged, deemed and taken to be a Publick Act, and shall be judicially taken notice of as such by all judges, justices and other persons whatsoever, without specially pleading the same.

Publick Act.

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17 GEO. III. c. 57.

An Act for more effectually securing the Property of Prints to Inventors and Engravers, by enabling them to sue for and recover Penalties in certain Cases.

[3 REV. STAT. 130.] [1777.]

WHEREAS an Act of Parliament passed in the eighth year of the reign of his late Majesty King George the Second, intituled "An Act for the encouragement of the arts of designing, engraving and etching historical and other prints, by vesting

Preamble. Recital of Acts 8 Geo. 2. [c. 13.]

[*a* So much as relates to plea of general issue, rep., Stat. Law Rev. Act, 1861.]

the properties thereof in the inventors and engravers during the time therein mentioned:" And whereas by an Act of Parliament passed in the seventh year of the reign of his present Majesty, for amending and rendering more effectual the aforesaid Act, and for other purposes therein mentioned, it was (among other things) enacted, that from and after the first day of January one thousand seven hundred and sixty-seven all and every person or persons who should engrave, etch or work in mezzotinto or chiaro oscuro, or cause to be engraved, etched or worked any print taken from any picture, drawing, model or sculpture, either ancient or modern, should have and were thereby declared to have the benefit and protection of the said former Act and that Act, for the term therein-after mentioned, in like manner as if such print had been graved or drawn from the original design of such graver, etcher or draughtsman: And whereas the said Acts have not effectually answered the purposes for which they were intended, and it is necessary for the encouragement of artists, and for securing to them the property of and in their works, and for the advancement and improvement of the aforesaid arts, that such further provisions should be made as are herein-after mentioned and contained: May it therefore please your Majesty that it may be enacted, and 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, that from and after the twenty-fourth day of June one thousand seven hundred and seventy-seven, if any engraver, etcher, printseller or other person shall, within the time limited by the aforesaid Acts or either of them, engrave, etch or work or cause or procure to be engraved, etched or worked, in mezzotinto or chiaro oscuro or otherwise, or in any other manner copy in the whole or in part, by varying, adding to or diminishing from the main design, or shall print, reprint or import for sale, or cause or procure to be printed, reprinted or imported for sale, or shall publish, sell or otherwise dispose of, or cause or procure to be published, sold or otherwise disposed of, any copy or copies of any historical print or prints, or any print or prints of any portrait, conversation, landscape or architecture, map, chart or plan, or any other print or prints whatsoever, which hath or have been or shall be engraved, etched, drawn or designed in any part of Great

and 7 Geo. 3. c. 38.

After June 24, 1777, if any engraver, &c. shall, within the time limited by the aforesaid Acts, engrave or etch, &c. any print without the consent of the proprietor, he shall be liable to damages and double costs.

Britain, without the express consent of the proprietor or proprietors thereof first had and obtained in writing signed by him, her or them respectively, with his, her or their own hand or hands, in the presence of and attested by two or more credible witnesses, then every such proprietor or proprietors shall and may, by and in a special action upon the case to be brought against the person or persons so offending, recover such damages as a jury on the trial of such action, or on the execution of a writ of inquiry thereon, shall give or assess, together with double costs of suit. [Rep., Stat. Law Rev. Act, 1861.][1]

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54 Geo. III. c. 56.

An Act to amend and render more effectual an Act of His present Majesty for encouraging the Art of making new Models and Casts of Busts, and other Things therein mentioned, and for giving further Encouragement to such Arts.

[5 Rev. Stat. 291.] [18th May 1814.]

Recital of 38 Geo. 3. c. 71.

Whereas by an Act passed in the thirty-eighth year of the reign of his present Majesty, intituled "An Act for encouraging the art of making new models and casts of busts and other things therein mentioned," the sole right and property thereof were vested in the original proprietors for a time therein specified:[2] And whereas the provisions of the said Act having been found ineffectual for the purposes thereby intended, it is expedient to amend the same, and to make other provisions and regulations for the encouragement of artists, and to secure to them the profits of and in their works, and for the advancement of the said arts: May it therefore please your Majesty that it may be enacted, and 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, that from and after the passing of this Act every person or persons who shall make or cause to be made any new and original sculpture, or model, or copy, or cast of the

From passing of this Act the sole right and property of all new and original

[1] So much as relates to double costs repealed. The provisions of the engraving Acts are extended to lithographs by 15 & 16 Vict. c. 12, s. 14. See *post*, p. 690.

[2] 38 Geo. III. c. 71, repealed by 24 & 25 Vict. c. 101.

sculpture, models, copies, and casts, vested in the original proprietors for 14 years.

human figure or human figures, or of any bust or busts, or of any part or parts of the human figure, clothed in drapery or otherwise, or of any animal or animals, or of any part or parts of any animal combined with the human figure or otherwise, or of any subject being matter of invention in sculpture, or of any alto or basso-relievo representing any of the matters or things herein-before mentioned, or any cast from nature of the human figure, or of any part or parts of the human figure, or of any cast from nature of any animal, or of any part or parts of any animal, or of any such subject containing or representing any of the matters and things herein-before mentioned, whether separate or combined, shall have the sole right and property of all and in every such new and original sculpture, model, copy, and cast of the human figure or human figures, and of all and in every such bust or busts, and of all and in every such part or parts of the human figure, clothed in drapery or otherwise, and of all and in every such new and original sculpture, model, copy, and cast representing any animal and animals, and of all and in every such work representing any part or parts of any animal combined with the human figure or otherwise, and of all and in every such new and original sculpture, model, copy, and cast of any subject, being matter of invention in sculpture, and of all and in every such new and original sculpture, model, copy, and cast in alto or basso-relievo representing any of the matters or things herein-before mentioned, and of every such cast from nature, for the term of fourteen years from first putting forth or publishing the same; provided in all and in every case the proprietor or proprietors do cause his, her, or their name or names, with the date, to be put on all and every such new and original sculpture, model, copy, or cast, and on every such cast from nature, before the same shall be put forth or published.

Works already published under the recited Act, vested in the proprietors for 14 years.

II. And be it further enacted, that the sole right and property of all works, which have been put forth or published under the protection of the said recited Act shall be extended, continued to, and vested in the respective proprietors thereof for the term of fourteen years, to commence from the date when such last mentioned works respectively were put forth or published.

Persons putting forth pirated copies or pirated

III. And be it further enacted, that if any person or persons shall, within such term of fourteen years, make or import,

or cause to be made or imported, or exposed to sale, or otherwise disposed of, any pirated copy or pirated cast of any such new and original sculpture, or model or copy, or cast of the human figure or human figures, or of any such bust or busts, or of any such part or parts of the human figure, clothed in drapery or otherwise, or of any such work of any animal or animals, or of any such part or parts of any animal or animals, combined with the human figure or otherwise, or of any such subject being matter of invention in sculpture, or of any such alto or basso-relievo representing any of the matters or things hereinbefore mentioned, or of any such cast from nature as aforesaid, whether such pirated copy or pirated cast be produced by moulding or copying from or imitating in any way any of the matters or things put forth or published under the protection of this Act, or of any works which have been put forth or published under the protection of the said recited Act, the right and property whereof is and are secured, extended, and protected by this Act, in any of the cases as aforesaid, to the detriment, damage, or loss of the original or respective proprietor or proprietors of any such works so pirated, then and in all such cases the said proprietor or proprietors or their assignee or assignees shall and may, by and in a special action upon the case to be brought against the person or persons so offending, receive such damages as a jury on a trial of such action shall give or assess, together with double costs of suit. [Rep., 5 & 6 Vict. c. 97 s. 2.][1]

casts, within the 14 years, shall be liable to damages in action on the case.

IV. Provided nevertheless, that no person or persons who shall or may hereafter purchase the right or property of any new and original sculpture or model, or copy or cast, or of any cast from nature, or of any of the matters and things published under or protected by virtue of this Act, of the proprietor or proprietors, expressed in a deed in writing signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of and attested by two or more credible witnesses, shall be subject to any action for copying or casting or vending the same, anything contained in this Act to the contrary notwithstanding.

Proviso for persons purchasing the copyright from the proprietors.

V. Provided always, and be it further enacted, that all actions to be brought as aforesaid against any person or persons for any offence committed against this Act shall be

Limitation of actions.

[1] So much as relates to double costs repealed.

commenced within six calendar months next after the discovery of every such offence, and not afterwards.

After the 14 years, the copyright shall return to the original proprietor, if then living, for a further term of 14 years.

VI. Provided always, and be it further enacted, that from and immediately after the expiration of the said term of fourteen years, the sole right of making and disposing of such new and original sculpture, or model, or copy, or cast of any of the matters or things herein-before mentioned, shall return to the person or persons who originally made or caused to be made the same, if he or they shall be then living, for the further term of fourteen years, . . .

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3 & 4 Will. IV. c. 15.

An Act to amend the Laws relating to Dramatic Literary Property.

[7 Rev. Stat. 355.] [10th June 1833.]

54 Geo. 3. c. 156. s. 4.

Whereas by an Act passed in the fifty-fourth year of the reign of his late Majesty King George the Third, intituled "An Act to amend the several Acts for the encouragement of learning by securing the copies and copyright of printed books to the authors of such books, or their assigns," it was amongst other things provided and enacted, that from and after the passing of the said Act the author of any book or books composed, and not printed or published, or which should thereafter be composed and printed and published, and his assignee or assigns, should have the sole liberty of printing and reprinting such book or books for the full term of twenty-eight years, to commence from the day of first publishing the same, and also, if the author should be living at the end of that period, for the residue of his natural life: And whereas it is expedient to extend the provisions of the said Act: Be it therefore 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, that from and after the passing of this Act the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed and not printed and published by the author thereof or his assignee, or which hereafter shall be composed and not printed or published by the author thereof or his assignee, or

The author of any dramatic piece or his assignee shall have as his property the sole liberty of representing it when not published;

the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions, any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production, printed and published within ten years before the passing of this Act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall, from the time of passing this Act, or from the time of such publication respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof: Provided nevertheless, that nothing in this Act contained shall prejudice, alter, or affect the right or authority of any person to represent or cause to be represented, at any place or places of dramatic entertainment whatsoever, any such production as aforesaid, in all cases in which the author thereof or his assignee shall, previously to the passing of this Act, have given his consent to or authorized such representation; but that such sole liberty of the author or his assignee shall be subject to such right or authority.

and after publication for 28 years or during author's life.

Proviso as to cases where, previously to the passing of this Act, consent has been given to such representation.

II. And be it further enacted, that if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act or right of the author or his assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than forty shillings, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be

Penalty on persons representing pieces contrary to this Act.

the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this Act, to be recovered, together with double costs of suit,[1] by such author or other proprietors, in any court having jurisdiction in such cases in that part of the said United Kingdom or of the British dominions in which the offence shall be committed; and in every such proceeding where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, or otherwise mentioning the same.

Limitation of actions.

III. Provided nevertheless, and be it further enacted, that all actions or proceedings for any offence or injury that 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 no effect.

Explanation of words.

IV. And be it further enacted, that whenever authors, persons, offenders, or others are spoken of in this Act in the singular number or in the masculine gender, the same shall extend to any number of persons and to either sex.

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5 & 6 WILL. IV. c. 65.

An Act for preventing the Publication of Lectures without Consent.

[7 REV. STAT. 899.] [9TH SEPTEMBER 1835.]

WHEREAS printers, publishers, and other persons have frequently taken the liberty of printing and publishing lectures delivered upon divers subjects without the consent of the authors of such lectures or the persons delivering the same in public, to the great detriment of such authors and lecturers: 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, that from and after the first day of September one thousand eight hundred and thirty-five the author of any lecture or lectures, or the person to whom he hath sold or otherwise conveyed the copy thereof in order

Authors of lectures, or their assigns, to have the sole right of publishing them.

[1] Double costs taken away by 5 & 6 Vict. c. 97, s. 2.

to deliver the same in any school, seminary, institution, or other place, or for any other purpose, shall have the sole right and liberty of printing and publishing such lecture or lectures; and that if any person shall, by taking down the same in short hand or otherwise in writing, or in any other way, obtain or make a copy of such lecture or lectures, and shall print or lithograph or otherwise copy and publish the same, or cause the same to be printed, lithographed, or otherwise copied and published, without leave of the author thereof, or of the person to whom the author thereof hath sold or otherwise conveyed the same, and every person who, knowing the same to have been printed or copied and published without such consent, shall sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, any such lecture or lectures, shall forfeit such printed or otherwise copied lecture or lectures, or parts thereof, together with one penny for every sheet thereof which shall be found in his custody, either printed, lithographed, or copied, or printing, lithographing, or copying, published or exposed to sale, contrary to the true intent and meaning of this Act, the one moiety thereof to his Majesty, his heirs or successors, and the other moiety thereof to any person who shall sue for the same, to be recovered in any of his Majesty's courts of record in Westminster, by action of debt, bill, plaint, or information, in which no wager of law, essoign, privilege, or protection, or more than one imparlance, shall be allowed.

Penalty on other persons publishing, &c. lectures without leave.

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

Penalty on printers or publishers of newspapers publishing lectures without leave.

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

Persons having leave to attend lectures not on that account licensed to publish them.

IV. Provided always, that nothing in this Act shall extend to prohibit any person from printing, copying, and publishing any lecture or lectures which have or shall have been printed

Act not to prohibit the publishing of lectures after expiration of the copyright

and published with leave of the authors thereof or their assignees, and whereof the time hath or shall have expired within which the sole right to print and publish the same is given by an Act passed in the eighth year of the reign of
8 Ann. c. 21. [19.] Queen Anne, intituled "An Act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies during the times therein mentioned," and by another Act passed in the fifty-fourth year of
54 Geo. 3. c. 156. the reign of King George the Third, intituled "An Act to amend the several Acts for the encouragement of learning, by securing the copies and copyright of printed books to the authors of such books, or their assigns," or to any lectures which have been printed or published before the passing of this Act.[1]

Act not to extend to lectures delivered without notice to justices, &c.

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

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6 & 7 Will. IV. c. 59.

An Act to extend the Protection of Copyright in Prints and Engravings to Ireland.

[7 Rev. Stat. 1055.] [13th August 1836.]

Whereas an Act was passed in the seventeenth year of the
17 Geo. 3. c. 57. reign of his late Majesty King George the Third, intituled "An Act for more effectually securing the property of prints to inventors and engravers, by enabling them to sue for and recover penalties in certain cases:" And whereas it is desirable to extend the provisions of the said Act to Ireland: Be

[1] 8 Anne, c. 19, and 54 Geo. III. c. 156, repealed by 5 & 6 Vict. c. 45, s. 1.

it therefore 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, that from and after the passing of this Act all the provisions contained in the said recited Act of the seventeenth year of the reign of his late Majesty King George the Third, and of all the other Acts therein recited, shall be and the same are hereby extended to the United Kingdom of Great Britain and Ireland.

Provisions of recited Act, extended to Ireland.

II. And be it further enacted, that from and after the passing of this Act, if any engraver, etcher, printseller, or other person shall, within the time limited by the aforesaid recited Acts, engrave, etch, or publish, or cause to be engraved, etched, or published, any engraving or print of any description whatever, either in whole or in part, which may have been or which shall hereafter be published in any part of Great Britain or Ireland, without the express consent of the proprietor or proprietors thereof first had and obtained in writing, signed by him, her, or them respectively, with his, her, or their own hand or hands, in the presence of and attested by two or more credible witnesses, then every such proprietor shall and may, by and in a separate action upon the case, to be brought against the person so offending in any court of law in Great Britain or Ireland, recover such damages as a jury on the trial of such action or on the execution of a writ of inquiry thereon shall give or assess, together with double costs of suit.[1]

Penalty on engraving or publishing any print without consent of proprietor in any part of the United Kingdom.

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5 & 6 VICT. C. 45.

An Act to amend the Law of Copyright.

[8 REV. STAT. 1152.] [1ST JULY 1842.]

WHEREAS it is expedient to amend the law relating to copyright, and to afford greater encouragement to the production of literary works of lasting benefit to the world: . . .

II. And be it enacted, that in the construction of this Act the word "book" shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published; that the words "dramatic piece" shall be construed to mean

Interpretation of Act. "Book."

"Dramatic piece."

[1] Double costs taken away by 5 & 6 Vict. c. 97, s. 2.

and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment; that the word "Copyright." "copyright" shall be construed to mean the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied; that the "Personal representative." words "personal representative" shall be construed to mean and include every executor, administrator, and next of kin "Assigns." entitled to administration; that the word "assigns" shall be construed to mean and include every person in whom the interest of an author in copyright shall be vested, whether derived from such author before or after the publication of any book, and whether acquired by sale, gift, bequest, or by "British dominions." operation of law, or otherwise; that the words "British dominions" shall be construed to mean and include all parts of the United Kingdom of Great Britain and Ireland, the Islands of Jersey and Guernsey, all parts of the East and West Indies, and all the colonies, settlements, and possessions of the crown which now are or hereafter may be acquired; and that whenever in this Act, in describing any person, matter, or thing, the word importing the singular number or the masculine gender only is used, the same shall be understood to include and to be applied to several persons as well as one person, and females as well as males, and several matters or things as well as one matter or thing, respectively, unless there shall be something in the subject or context repugnant to such construction.

Endurance of term of copyright in any book hereafter to be published in the lifetime of the author; or after the author's death.

III. And be it enacted, that the copyright in every book which shall after the passing of this Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns: Provided always, that if the said term of seven years shall expire before the end of forty-two years from the first publication of such book, the copyright shall in that case endure for such period of forty-two years; and that the copyright in every book which shall be published after the death of its author shall endure for the term of forty-two years from the first publication thereof, and shall be the property of the proprietor of the author's manuscript from which such book shall be first published, and his assigns.

In cases of subsisting copyright, the term

IV. And whereas it is just to extend the benefits of this Act to authors of books published before the passing thereof, and

in which copyright still subsists: Be it enacted, that the copyright which at the time of passing this Act shall subsist in any book theretofore published (except as herein-after mentioned) shall be extended and endure for the full term provided by this Act in cases of books thereafter published, and shall be the property of the person who at the time of passing of this Act shall be the proprietor of such copyright: Provided always, that in all cases in which such copyright shall belong in whole or in part to a publisher or other person who shall have acquired it for other consideration than that of natural love and affection, such copyright shall not be extended by this Act, but shall endure for the term which shall subsist therein at the time of passing of this Act, and no longer, unless the author of such book, if he shall be living, or the personal representative of such author, if he shall be dead, and the proprietor of such copyright, shall, before the expiration of such term, consent and agree to accept the benefits of this Act in respect of such book, and shall cause a minute of such consent in the form in that behalf given in the schedule to this Act annexed to be entered in the book of registry herein-after directed to be kept, in which case such copyright shall endure for the full term by this Act provided in cases of books to be published after the passing of this Act, and shall be the property of such person or persons as in such minute shall be expressed.

to be extended except when it shall belong to an assignee for other consideration than natural love and affection; in which case it shall cease at the expiration of the present term, unless its extension be agreed to between the proprietor and the author.

V. And whereas it is expedient to provide against the suppression of books of importance to the public: Be it enacted, that it shall be lawful for the judicial committee of her Majesty's privy council, on complaint made to them that the proprietor of the copyright in any book after the death of its author has refused to republish or to allow the republication of the same, and that by reason of such refusal such book may be withheld from the public, to grant a licence to such complainant to publish such book, in such manner and subject to such conditions as they may think fit; and that it shall be lawful for such complainant to publish such book according to such licence.

Judicial committee of the privy council may license the republication of books which the proprietor refuses to republish after death of the author.

VI. And be it enacted, that a printed copy of the whole of every book which shall be published after the passing of this Act, together with all maps, prints, or other engravings belonging thereto, finished and coloured in the same manner as the best copies of the same shall be published, and also of any sec-

Copies of books published after the passing of this Act, and of all subsequent editions, to be delivered within certain times at

the British Museum.

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

Mode of delivering copies at the British Museum.

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

A copy of every book to be delivered within a month after demand to the officer of the Stationers Company, for the following libraries: the Bodleian at Oxford, the public library at Cambridge, the Faculty of Advocates at Edinburgh, and that of Trinity College, Dublin.

VIII. And be it enacted, that a copy of the whole of every book, and of any second or subsequent edition of every book containing additions and alterations, together with all maps and prints belonging thereto, which after the passing of this Act shall be published, shall, on demand thereof in writing, left at the place of abode of the publisher thereof at any time within twelve months next after the publication thereof, under the hand of the officer of the Company of Stationers who shall from time to time be appointed by the said company for the purposes of this Act, or under the hand of any other person thereto authorized by the persons or bodies politic and corporate, proprietors and managers of the libraries following,

(videlicet,) the Bodleian library at Oxford, the public library at Cambridge, the library of the Faculty of Advocates at Edinburgh, the library of the College of the Holy and Undivided Trinity of Queen Elizabeth near Dublin, be delivered, upon the paper of which the largest number of copies of such book or edition shall be printed for sale, in the like condition as the copies prepared for sale by the publisher thereof respectively, within one month after demand made thereof in writing as aforesaid, to the said officer of the said Company of Stationers for the time being, which copies the said officer shall and he is hereby required to receive at the hall of the said company, for the use of the library for which such demand shall be made within such twelve months as aforesaid; and the said officer is hereby required to give a receipt in writing for the same, and within one month after any such book shall be so delivered to him as aforesaid to deliver the same for the use of such library.

Publishers may deliver the copies to the libraries, instead of at the Stationers Company.

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

Penalty for default in delivering copies for the use of the libraries.

X. And be it enacted, that if any publisher of any such book, or of any second or subsequent edition of any such book, shall neglect to deliver the same pursuant to this Act, he shall for every such default forfeit, besides the value of such copy of such book or edition which he ought to have delivered, a sum not exceeding five pounds, to be recovered by the librarian or other officer (properly authorized) of the library for the use whereof such copy should have been delivered, in a summary way, on conviction before two justices of the peace for the county or place where the publisher making default shall reside, or by *action of debt* or other proceeding of the like nature, at the suit of such librarian or other officer, in any court of record in the United Kingdom; in which action, if the plaintiff shall obtain a verdict, he shall recover his costs

reasonably incurred, to be taxed as between attorney and client.

Book of registry to be kept at Stationers Hall.

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

Copies of entries to be given when required, and to be received in evidence.

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

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

Entries of copyright may be made in the book of registry.

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

Persons aggrieved by any entry in the book of registry may apply to a court of law in term, or judge in vacation, who may order such entry to be varied or expunged.

XIV. And be it 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 Court of Queen's Bench, Court of Common Pleas, or Court of Exchequer, in term time, or to apply by summons to any judge of either of such courts in vacation, for an order that such entry may be expunged or varied; and that upon any such application by motion or summons to either of the said courts, or to a judge as aforesaid, such court or judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as to such court or judge shall seem just; and the officer appointed by the Stationers Company for the purposes of this Act shall, on the production to him of any such order for expunging or varying any such entry, expunge or vary the same according to the requisitions of such order.

Remedy for the piracy of books by action on the case.

XV. And be it enacted, that if any person shall, in any part of the British dominions, 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 import for sale or hire any such book so having been unlawfully printed from parts beyond the sea, or, knowing such book to have been so unlawfully printed or imported, shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession, for sale or hire, any such book so unlawfully printed or imported, without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought in any court of record in that part of the British dominions in which the offence shall be committed: Provided always, that in Scotland such offender shall be liable to an action in the court of ses-

sion in Scotland, which shall and may be brought and prosecuted in the same manner in which any other action of damages to the like amount may be brought and prosecuted there.

In actions for piracy the defendant to give notice of the objections to the plaintiff's title on which he means to rely.

XVI. And be it enacted, that after the passing of this Act, in any action brought within the British dominions against any person for printing any such book for sale, hire, or exportation, or for importing, selling, publishing, or exposing to sale or hire, or causing to be imported, sold, published, or exposed to sale or hire, any such book, 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 objection 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 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.

No person except the proprietor, &c. shall import into the British dominions for sale or hire any book first composed, &c. within the United Kingdom, and reprinted

XVII. And be it enacted, that after the passing of this Act it shall not be lawful for any person, not being the proprietor of the copyright, or some person authorized by him, to import into any part of the United Kingdom, or into any other part of the British dominions, for sale or hire, any printed book first composed or written or printed and published in any part

of the said United Kingdom, wherein there shall be copyright, and reprinted in any country or place whatsoever out of the British dominions; and if any person, not being such proprietor or person authorized as aforesaid, shall import or bring, or cause to be imported or brought, for sale or hire, any such printed book, into any part of the British dominions, contrary to the true intent and meaning of this Act, or shall knowingly sell, publish, or expose to sale or let to hire, or have in his possession for sale or hire, any such book, then every such book shall be forfeited, and shall be seized by any officer of customs or excise, and the same shall be destroyed by such officer; and every person so offending, being duly convicted thereof before two justices of the peace for the county or place in which such book shall be found, shall also for every such offence forfeit the sum of ten pounds, and double the value of every copy of such book which he shall so import or cause to be imported into any part of the British dominions, or shall knowingly sell, publish, or expose to sale or let to hire, or shall cause to be sold, published, or exposed to sale or let to hire, or shall have in his possession for sale or hire, contrary to the true intent and meaning of this Act, five pounds to the use of such officer of customs or excise, and the remainder of the penalty to the use of the proprietor of the copyright in such book.

elsewhere, under penalty of forfeiture thereof, and also of 10*l.* and double the value.

Books may be seized by officers of customs or excise.

XVIII. And be it enacted, that when any publisher or other person shall, before or at the time of the passing of this Act, have projected, conducted, and carried on, or shall hereafter project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and shall have employed or shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall have been or shall hereafter be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the

Copyright in encyclopædias, periodicals, and works published in a series, reviews, or magazines.

same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act; except only that in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act: Provided always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof, or his assigns: Provided also, that nothing herein contained shall alter or affect the right of any person who shall have been or who shall be so employed as aforesaid to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid.

Proviso for authors who have reserved the right of publishing their articles in a separate form.

Proprietors of encyclopædias, periodicals, and works published in a series; may enter at once at Stationers Hall, and thereon have the benefit of the registration of the whole.

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

3 & 4 Will. 4. c. 15.

XX. And whereas an Act was passed in the third year of the reign of his late Majesty, to amend the law relating to dramatic literary property, and it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that Act to the full time by this Act provided for the continuance of copyright: And whereas it is expedient to extend

to musical compositions the benefits of that Act, and also of this Act: Be it therefore enacted, that the provisions of the said Act of his late Majesty, and of this Act, shall apply to musical compositions; and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns, for the term of this Act provided for the duration of copyright in books; and the provisions herein-before enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this Act, to the first publication of any book: Provided always, that in case of any dramatic piece or musical composition in manuscript, it shall be sufficient for the person having the sole liberty of representing or performing or causing to be represented or performed the same, to register only the title thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor thereof, and the time and place of its first representation or performance.

Provisions of recited Act and this Act shall apply to musical compositions; and the sole liberty of representing dramatic pieces and musical compositions shall remain in the author during the term of copyright provided by this Act.

XXI. And be it enacted, that the person who shall at any time have the sole liberty of representing such dramatic piece or musical composition shall have and enjoy the remedies given and provided in the said Act of the third and fourth years of the reign of his late Majesty King William the Fourth, passed to amend the laws relating to dramatic literary property, during the whole of his interest therein, as fully as if the same were re-enacted in this Act.

Proprietors of right of dramatic representations shall have all the remedies given by 3 & 4 Will. 4. c. 15.

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

Assignment of copyright of a dramatic piece *not to convey* the right of representation.

XXIII. And be it enacted, that all copies of any book

Books pirated shall become the

property of the proprietor of the copyright, and may be recovered by action.

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 or imported 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 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.

No proprietor of copyright commencing after this Act shall sue or proceed for any infringement before making entry in the book of registry.

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

Proviso for dramatic pieces.

Copyright shall be personal property.

XXV. And be it enacted, that all copyright shall be deemed personal property, and shall be transmissible by bequest, or, in case of intestacy, shall be subject to the same law of distribution as other personal property, and in Scotland shall be deemed to be personal and moveable estate.

General Issue.

XXVI. And be it enacted, that if any action or suit shall be commenced or brought against any person or persons whomsoever for doing or causing to be done anything in pursuance of this Act, the defendant or defendants in such action may plead the general issue, and give the special matter in evidence; and if upon such action a verdict shall be given for the defendant, or the plaintiff shall become nonsuited, or discontinue his action, then the defendant shall have and recover

his full costs, for which he shall have the same remedy as a defendant in any case by law hath; and that all actions, suits, bills, indictments, or informations for any offence that 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; provided that such limitation of time shall not extend or be construed to extend to any actions, suits, or other proceedings, which under the authority of this Act shall or may be brought, sued, or commenced for or in respect of any copies of books to be delivered for the use of the British Museum, or of any one of the four libraries herein-before mentioned.

Costs.

Limitation of actions;

except actions, &c. in respect of the delivery of books.

XXVII. Provided always, and be it enacted, that nothing in this Act contained shall affect or alter the rights of the two universities of Oxford and Cambridge, the colleges or houses of learning within the same, the four universities in Scotland, the college of the Holy and Undivided Trinity of Queen Elizabeth near Dublin, and the several colleges of Eton, Westminster, and Winchester, in any copyrights heretofore and now vested or hereafter to be vested in such universities and colleges respectively, anything to the contrary herein contained notwithstanding.

Saving the rights of the universities, and the colleges of Eton, Westminster,

XXVIII. Provided also, and be it enacted, that nothing in this Act contained shall affect, alter, or vary any right subsisting at the time of passing of 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.

Saving as to subsisting rights, contracts, and engagements.

XXIX. And be it enacted, that this Act shall extend to the United Kingdom of Great Britain and Ireland, and to every part of the British dominions.

Extent of Act.

. . . . . .

SCHEDULE to which the preceding Act refers.

No. 1.

FORM of MINUTE of CONSENT to be entered at Stationers Hall.

We, the undersigned, *A. B.* of the author of a certain book, intituled *Y. Z.* [or the personal representative of the author, as the case may be], and *C. D.*, of do hereby certify, that we have

consented and agreed to accept the benefits of the Act passed in the fifth year of the reign of Her Majesty Queen Victoria, cap. , for the extension of the term of copyright therein provided by the said Act, and hereby declare that such extended term of copyright therein is the property of the said *A. B.* or *C. D.*

Dated this day of 18 .

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

To the Registering Officer appointed by the Stationers Company.

No. 2.

FORM of REQUIRING ENTRY OF PROPRIETORSHIP.

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

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

Dated this day of 18 .

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

No. 3.

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.
	Y. Z.	*A. B.*	*C. D.*	

No. 4.

FORM of CONCURRENCE of the PARTY assigning in any BOOK previously registered.

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

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

Dated this day of 18 .

(Signed) *A. B.*

No. 5.

FORM of ENTRY of ASSIGNMENT of COPYRIGHT in any BOOK previously registered.

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

7 & 8 VICT. C. 12.

An Act to amend the Law relating to International Copyright.

[9 REV. STAT. 224.] [10TH MAY 1844.]

[SECTION 1 recites 1 & 2 Vict. c. 59, which is designated as the International Copyright Act; 5 & 6 Vict. c. 45, designated as the Copyright Amendment Act; 3 & 4 Will. IV, c. 15, des-

ignated as the Dramatic Literary Property Act; 8 Geo. II. c. 13, 7 Geo. III. c. 38, 17 Geo. III. c. 57, and 6 & 7 Will. IV. c. 59, designated as the Engraving Copyright Acts; and 38 Geo. III. c. 71 (repealed by 24 & 25 Vict. c. 101), and 54 Geo. III. c. 56, designated as the Sculpture Copyright Acts. It then declares:] And whereas the powers vested in her Majesty by the said International Copyright Act are insufficient to enable her Majesty to confer upon authors of books first published in foreign countries copyright of the like duration, and with the like remedies for the infringement thereof, which are conferred and provided by the said Copyright Amendment Act with respect to authors of books first published in the British dominions; and the said International Copyright Act does not empower her Majesty to confer any exclusive right of representing or performing dramatic pieces or musical compositions first published in foreign countries upon the authors thereof, nor to extend the privilege of copyright to prints and sculpture first published abroad; and it is expedient to vest increased powers in her Majesty in this respect, and for that purpose to repeal the said International Copyright Act, and to give such other powers to her Majesty, and to make such further provisions, as are herein-after contained: 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, that the said recited Act herein designated as the International Copyright Act shall be and the same is hereby repealed. [Rep., Stat. Law Rev. Act, 1874 (No. 2).]

Repeal of International Copyright Act, 1 & 2 Vict. c. 59.

II. And be it enacted, that it shall be lawful for her Majesty, by any order of her Majesty in council, to direct that, as respects all or any particular class or classes of the following works, (namely,) books, prints, articles of sculpture, and other works of art, to be defined in such order, which shall after a future time, to be specified in such order, be first published in any foreign country to be named in such order, the authors, inventors, designers, engravers, and makers thereof respectively, their respective executors, administrators, and assigns, shall have the privilege of copyright therein during such period or respective periods as shall be defined in such order, not exceeding, however, as to any of the above-mentioned works, the term of copyright which authors, inventors, designers,

Her Majesty, by order in council, may direct that authors, &c. of works first published in foreign countries shall have copyright therein within her Majesty's dominions for any term not exceeding that for which authors, &c. o like works first published in the United Kingdom would be entitled to copyright.

engravers, and makers of the like works respectively first published in the United Kingdom may be then entitled to under the herein-before recited Acts respectively, or under any Acts which may hereafter be passed in that behalf.[1]

If the order applies to books, the copyright law as to books first published in this country shall apply to the books to which the order relates, if registered, with certain exceptions.

III. And be it enacted, that in case any such order shall apply to books, all and singular the enactments of the said Copyright Amendment Act, and of any other Act for the time being in force with relation to the copyright in books first published in this country, shall, from and after the time so to be specified in that behalf in such order, and subject to such limitation as to the duration of the copyright as shall be therein contained, apply to and be in force in respect of the books to which such order shall extend, and which shall have been registered as herein-after is provided, in such and the same manner as if such books were first published in the United Kingdom, save and except such of the said enactments, or such parts thereof, as shall be excepted in such order, and save and except such of the said enactments as relate to the delivery of copies of books at the British Museum, and to or for the use of the other libraries mentioned in the said Copyright Amendment Act.

If the order applies to prints, sculptures, &c. the copyright law as to prints or sculptures first published in this country shall apply to the prints, sculptures, &c. to which such order relates, if registered.

IV. And be it enacted, that in case any such order shall apply to prints, articles of sculpture, or to any such other works of art as aforesaid, all and singular the enactments of the said Engraving Copyright Acts, and the said Sculpture Copyright Acts, or of any other Act for the time being in force with relation to the copyright in prints or articles of sculpture first published in this country, and of any Act for the time being in force with relation to the copyright in any similar works of art first published in this country, shall, from and after the time so to be specified in that behalf in such order, and subject to such limitation as to the duration of the copyright as shall be therein contained respectively, apply to and be in force in respect of the prints, articles of sculpture, and other works of art to which such order shall extend, and which shall have been registered as herein-after is provided, in such and the same manner as if such articles and other works of art were first published in the United Kingdom, save and except such of the said enactments or such parts thereof as shall be excepted in such order.

[1] By section 12 of 25 & 26 Vict. c. 68, *post*, p. 697, the provisions of this statute are extended to paintings, drawings, and photographs.

Her Majesty may, by order in council, direct that authors and composers of dramatic pieces and musical compositions first publicly represented and performed in foreign countries shall have exclusive rights of representation in the British dominions.

V. And be it enacted, that it shall be lawful for her Majesty, by any order of her Majesty in council, to direct that the authors of dramatic pieces and musical compositions which shall after a future time, to be specified in such order, be first publicly represented or performed in any foreign country to be named in such order, shall have the sole liberty of representing or performing in any part of the British dominions such dramatic pieces or musical compositions during such period as shall be defined in such order, not exceeding the period during which authors of dramatic pieces and musical compositions first publicly represented or performed in the United Kingdom may for the time be entitled by law to the sole liberty of representing and performing the same; and from and after the time so specified in any such last-mentioned order the enactments of the said Dramatic Literary Property Act and of the said Copyright Amendment Act, and of any other Act for the time being in force with relation to the liberty of publicly representing and performing dramatic pieces or musical compositions, shall, subject to such limitation as to the duration of the right conferred by any such order as shall be therein contained, apply to and be in force in respect of the dramatic pieces and musical compositions to which such order shall extend, and which shall have been registered as herein-after is provided, in such and the same manner as if such dramatic pieces and musical compositions had been first publicly represented and performed in the British dominions, save and except such of the said enactments or such parts thereof as shall be excepted in such order.

Enactments relating to similar pieces first represented in this country shall apply to such pieces, if registered.

Particulars to be observed as to registry and to delivery of copies;

VI. Provided always, and be it enacted, that no author of any book, dramatic piece, or musical composition, or his executors, administrators, or assigns, and no inventor, designer, or engraver of any print, or maker of any article of sculpture, or other work of art, his executors, administrators, or assigns, shall be entitled to the benefit of this Act, or of any order in council to be issued in pursuance thereof, unless, within a time or times to be in that behalf prescribed in each such order in council, such book, dramatic piece, musical composition, print, article of sculpture, or other work of art, shall have been so registered and such copy thereof shall have been so delivered as herein-after is mentioned; (that is to say,)

as to books and printed dramatic pieces or musical compositions;

as regards such book, and also such dramatic piece or musical composition, (in the event of the same having been printed,)

the title to the copy thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor of the copyright thereof, the time and place of the first publication, representation, or performance thereof, as the case may be, in the foreign country named in the order in council under which the benefits of this Act shall be claimed, shall be entered in the register book of the Company of Stationers in London, and one printed copy of the whole of such book, and of such dramatic piece or musical composition, in the event of the same having been printed, and of every volume thereof, upon the best paper upon which the largest number or impression of the book, dramatic piece, or musical composition shall have been printed for sale, together with all maps and prints relating thereto, shall be delivered to the officer of the Company of Stationers at the hall of the said company; and as regards dramatic pieces and musical compositions in manuscript, the title to the same, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor of the right of representing or performing the same, and the time and place of the first representation or performance thereof in the country named in the order in council under which the benefit of the Act shall be claimed, shall be entered in the said register book of the said Company of Stationers in London; and as regards prints, the title thereof, the name and place of abode of the inventor, designer, or engraver thereof, the name of the proprietor of the copyright therein, and the time and place of the first publication thereof in the foreign country named in the order in council under which the benefits of the Act shall be claimed, shall be entered in the said register book of the said Company of Stationers in London, and a copy of such print, upon the best paper upon which the largest number or impressions of the print shall have been printed for sale, shall be delivered to the officer of the Company of Stationers at the hall of the said company; and as regards any such article of sculpture, or any such other work of art as aforesaid, a descriptive title thereof, the name and place of abode of the maker thereof, the name of the proprietor of the copyright therein, and the time and place of its first publication in the foreign country named in the order in council under which the benefit of this Act shall be claimed, shall be entered in the said register book of the said Company of Stationers in

as to dramatic pieces and musical compositions in manuscript;

as to prints;

as to sculpture, &c.

London; and the officer of the said Company of Stationers receiving such copies so to be delivered as aforesaid shall give a receipt in writing for the same, and such delivery shall to all intents and purposes be a sufficient delivery under the provisions of this Act.

In case of books published anonymously, it shall be sufficient to register the name, &c. of the publisher.

VII. Provided always, and be it enacted, that if a book be published anonymously it shall be sufficient to insert in the entry thereof in such register book the name and place of abode of the first publisher thereof, instead of the name and place of abode of the author thereof, together with a declaration that such entry is made either on behalf of the author or on behalf of such first publisher, as the case may require.

The provisions of the Copyright Amendment Act 5 & 6 Vict. c. 45. as regards entries in the register book of the Company of Stationers, &c to apply to books, &c. registered under this Act.

VIII. And be it enacted, that the several enactments in the said Copyright Amendment Act contained with relation to keeping the said register book, and the inspection thereof, the searches therein, and the delivery of certified and stamped copies thereof, the reception of such copies in evidence, the making of false entries in the said book, and the production in evidence of papers falsely purporting to be copies of entries in the said book, the applications to the courts and judges by persons aggrieved by entries in the said book, and the expunging and varying such entries, shall apply to the books, dramatic pieces, and musical compositions, prints, articles of sculpture, and other works of art, to which any order in council issued in pursuance of this Act shall extend, and to the entries and assignments of copyright and proprietorship therein, in such and the same manner as if such enactments were here expressly enacted in relation thereto, save and except that the forms of entry prescribed by the said Copyright Amendment Act may be varied to meet the circumstances of the case, and that the sum to be demanded by the officer of the said Company of Stationers for making any entry required by this Act shall be one shilling only.

As to expunging or varying entry grounded in wrongful first publication.

IX. And be it enacted, that every entry made in pursuance of this Act of a first publication shall be primâ facie proof of a rightful first publication; but if there be a wrongful first publication, and any party have availed himself thereof to obtain an entry of a spurious work, no order for expunging or varying such entry shall be made unless it be proved to the satisfaction of the court or of the judge taking cognizance of the application for expunging or varying such entry, first, with respect to a wrongful publication in a country to which the

author or first publisher does not belong, and in regard to which there does not subsist with this country any treaty of international copyright, that the party making the application was the author or first publisher, as the case requires; second, with respect to a wrongful first publication either in the country where a rightful first publication has taken place, or in regard to which there subsists with this country a treaty of international copyright, that a court of competent jurisdiction in any such country where such wrongful first publication has taken place has given judgment in favour of the right of the party claiming to be the author or first publisher.

Copies of books wherein copyright is subsisting under this Act printed in foreign countries other than those wherein the book was first published shall not be imported, except with consent of registered proprietors, and shall be subject to laws of customs as to prohibited goods.

X. And be it enacted, that all copies of books wherein there shall be any subsisting copyright under or by virtue of this Act, or of any order in council made in pursuance thereof, printed or reprinted in any foreign country except that in which such books were first published, shall be and the same are hereby absolutely prohibited to be imported into any part of the British dominions, except by or with the consent of the registered proprietor of the copyright thereof, or his agent authorized in writing, and if imported contrary to this prohibition the same and the importers thereof shall be subject to the enactments in force relating to goods prohibited to be imported by any Act relating to the customs; and as respects any such copies so prohibited to be imported, and also as respects any copies unlawfully printed in any place whatsoever of any books wherein there shall be any such subsisting copyright as aforesaid, any person who shall in any part of the British dominions import such prohibited or unlawfully printed copies, or who, knowing such copies to be so unlawfully imported or unlawfully printed, shall sell, publish, or expose to sale or hire, or shall cause to be sold, published, or exposed to sale or hire, or have in his possession for sale or hire, any such copies so unlawfully imported or unlawfully printed, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright, to be brought and prosecuted in the same courts and in the same manner, and with the like restrictions upon the proceedings of the defendant, as are respectively prescribed in the said Copyright Amendment Act with relation to actions thereby authorized to be brought by proprietors of copyright against persons importing or selling books unlawfully printed in the British dominions.

Liability of persons selling such copies or any copies unlawfully printed.

Officer of Stationers Company to deposit books, &c. delivered in the British Museum.

XI. And be it enacted, that the said officer of the said Company of Stationers shall receive at the hall of the said company every book, volume, or print so to be delivered as aforesaid, and within one calendar month after receiving such book, volume, or print shall deposit the same in the library of the British Museum.

As to depositing copies of second or subsequent editions.

XII. Provided always, and be it enacted, that it shall not be requisite to deliver to the said officer of the said Stationers Company any printed copy of the second or of any subsequent edition of any book or books so delivered as aforesaid, unless the same shall contain additions or alterations.

Different periods may be specified for continuance of privilege for different foreign countries and classes of works, and times for entries, &c. may be different.

XIII. And be it enacted, that the respective terms to be specified by such orders in council respectively for the continuance of the privilege to be granted in respect of works to be first published in foreign countries may be different for works first published in different foreign countries and for different classes of such works; and that the times to be prescribed for the entries to be made in the register book of the Stationers Company, and for the deliveries of the books and other articles to the said officer of the Stationers Company, as herein-before is mentioned, may be different for different foreign countries and for different classes of books or other articles.

No order to take effect unless it states that reciprocal protection is secured for parties interested in works first published in British dominions.

XIV. Provided always, and be it enacted, that no such order in Council shall have any effect unless it shall be therein stated, as the ground for issuing the same, that due protection has been secured by the foreign power so named in such order in council for the benefit of parties interested in works first published in the dominions of her Majesty similar to those comprised in such order.

Orders to be published in Gazette, and to have effect as if included in this Act.

XV. And be it enacted, that every order in council to be made under the authority of this Act shall as soon as may be after the making thereof by her Majesty in council be published in the London Gazette, and from the time of such publication shall have the same effect as if every part thereof were included in this Act.

Orders to be laid before Parliament.

XVI. And be it enacted, that a copy of every order of her Majesty in council made under this Act shall be laid before both Houses of Parliament within six weeks after issuing the same, if Parliament be then sitting, and if not, then within six weeks after the commencement of the then next session of Parliament.

Orders may be revoked.

XVII. And be it enacted, that it shall be lawful for her Majesty by an order in council from time to time to revoke or alter any order in council previously made under the authority of this Act, but nevertheless without prejudice to any rights acquired previously to such revocation or alteration.

Transl . 15.

[XVIII. *a*] Provided always, and be it enacted, that nothing in this Act contained shall be construed to prevent the printing, publication, or sale of any translation of any book the author whereof and his assigns may be entitled to the benefit of this Act.

Authors, &c. of works first published in foreign countries not entitled to copyright except under this Act.

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

Interpretation clause.

XX. And be it enacted, that in the construction of this Act the word "book" shall be construed to include "volume," "pamphlet," "sheet of letter-press," "sheet of music," "map," "chart," or "plan;" and the expression "articles of sculpture" shall mean all such sculptures, models, copies, and casts as are described in the said Sculpture Copyright Acts, and in respect of which the privileges of copyright are thereby conferred; and the words "printing" and "re-printing" shall include engraving and any other method of multiplying copies; and the expression "her Majesty" shall include the heirs and successors of her Majesty; and the expressions "order of her Majesty in council," "order in council," and "order," shall respectively mean order of her Majesty acting by and with the advice of her Majesty's most honourable privy council; and the expression "officer of the Company of Stationers," shall mean the officer appointed by the said Company of Stationers for the purposes of the said Copyright Amendment Act; and in describing any persons or things any word importing the plural number shall mean also one person or thing, and any word importing the singular number shall

[*a* Section 18 is rep., 15 & 16 Vict. c. 12. s. 1, so far as the same is inconsistent with the provisions thereinafter contained.]

include several persons or things, and any word importing the masculine shall include also the feminine gender; unless in any of such cases there shall be something in the subject or context repugnant to such construction.

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13 & 14 Vict. c. 104.

An Act to extend and amend the Acts relating to the Copyright of Designs.

[10 Rev. Stat. 1162.] [14th August 1850.]

This statute contains the following provisions relating to sculpture: —

Registration of sculpture, models, &c. within protection of Sculpture Copyright Acts.

VI. That the registrar of designs, upon application by or on behalf of the proprietor of any sculpture, model, copy, or cast within the protection of the Sculpture Copyright Acts, and upon being furnished with such copy, drawing, print, or description, in writing or in print, as in the judgment of the said registrar shall be sufficient to identify the particular sculpture, model, copy, or cast in respect of which registration is desired, and the name of the person claiming to be proprietor, together with his place of abode or business or other place of address, or the name, style, or title of the firm under which he may be trading, shall register such sculpture, model, copy, or cast, in such manner and form as shall from time to time be prescribed or approved by the Board of Trade, for the whole or any part of the term during which copyright in such sculpture, model, copy, or cast may or shall exist under the Sculpture Copyright Acts; and whenever any such registration shall be made, the said registrar shall certify under his hand and seal of office, in such form as the said board shall direct or approve, the fact of such registration, and the date of the same, and the name of the registered proprietor, or the style or title of the firm under which such proprietor may be trading, together with his place of abode or business or other place of address.[1]

[1] By the 38 & 39 Vict. c. 93, ss. 2–4 (Law Rep. 10 Stat. 1042), passed in 1875, the duties vested in the Board of Trade by the Designs Acts were transferred to the Commissioners of Patents, who were also empowered to make arrangements for the performance of the duties of Registrar of Designs, whose office was abolished.

VII. That if any person shall, during the continuance of the copyright in any sculpture, model, copy, or cast which shall have been so registered as aforesaid, make, import, or cause to be made, imported, exposed for sale, or otherwise disposed of, any pirated copy or pirated cast of any such sculpture, model, copy, or cast, in such manner and under such circumstances as would entitle the proprietor to a special action on the case under the Sculpture Copyright Acts, the person so offending shall forfeit for every such offence a sum not less than five pounds, and not exceeding thirty pounds, to the proprietor of the sculpture, model, copy, or cast whereof the copyright shall have been infringed; and for the recovery of any such penalty the proprietor of the sculpture, model, copy, or cast which shall have been so pirated shall have and be entitled to the same remedies as are provided for the recovery of penalties incurred under the Designs Act, 1842: Provided always, that the proprietor of any sculpture, model, copy, or cast which shall be registered under this Act shall not be entitled to the benefit of this Act, unless every copy or cast of such sculpture, model, copy, or cast which shall be published by him after such registration shall be marked with the word "registered," and with the date of registration.

Penalty for making, selling, &c. copies of registered sculptures, &c.

5 & 6 Vict. c. 100.

Copies published by proprietor of registered sculpture, &c. to be marked as "registered."

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15 & 16 VICT. C. 12.

An Act to enable Her Majesty to carry into effect a Convention with France on the Subject of Copyright; to extend and explain the International Copyright Acts; and to explain the Acts relating to Copyright in Engravings.

[11 REV. STAT. 283.] [28th MAY 1852.]

WHEREAS an Act was passed in the seventh year of the reign of her present Majesty, intituled "An Act to amend the law relating to international copyright," herein-after called "The International Copyright Act:" And whereas a convention has lately been concluded between her Majesty and the French Republic, for extending in each country the enjoyment of copyright in works of literature and the fine arts first published in the other, and for certain reductions of duties now levied on books, prints, and musical works published in France: And whereas certain of the stipulations on the part of her

7 & 8 Vict. c. 12.

Majesty contained in the said treaty require the authority of Parliament: And whereas it is expedient that such authority should be given; and that her Majesty should be enabled to make similar stipulations in any treaty on the subject of copyright which may hereafter be concluded with any foreign power: 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:

Translations.

Repeal of 7 & 8 Vict. c. 12. s. 18. in part.

I. The eighteenth section of the said Act of the seventh year of her present Majesty, chapter twelve, shall be repealed, so far as the same is inconsistent with the provisions herein-after contained.

Her Majesty may by order in council direct that the authors of books published in foreign countries may for a limited time prevent unauthorized translations.

II. Her Majesty may, by order in council, direct that the authors of books which are, after a future time to be specified in such order, published in any foreign country to be named in such order, their executors, administrators, and assigns, shall, subject to the provisions herein-after contained or referred to, be empowered to prevent the publication in the British dominions of any translations of such books not authorized by them, for such time as may be specified in such order, not extending beyond the expiration of five years from the time at which the authorized translations of such books herein-after mentioned are respectively first published, and in the case of books published in parts, not extending as to each part beyond the expiration of five years from the time at which the authorized translation of such part is first published.

Thereupon the law of copyright shall extend to prevent such translations.

III. Subject to any provisions or qualifications contained in such order, and to the provisions herein contained or referred to, the laws and enactments for the time being in force for the purpose of preventing the infringement of copyright in books published in the British dominions shall be applied for the purpose of preventing the publication of translations of the books to which such order extends which are not sanctioned by the authors of such books, except only such parts of the said enactments as relate to the delivery of copies of books for the use of the British Museum, and for the use of the other libraries therein referred to.

Her Majesty may by order in council direct that the authors of dramatic works represented in foreign countries

IV. Her Majesty may, by order in council, direct that authors of dramatic pieces which are, after a future time to be specified in such order, first publicly represented in any foreign country to be named in such order, their executors, ad-

ministrators, and assigns, shall, subject to the provisions herein-after mentioned or referred to, be empowered to prevent the representation in the British dominions of any translation of such dramatic pieces not authorized by them, for such time as may be specified in such order, not extending beyond the expiration of five years from the time at which the authorized translations of such dramatic pieces herein-after mentioned are first published or publicly represented.

may for a limited time prevent the representation of unauthorized translations.

V. Subject to any provisions or qualifications contained in such last-mentioned order, and to the provisions herein-after contained or referred to, the laws and enactments for the time being in force for ensuring to the author of any dramatic piece first publicly represented in the British dominions the sole liberty of representing the same shall be applied for the purpose of preventing the representation of any translations of the dramatic pieces to which such last-mentioned order extends, which are not sanctioned by the authors thereof.

Thereupon the law for protecting the representation of dramatic pieces shall extend to prevent the representation of such unauthorized translations.

VI. Nothing herein contained shall be so construed as to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country.[1]

Saving as to imitations of dramatic pieces, &c.

VII. Notwithstanding anything in the said International Copyright Act or in this Act contained, any article of political discussion which has been published in any newspaper or periodical in a foreign country, may, if the source from which the same is taken be acknowledged, be republished or translated in any newspaper or periodical in this country; and any article relating to any other subject which has been so published as aforesaid may, if the source from which the same is taken be acknowledged, be republished or translated in like manner, unless the author has signified his intention of preserving the copyright therein, and the right of translating the same, in some conspicuous part of the newspaper or periodical in which the same was first published, in which case the same shall, without the formalities required by the next following section, receive the same protection as is by virtue of the International Copyright Act or this Act extended to books.

Articles in foreign newspapers, &c. relating to politics may be republished or translated if the source be acknowledged; and also articles on other subjects, unless the author has signified his intention of preserving the copyright.

VIII. No author, or his executors, administrators, or assigns, shall be entitled to the benefit of this Act, or of any order in

No author to be entitled to benefit of this

[1] See 38 & 39 Vict. c. 12, *post*, p. 697.

Act, or any order in council pursuant thereto, without complying with the requisitions herein specified.

council issued in pursuance thereof, in respect of the translation of any book or dramatic piece, if the following requisitions are not complied with: (that is to say,)

1. The original work from which the translation is to be made must be registered and a copy thereof deposited in the United Kingdom in the manner required for original works by the said International Copyright Act, within three calendar months of its first publication in the foreign country:
2. The author must notify on the title page of the original work, or, if it is published in parts, on the title page of the first part, or, if there is no title page, on some conspicuous part of the work, that it is his intention to reserve the right of translating it:
3. The translation sanctioned by the author, or a part thereof, must be published either in the country mentioned in the order in council by virtue of which it is to be protected, or in the British dominions, not later than one year after the registration and deposit in the United Kingdom of the original work; and the whole of such translation must be published within three years of such registration and deposit:
4. Such translation must be registered and a copy thereof deposited in the United Kingdom within a time to be mentioned in that behalf in the order by which it is protected, and in the manner provided by the said International Copyright Act for the registration and deposit of original works:
5. In the case of books published in parts, each part of the original work must be registered and deposited in this country in the manner required by the said International Copyright within three months after the first publication thereof in the foreign country:
6. In the case of dramatic pieces the translation sanctioned by the author must be published within three calendar months of the registration of the original work:
7. The above requisitions shall apply to articles originally published in newspapers or periodicals, if the same be afterwards published in a separate form, but shall not apply to such articles as originally published.

Pirated copies prohibited to be imported, except with consent of proprietor;

IX. All copies of any works of literature or art wherein there is any subsisting copyright by virtue of the International Copyright Act and this Act, or of any order in council made in pursuance of such Acts or either of them, and which are printed, reprinted, or made in any foreign country except that in which such work shall be first published, and all unauthorized translations of any book or dramatic piece the publication or public representation in the British dominions of translations whereof, not authorized as in this Act mentioned, shall for the time being be prevented under any order in council made in pursuance of this Act, are hereby absolutely prohibited to be imported into any part of the British dominions, except by or with the consent of the registered proprietor of the copyright of such work or of such book or piece, or his agent authorized in writing; and the provision of the Act of the sixth year of her Majesty "to amend the law of copyright." for the forfeiture, seizure, and destruction of any printed book first published in the United Kingdom wherein there shall be copyright, and reprinted in any country out of the British dominions, and imported into any part of the British dominions by any person not being the proprietor of the copyright, or a person authorized by such proprietor, shall extend and be applicable to all copies of any works of literature and art, and to all translations, the importation whereof into any part of the British dominions is prohibited under this Act.

Provisions of 5 & 6 Vict. c. 45. as to forfeiture, &c. of pirated works, &c. to extend to works prohibited to be imported under this Act.

Foregoing provisions to be incorporated with 7 & 8 Vict. c. 12.

X. The provisions herein-before contained shall be incorporated with the International Copyright Act, and shall be read and construed therewith as one Act.

Translations of French books, &c. to be protected as herein-before mentioned, during the continuance of the existing convention and of the order in council already made without further order in council.

XI. And whereas her Majesty has already, by order in council under the said International Copyright Act, given effect to certain stipulations contained in the said convention with the French Republic; and it is expedient that the remainder of the stipulations on the part of her Majesty the said convention contained should take effect from the passing of this Act without any further order in council: During the continuance of the said convention, and so long as the order in council already made under the said International Copyright Act remains in force, the provisions herein-before contained shall apply to the said convention, and to translations of books and dramatic pieces which are, after the passing of this Act,

published or represented in France, in the same manner as if her Majesty had issued her order in council in pursuance of this Act for giving effect to such convention, and had therein directed that such translations should be protected as hereinbefore mentioned for a period of five years from the date of the first publication or public representation thereof respectively, and as if a period of three months from the publication of such translation were the time mentioned in such order as the time within which the same must be registered and a copy thereof deposited in the United Kingdom.

. . . . . .

Lithographs, &c.

Recit : of 8 Geo. 2. c. 13. 7 Geo. 3. c. 38. 17 Geo 3. c. 57. 6 & 7 Will. 4. c. 59.

XIV. And whereas by the four several Acts of Parliament following; (that is to say,) an Act of the eighth year of the reign of King George the Second, chapter thirteen: an Act of the seventh year of the reign of King George the Third, chapter thirty-eight: An act of the seventeenth year of the reign of King George the Third, chapter fifty-seven; and an Act of the seventh year of King William the Fourth, chapter fifty-nine, provision is made for securing to every person who invents, or designs, engraves, etches, or works in mezzotinto or chiaro-oscuro, or, from his own work, design, or invention, causes or procures to be designed, engraved, etched, or worked in mezzotinto or chiaro-oscuro, any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever, and to every person who engraves, etches, or works in mezzotinto or chiaro-oscuro, or causes to be engraved, etched, or worked any print taken from any picture, drawing, model, or sculpture, notwithstanding such print has not been graven or drawn from his own original design, certain copyrights therein defined: And whereas doubts are entertained whether the provisions of the said Acts extend to lithographs and certain other impressions; and it is expedient to remove such doubts:

Provisions of recited Acts shall include lithographs, &c.

It is hereby declared, that the provisions of the said Acts are intended to include prints taken by lithography, or any other mechanical process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely; and the said Acts shall be construed accordingly.

25 & 26 VICT. C. 68.

An Act for amending the Law relating to Copyright in Works of the Fine Arts, and for repressing the Commission of Fraud in the Production and Sale of such Works.

[14 REV. STAT. 162.] [29TH JULY 1862.]

WHEREAS by law, as now established, the authors of paintings, drawings, and photographs have no copyright in such their works; and it is expedient that the law should in that respect be amended: 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: —

Copyright in paintings, &c. hereafter made or sold to vest in the author for his life and for seven years after his death.

I. The author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death; provided, that when any painting or drawing, or the negative of any photograph, shall for the first time after the passing of this Act be sold or disposed of, or shall be made or executed for or on behalf of any other person for a good or a valuable consideration, the person so selling or disposing of or making or executing the same shall not retain the copyright thereof, unless it be expressly reserved to him by agreement in writing, signed, at or before the time of such sale or disposition, by the vendee or assignee of such painting or drawing, or of such negative of a photograph, or by the person for or on whose behalf the same shall be so made or executed, but the copyright shall belong to the vendee or assignee of such painting or drawing, or of such negative of a photograph, or to the person for or on whose behalf the sam shall have been made or executed; nor shall the vendee or assignee thereof be entitled to any such copyright, unless, at or before the time of such sale or disposition, an agreement in

writing, signed by the person so selling or disposing of the same, or by his agent duly authorized, shall have been made to that effect.

Copyright not to prevent the representation of the same subjects in other works.

II. Nothing herein contained shall prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object.

Copyright to be personal estate. Assignments, licences, &c. to be in writing.

III. All copyright under this Act shall be deemed personal or moveable estate, and shall be assignable at law; and every assignment thereof, and every licence to use or copy by any means or process the design or work which shall be the subject of such copyright, shall be made by some note or memorandum in writing, to be signed by the proprietor of the copyright, or by his agent appointed for that purpose in writing.

Register of proprietors of copyright in paintings, drawings, and photographs to be kept at Stationers Hall by the officer appointed for the purposes of 5 & 6 Vict. c. 45.

IV. There shall be kept at the hall of the Stationers Company, by the officer appointed by the said Company for the purposes of the Act passed in the sixth year of Her present Majesty, intituled "An Act to amend the law of copyright," a book or books, entitled "The Register of Proprietors of Copyright in Paintings, Drawings, and Photographs," wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject of such work, and in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph of the said work; and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration; and no action shall be sustainable nor any penalty be recoverable in respect of anything done before registration.

Certain enactments of 5 & 6 Vict. c. 45. to apply to the register to be kept under this Act.

V. The several enactments in the said Act of the sixth year of Her present Majesty contained, with relation to keeping the register book thereby required, and the inspection thereof, the searches therein, and the delivery of certified and stamped copies thereof, the reception of such copies in evidence, the

making of false entries in the said book, and the production in evidence of papers falsely purporting to be copies of entries in the said book, the application to the courts and judges by persons aggrieved by entries in the said book, and the expunging and varying such entries, shall apply to the book or books to be kept by virtue of this Act, and to the entries and assignments of copyright and proprietorship therein under this Act, in such and the same manner as if such enactments were here expressly enacted in relation thereto; save and except that the forms of entry prescribed by the said Act of the sixth year of Her present Majesty may be varied to meet the circumstances of the case, and that the sum to be demanded by the officer of the said Company of Stationers for making any entry required by this Act shall be one shilling only.

Penalties on infringement of copyright.

VI. If the author of any painting, drawing, or photograph in which there shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported, sold, published, let to hire, distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright for the time being a sum not exceeding ten pounds; and all such repetitions, copies, and imitations made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright.

Penalties on fraudulent productions and sales.

VII. No person shall do or cause to be done any or either of the following acts; that is to say,

First, no person shall fraudulently sign or otherwise affix, or fraudulently cause to be signed or otherwise affixed,

to or upon any painting, drawing, or photograph, or the negative thereof, any name, initials, or monogram:

Secondly, no person shall fraudulently sell, publish, exhibit, or dispose of, or offer for sale, exhibition, or distribution, any painting, drawing, or photograph, or negative of a photograph, having thereon the name, initials, or monogram of a person who did not execute or make such work:

Thirdly, no person shall fraudulently utter, dispose of, or put off, or cause to be uttered or disposed of, any copy or colourable imitation of any painting, drawing, or photograph, or negative of a photograph, whether there shall be subsisting copyright therein or not, as having been made or executed by the author or maker of the original work from which such copy or imitation shall have been taken:

Fourthly, where the author or maker of any painting, drawing, or photograph, or negative of a photograph, made either before or after the passing of this Act, shall have sold or otherwise parted with the possession of such work, if any alteration shall afterwards be made therein by any other person, by addition or otherwise, no person shall be at liberty, during the life of the author or maker of such work, without his consent, to make or knowingly to sell or publish, or offer for sale, such work or any copies of such work so altered as aforesaid, or of any part thereof, as or for the unaltered work of such author or maker:

Every offender under this section shall, upon conviction, forfeit to the person aggrieved a sum not exceeding ten pounds, or not exceeding double the full price, if any, at which all such copies, engravings, imitations, or altered works shall have been sold or offered for sale; and all such copies, engravings, imitations, or altered works shall be forfeited to the person, or the assigns or legal representatives of the person, whose name, initials, or monogram shall be so fraudulently signed or affixed thereto, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid: Provided always, that the penalties imposed by this section shall not be incurred unless the person whose name, initials, or monogram shall be so fraudulently signed or affixed, or to whom such spurious or altered work shall be

so fraudulently or falsely ascribed as aforesaid, shall have been living at or within twenty years next before the time when the offence may have been committed.

Recovery of pecuniary penalties.

VIII. All pecuniary penalties which shall be incurred, and all such unlawful copies, imitations, and all other effects and things as shall have been forfeited by offenders, pursuant to this Act, and pursuant to any Act for the protection of copyright engravings, may be recovered by the person herein-before and in any such Act as aforesaid empowered to recover the same respectively, and herein-after called the complainant or the complainer, as follows:

In England and Ireland.

In England and Ireland, either by action against the party offending, or by summary proceeding before any two justices having jurisdiction where the party offending resides:

In Scotland.

In Scotland by action before the Court of Session in ordinary form, or by summary action before the sheriff of the county where the offence may be committed or the offender resides, who, upon proof of the offence or offences, either by confession of the party offending, or by the oath or affirmation of one or more credible witnesses, shall convict the offender, and find him liable to the penalty or penalties aforesaid, as also in expenses; and it shall be lawful for the sheriff, in pronouncing such judgment for the penalty or penalties and costs, to insert in such judgment a warrant, in the event of such penalty or penalties and costs not being paid, to levy and recover the amount of the same by poinding: Provided always, that it shall be lawful to the sheriff, in the event of his dismissing the action and assoilzieing the defender, to find the complainer liable in expenses; and any judgment so to be pronounced by the sheriff in such summary application shall be final and conclusive, and not subject to review by advocation, suspension, reduction, or otherwise.

Superior Courts of Record in which any action is pending may make an order for an injunction, inspection, or account.

IX. In any action in any of Her Majesty's Superior Courts of Record at Westminster and in Dublin, for the infringement of any such copyright as aforesaid, it shall be lawful for the Court in which such action is pending, if the Court be then sitting, or if the Court be not sitting, then for a judge of such Court, on the application of the plaintiff or defendant

respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection, and account, and the proceedings therein respectively, as to such Court or judge may seem fit.

Importation of pirated works prohibited.

X. All repetitions, copies, or imitations of paintings, drawings, or photographs, wherein or in the design whereof there shall be subsisting copyright under this Act, and all repetitions, copies, and imitations of the design of any such painting or drawing, or of the negative of any such photograph, which, contrary to the provisions of this Act, shall have been made in any foreign state, or in any part of the British dominions, are hereby absolutely prohibited to be imported into any part of the United Kingdom, except by or with the consent of the proprietor of the copyright thereof, or his agent authorized in writing; and if the proprietor of any such copyright, or his agent, shall declare that any goods imported are repetitions, copies, or imitations of any such painting, drawing, or photograph, or of the negative of any such photograph, and so prohibited as aforesaid, then such goods may be detained by the officers of Her Majesty's Customs.

Right to bring action for damages, &c.

XI. If the author of any painting, drawing, or photograph, in which there shall be subsisting copyright, after having sold or otherwise disposed of such copyright, or if any other person, not being the proprietor for the time being of such copyright, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied, for sale, hire, exhibition, or distribution, any such work or the design thereof, or the negative of any such photograph, or shall import or cause to be imported into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be sold, published, let to hire, exhibited, or distributed, or offered for sale, hire, exhibition, or distribution, any repetition, copy, or imitation of such work, or the design thereof, or the negative of any such photograph, made without such consent as aforesaid, then every such proprietor, in addition to the remedies hereby given for the recovery of any such penalties, and forfeiture of any such things as aforesaid, may recover damages by and in a special action on the case, to be brought against the person so offending, and may in such action recover and enforce the delivery to

him of all unlawful repetitions, copies, and imitations, and negatives of photographs, or may recover damages for the retention or conversion thereof: Provided, that nothing herein contained, nor any proceeding, conviction, or judgment, for any act hereby forbidden, shall affect any remedy which any person aggrieved by such act may be entitled to either at law or in equity.

Provisions of 7 & 8 Vict. c. 12. to be considered as included in this Act.

XII. This Act shall be considered as including the provisions of the Act passed in the session of Parliament held in the seventh and eighth years of Her present Majesty, intituled "An Act to amend the law relating to international copyright," in the same manner as if such provisions were part of this Act.

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38 & 39 VICT. C. 12.

An Act to amend the Law relating to International Copyright.

[LAW REP. 10 STAT. 133.] [13TH MAY 1875.]

WHEREAS by an Act passed in the fifteenth year of the reign of Her present Majesty, chapter twelve, intituled "An Act to enable Her Majesty to carry into effect a convention with France on the subject of copyright; to extend and explain the International Copyright Acts; and to explain the Acts relating to copyright in engravings," it is enacted, that "Her Majesty may, by Order in Council, direct that authors of dramatic pieces which are, after a future time, to be specified in such order, first publicly represented in any foreign country, to be named in such order, their executors, administrators, and assigns, shall, subject to the provisions therein-after mentioned or referred to, be empowered to prevent the representation in the British dominions of any translation of such dramatic pieces not authorized by them, for such time as may be specified in such order, not extending beyond the expiration of five years from the time at which the authorized translations of such dramatic pieces are first published and publicly represented:"

And whereas by the same Act it is further enacted, "that, subject to any provisions or qualifications contained in such order, and to the provisions in the said Act contained or referred to, the laws and enactments for the time being in force for ensuring to the author of any dramatic piece first publicly

represented in the British dominions the sole liberty of representing the same shall be applied for the purpose of preventing the representation of any translations of the dramatic pieces to which such order extends, which are not sanctioned by the authors thereof:"

And whereas by the sixth section of the said Act it is provided, that "nothing in the said Act contained shall be so construed as to prevent fair imitations or adaptations to the English stage of any dramatic piece or musical composition published in any foreign country:"

And whereas it is expedient to alter or amend the last-mentioned provision under certain circumstances:

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; viz.,

I. In any case in which, by virtue of the enactments herein-before recited, any Order in Council has been or may hereafter be made for the purpose of extending protection to the translations of dramatic pieces first publicly represented in any foreign country, it shall be lawful for Her Majesty by Order in Council to direct that the sixth section of the said Act shall not apply to the dramatic pieces to which protection is so extended; and thereupon the said recited Act shall take effect with respect to such dramatic pieces and to the translations thereof as if the said sixth section of the said Act were hereby repealed.

Revised Statute of the United States, being the Act of July 8, 1870, as contained in the Revised Statutes, Second Edition, 1878, page 957.

4948. Copyrights to be under charge of Librarian of Congress.

4949. Seal of office.

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4960. Penalty for omission.
4961. Postmaster to give receipts.
4962. Publication of notice of entry for copyright prescribed.
4963. Penalty for false publication of notice of entry
4964. Damages for violation of copyright of books.
4965. For violating copyright of maps, charts, prints, &c.
4966. For violating copyright of dramatic compositions.
4967. Damages for printing or publishing any manuscript without consent of author, &c.
4968. Limitation of action in copyright cases.
4969. Defenses to action in copyright cases.
4970. Injunctions in copyright cases.
4971. Aliens and non-residents not privileged.

Copyrights to be under charge of Librarian of Congress.

SEC. 4948. All records and other things relating to copyrights and required by law to be preserved, shall be under the control of the Librarian of Congress, and kept and preserved in the Library of Congress; and the Librarian of Congress shall have the immediate care and supervision thereof, and, under the supervision of the joint committee of Congress on the Library, shall perform all acts and duties required by law touching copyrights.

Seal of office.

SEC. 4949. The seal provided for the office of the Librarian of Congress shall be the seal thereof, and by it all records and papers issued from the office and to be used in evidence shall be authenticated.

Bond of Librarian.

SEC. 4950. The Librarian of Congress shall give a bond, with sureties, to the Treasurer of the United States, in the sum of five thousand dollars, with the condition that he will render to the proper officers of the Treasury a true account of all moneys received by virtue of his office.

Annual report.

SEC. 4951. The Librarian of Congress shall make an annual report to Congress of the number and description of copyright publications for which entries have been made during the year.

What publica-

SEC. 4952. Any citizen of the United States or resident

tions may be entered for copyright.

therein, who shall be the author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print,[1] 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 may reserve the right to dramatize or to translate their own works.

Term of copyrights.

SEC. 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.

Continuance of term.

SEC. 4954. The author, inventor, or designer, if he be still living and a citizen of the United States or resident therein, 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 person 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.

Assignment of copyrights and recording.

SEC. 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.

Deposit of title and published copies.

SEC. 4956. No person shall be entitled to a copyright unless he shall, before publication, 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 printed copy of the title of the book or other article, or a description of the painting, drawing, chromo, statue, statuary, or a model or design for a work of the fine arts, for which he

[1] See Act of 1874, s. 8, *post*, p. 705.

desires a copyright, nor unless he shall also, within ten days from the publication thereof, 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, two copies of such copyright book or other article, or in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of the same.

Book of entry and attested copy.

SEC. 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 other wise, 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.

Fees.

SEC. 4958. The Librarian of Congress shall receive, from the persons to whom the services designated are rendered, the following fees:—

First. For recording the title or description of any copyright book or other article, fifty cents.

Second. For every copy under seal of such record actually given to the person claiming the copyright, or his assigns, fifty cents.

Third. For recording any instrument of writing for the assignment of a copyright, fifteen cents for every one hundred words.[1]

Fourth. For every copy of an assignment, ten cents for every one hundred words.[1]

All fees so received shall be paid into the Treasury of the United States.

Copies of copyright works to be furnished to Librarian of Congress.

SEC. 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, within ten days after its publication, two complete printed copies thereof, of the best edition issued, or description or photograph of such article as

[1] See Act of 1874, s. 2, *post*, p. 705.

hereinbefore required, and a copy of every subsequent edition wherein any substantial changes shall be made.

Penalty for omission.

SEC. 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 four thousand nine hundred and fifty-six, and four thousand nine hundred and fifty-nine, 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.

Postmaster to give receipts.

SEC. 4961. The postmaster to whom such copyright book, title, or other article is delivered, shall, if requested, give a receipt therefor; and when so delivered he shall mail it to its destination.

Publication of notice of entry for copyright prescribed.

SEC. 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 portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words: "Entered according to Act of Congress, in the year , by A. B., in the office of the Librarian of Congress, at Washington."[1]

Penalty for false publication of notice of entry.

SEC. 4963. Every person who shall insert or impress such notice, or words of the same purport, in or upon any book, map, chart, musical composition, print, cut, engraving, or photograph, or other article, for which he has not obtained a copyright, 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.

Damages for violation of copyright of books.

SEC. 4964. Every person who, after the recording of the title of any book as provided by this chapter, shall 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, or import, or knowing

[1] See Act of 1874, s. 1, *post*, p. 704.

the same to be so printed, published, or imported, shall sell or expose to 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.

For violating copyright of maps, charts, prints, &c.

SEC. 4965. If any person, after the recording of the title of any map, chart, 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 chapter, shall, 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, engrave, etch, work, copy, print, publish, 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, or imported, shall sell or expose to 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; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale; one-half thereof to the proprietor and the other half to the use of the United States.

For violating copyright of dramatic compositions.

SEC. 4966. Any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, 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.

Damages for printing or publishing any manuscript without consent of author, &c.

SEC. 4967. Every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, if such author or proprietor is a citizen of the United States, or resident therein, shall be liable to the author or proprietor for all damages occasioned by such injury.

Limitation of action in copyright cases.

SEC. 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.

Defenses to action in copyright cases.

SEC. 4969. In all actions arising under the laws respecting copyrights, the defendant may plead the general issue, and give the special matter in evidence.

Injunctions in copyright cases.

SEC. 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.

Aliens and non-residents not privileged.

SEC. 4971. Nothing in this chapter shall be construed to prohibit the printing, publishing, importation, or sale of any book, map, chart, dramatic or musical composition, print, cut, engraving, or photograph, written, composed, or made by any person not a citizen of the United States nor resident therein.

ACT OF JUNE 18, 1874.

(18 U. S. ST. AT L. 78.)

An act to amend the law relating to patents, trade marks, and copyrights.

No right of action for infringement of copyright unless, &c.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, 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 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

Modes of entry.

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."

Fee for recording and certifying assignments of copyright.

SEC. 2. That for recording and certifying any instrument of writing for the assignment of a copyright, the Librarian of Congress shall receive from the persons to whom the service is rendered, one dollar; and for every copy of an assignment, one dollar; said fee to cover, in either case, a certificate of the record, under seal of the Librarian of Congress; and all fees so received shall be paid into the Treasury of the United States.

Restriction on application of words "Engraving," "cut," and "print."

SEC. 3. That in the construction of this act, the words "Engraving," "cut," and "print" shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints, except that there shall be paid for recording the title of any print or label not a trade mark, six dollars, which shall cover the expense of furnishing a copy of the record under the seal of the Commissioner of Patents, to the party entering the same.

Other prints and labels may be registered in Patent Office.

Commissioner of Patents charged with supervision.

Fees.

Repeal of inconsistent laws.

SEC. 4. That all laws and parts of laws inconsistent with the foregoing provisions be and the same are hereby repealed.

Takes effect Aug. 1, 1874.

SEC. 5. That this act shall take effect on and after the first day of August, eighteen hundred and seventy-four.

Approved, June 18, 1874.

Provisions of the Revised Statutes of the United States which, with section 4970 (*ante*, p. 704), *govern Jurisdiction in Copyright Cases.*

Jurisdiction.

SEC. 629. The circuit courts shall have original jurisdiction as follows:

Aliens, citizens of different States.

First. Of all suits of a civil nature at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, and an alien

is a party, or the suit is between a citizen of the State where it is brought and a citizen of another State. . . .

. . . . . .

Ninth. Of all suits at law or in equity arising under the patent or copyright laws of the United States.[1]

Writs of error and appeals, without reference to amount.

SEC. 699. A writ of error [to the Supreme Court of the United States] may be allowed to review any final judgment at law, and an appeal shall be allowed from any final decree in equity hereinafter mentioned, without regard to the sum or value in dispute:

Patent and copyright cases.

First. Any final judgment at law or final decree in equity of any circuit court, or of any district court acting as a circuit court, or of the supreme court of the District of Columbia, or of any Territory, in any case touching patent-rights or copyrights.[2]

[1] U. S. Rev. St. 110, 111.

The Act of March 3, 1875, 18 U. S. St. at L. 470, provides that "the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States or a controversy between citizens of the same State claiming land under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects."

[2] U. S. Rev. St. 130.

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Cambridge: Press of John Wilson & Son.