May 27 '03

SEVEN LECTURES

ON

The Law and History of Copyright in Books

BY

AUGUSTINE BIRRELL, M.P.

ONE OF HER MAJESTY'S COUNSEL

AND

QUAIN PROFESSOR OF LAW AT UNIVERSITY COLLEGE, LONDON

CASSELL AND COMPANY, LIMITED

LONDON, PARIS, NEW YORK & MELBOURNE

1899

ALL RIGHTS RESERVED

SUK 944 B1R

To
BBLG Esq

Rec Nov 27, 1849.

NOTE.

As Quain Professor of Law at University College, London, I delivered Eighteen Lectures on the general subject of Copyright in the earlier part of this year. I have thought it worth while to reprint the more popular of these Lectures, chiefly because the Law on the subject is expected before long to engage what is sometimes called "the attention of Parliament."

A. B.

3, *New Square, Lincoln's Inn*,
December, 1898.

CONTENTS.

I.

INTRODUCTORY 9

II.

THE ORIGIN OF COPYRIGHT 41

III.

THE STATIONERS' COMPANY AND THE FIRST COPYRIGHT STATUTE 71

IV.

THE BATTLE OF THE BOOKSELLERS FOR PERPETUAL COPYRIGHT 99

V.

LEGISLATIVE ENACTMENTS SINCE QUEEN ANNE . . 141

VI.

LITERARY LARCENY 167

VII.

THE PRESENT SITUATION 195

INDEX 225

I.

INTRODUCTORY.

COPYRIGHT IN BOOKS.

I.

INTRODUCTORY.

WHATEVER charm is possessed by the subject of copyright is largely due to the fact that it is a bundle of ideas and rights of modern origin. It is not like the majority of legal conceptions lost in an antiquity about which we can only guess, and about which each generation guesses differently. The Homeric Poems as poetry are beyond reproach, but they were never copyright. You may search through the huge compilations of Justinian without lighting upon a word indicative of any right possessed by the author of a book to control the multiplication of copies; and yet books abounded even before the invention of printing, and though the pirate escaped animadversion, not so the plagiarist. Nor can you, even after the invention of the movable types, which rendered

the reproduction of copies an easy, because a mechanical, process, discern any moment of time marking the epoch when the Western World recognised the right of an author as such to levy dues upon the published product of his own brain and intellectual industry. We are thus able to observe for ourselves a claim made by the producer of an article to have property in it, and the mode in which that claim has been met and recognised by those who wished to consume the article in question.

All through the 17th and 18th centuries in France, and during the latter half of the 18th century in England, a controversy was carried on between *savants*, booksellers and lawyers as to whether authors were entitled to an exclusive right of multiplying copies of their works as *property* or as *privilege*. In France, the question assumed this shape—Were the rights of authors the creatures first of Royal patronage, and subsequently of social concession, or were they *un droit absolu, une propriété ?* In England we asked the question in this way—Are the rights of authors property-rights at Common Law or

the creatures either of a prerogative of the Crown or of our Statute Book? . . .

The reason why these questions were asked both in France and England was this —Certain rights over things amounting in the aggregate to a more or less complete exclusion of others than the owner from participating, save by consent, in their enjoyment had in the Western World become recognised as *property*, as our old friends *Meum* and *Tuum*. The origin of property, of exclusive ownership, is one of the subjects about which our predecessors in title loved to discourse at large after a fashion more ingenious than historical. Occupancy and Labour are the mythical parents of Property, but we shall be less wrong in assuming that the pedigree was invented to account for the fact of possession than in attributing the fact of possession to the virtues of the pedigree. But whatever was its origin, the Western World has throughout its long history shown an ever increasing disposition to recognise the right of individuals to the exclusive possession of certain things, and these rights it has clustered

together, recognised, venerated, worshipped, under the word *property*.

To be allowed to enter this sacrosanct circle is a great thing. None but the oldest families are admitted. Our Common Law, for example, one of the most remarkable and on the whole worshipful systems that ever nurtured a nation of freemen, will not allow new titles, new estates in land, new modes of inheritance, new fetters on the disposition of things, and to establish your claim to join the august company of owners you must be able to make out that the right you contend for was recognised as property by the ancient customs of the realm—that it is some sort of real or descendible estate—or if not that, *goods*, *debts*, or *contracts*. Once inside this circle your rights were supposed in some romantic way to be outside the chill region of positive law—they were based upon natural justice—and were indeed natural rights, existing previously to the social contract, and without which Society was deemed impossible.

Nor were these romantic conceptions mere *jeux d'esprit*. Consequences flowed from them. If your right to turn your neighbour

off your premises — to keep your things to yourself — was *property*, and therefore *ex hypothesi* founded on natural justice, he who sought to interfere with your complete dominion was a thief or a trespasser, but if your rights were based upon some special concession made to you upon your own merits, you then found yourself dubbed a monopolist, and the brave man who sought to get the better of you was, at the worst, an *infringer* or smuggler. Monopoly is always an odious word. Property is still a sacred one. Marmontel, in his Memoirs, tells us of an interview with Bassompierre, a bookseller, or, as we should now call him in this department of his business, a publisher of Liége. Bassompierre had made such a good thing out of the sale of Marmontel's famous *Bélisaire* that he felt compelled to call upon the author, who was passing through his town, and thank him for the service he had rendered. Marmontel was furious. "What," says he, "you first rob me of the fruits of my labours, and then have the effrontery to come and brag about it under my nose!" Bassompierre was amazed.

It had not struck him in that light. "Monsieur," said he, "you forget Liége is a free country, and we have nothing to do with you and your *privileges.*"[1]

There is a good deal in a name.

The struggle, "Property or Privilege," had substance in it. If authors or their assignees could make out that their right to the exclusive multiplication of copies of their books ought to be regarded as property, in the same way as lands, houses, goods and chattels, it followed that this right was one of indefinite duration, and could be so disposed of in the market *inter vivos*, or bequeathed or left to descend to relatives according to the laws of inheritance. If, on the other hand, it was not property but privilege, then its term of enjoyment could and would be measured, limited, restricted, according to the wording of the Letters Patent, or of the Act of the Legislature or other document which created it.

The authors and their friends in France put their case somewhat in this fashion. A man conceives the idea of a literary work; he

[1] *See* "Marmontel's Memoirs," Book viii.

thinks over it, he elaborates it, and finally he clothes it in words capable of communicating it to other minds. The result is a product of his faculties the most direct and exclusive anyone can imagine. "Athalie" is Racine's, "Tartuffe" is Molière's—the *Lettres Provinciales* are Pascal's, the *Discours sur l'Histoire Universelle* is Bossuet's. Who dare deny it? The manuscript of the completed work is material property, which belongs to the author just as much as the desk on which he wrote it. He can lend it to ten, twenty, a thousand persons if he chooses, who might pay him for the pleasure of reading it. But in whose so ever hands the manuscript might be found, it still remained the author's property.

Then comes the Art of Printing. If the author had a private printing press he could publish an edition for himself, but, as this is unusual, he employs and pays a printer and a bookseller. The edition is circulated, and each buyer of a copy becomes the owner of a copy of a book which is his to read and to lend, to sell, or to leave to his heirs. But every copy supposes an original which subsists

somewhere in splendid isolation, whatever may be the number of the copies, and were the purchaser of a single copy to reproduce other copies from it he would thereby wholly or in part destroy the value of the property still in the hands of the owner of the original. To do this would be a wrongful act, and is usually so regarded whilst the author lives. If authors lived for ever, few would dispute their perpetual copyright; but what difference can his mortality make in the nature or character of his right, which is not a right to *ideas*, but simply to the perpetual reproduction of a manuscript? It is the *text* that must not be reproduced without permission. The text or the manuscript is the *material* object of the property-right; and the fact that copies are struck off to make reading easy, and that it is as easy to print from a copy as from the original, makes no real difference in the nature of the right, though it may make it more difficult of enforcement.

The answer to this amiable reasoning was of this kind: Property means exclusion, and all that the laws do is to *protect* people who are lawfully in possession of their own

or to *restore* their property to those who have been dispossessed by force or fraud. So if an author is robbed of his manuscript the law will do what it can to punish the thief, and this for the protection of property and for the preservation of the peace, which must be perpetually broken if trespass, robbery, and disseisin are of frequent occurrence. The essence of Property is an unwillingness to share it, but the literary art lives by *communication;* its essence is the telling of a tale with the object of creating an impression and of causing repetition. A tells a tale in prose or verse to B, who is so mightily tickled by it that he repeats it to C, who pours it into the ear of D, and so on. Can one imagine copyright in a fable of Æsop or a proverb of Solomon? Publication is dedication to the public subject to such terms and conditions as wisdom or prudence may ask for, and justice or generosity may allow. Was there ever an author who would not sooner publish and starve than not publish at all? This proves that the author's rights are not based on a desire to exclusive possession of that which he has written.

He does not want to be left alone with his own. His desire is to make his book known, and by publication he gives it to the world.

This was the character of the arguments employed in France against the theory of property in books. It cannot be said that either party to the controversy obtained even a forensic success. More and more did the leaders of French opinion recognise the claims of authors to be rewarded for their labours, but equally did they perceive how impossible it was to confer upon them rights equal in duration to those which, in more primitive times, owners of other kinds of articles had been allowed to acquire. M. de Lamartine, the poet, had no difficulty in declaring that there ought to be no difference between an author's right to his own book and a banker's right to his own securities, but M. de Lamartine, the legislator, talked a different language. *Nous étions une Commission de législateurs et non une Académie de philosophes!* You can all guess what is coming. When a man of letters reminds you that he is speaking not as a philosopher, but as a politician, you know it is a peculiar

kind of grace before an odd sort of meal—the good man is going to eat his own words. Lamartine proceeds with his *déjeuner*:

"Comme philosophes, remontant à la métaphysique de cette question, et retrouvant sans doute dans la nature et dans les droits naturels du travail intellectuel des titres aussi évidents, aussi saints et aussi imprescriptibles que ceux du travail des mains, nous aurions été amenés peut-être à proclamer théoriquement la perpétuité de possession des fruits de ce travail; comme législateurs notre mission est autre. Nous n'avons pas voulu la dépasser. Le législateur proclame rarement des principes absolus, surtout quand ce sont des vérités nouvelles; il proclame des applications relatives, pratiques et proportionnées aux idées reçues aux mœurs et aux habitudes des temps et de la chose dont il écrit le code." [1]

In other words, mankind would not submit to perpetual copyright, and so in France authors have been very willing to take fifty years in addition to their own lives.

In England the question was complicated, and, indeed, butchered, by an Act of Parliament—the first copyright statute anywhere to be found—the 8th of Good Queen Anne. I shall have in a subsequent lecture to consider this perfidious measure, "rigged with curses dark," in more detail; enough now to

[1] "Études sur la Propriété Littéraire," par M. Édouard Laboulaye. Paris, 1858, p. xx.

say that it was originally, such is the tradition, drafted by Dr. Swift solely in the interests of authors and booksellers, who, ever since the abolition of the Star Chamber and the subsequent expiration, in 1679, of the Licensing Acts, found themselves much put about for summary remedies against piratical printers, who, when pursued through all the forms of actions in the King's or Queen's Bench, were accustomed, like John Bunyan's inimitable and immortal Mr. Badman, "to break," or if they did not break, then, if I may use language which has not the warrant of Bunyan, "to bolt." Swift's draft Bill, like Cranmer's rough draft of the Articles of our Faith, has unfortunately disappeared, but that it was rudely treated in Committee is certain, though all we know now is the measure as it received the Royal Assent and remained upon the Statute Book of the Realm until repealed in 1842. It was intituled, "An Act for the Encouragement of Learning," and recited that it was enacted in order to enable learned men to write useful books. By its provisions two terms each of fourteen years were created for all future publications, one term

to follow immediately upon the expiration of the other, if the author were still living at the date of such expiration. Summary process—burning the stolen goods, etc.—was provided against infringers, whilst if any publisher should sell a book too dear, any person who conceived that to be the case was at liberty to take the opinion on that subject of the Archbishop of Canterbury, the Lord Chancellor, the Bishop of London, the Chief Justices of the Queen's Bench and the Common Pleas, the Chief Baron of the Exchequer, and of those two literary experts, the Vice-Chancellors of the Universities of Oxford and Cambridge, and if these authorities, or any or either of them, thought the price high and unreasonable, they or he had liberty to fix the fair price and full jurisdiction over the costs of the application.

This well-meaning statute spoilt all. It gave away the whole case of the British author, for amidst all the judicial differences during the last century on copyright there was a steady majority of judges in favour of the view that but for the Statute of Anne an author was entitled to perpetual

copyright in his published work. This right (if it ever existed) the Act destroyed.

Whether this judicial opinion as to the existence at Common Law of perpetual copyright in an author and his assigns was sound may well be doubted, and possibly if the House of Lords had held in *Donaldson* v. *Becket* that perpetual copyright had survived Queen Anne, an Act of Parliament would, sooner or later, have been passed curtailing the rights of authors. But how annoying, how distressing, to have evolution artificially arrested and so interesting a question stifled by an ignorant Legislature, set in motion not by an irate populace clamouring for cheap books (as a generation later they were to clamour for cheap gin), but by the authors and their proprietors, the booksellers.

On the details of the question I shall have something to say hereafter; just now it is enough to observe that it seems at first very curious how such a question as the duration of an author's rights in his own works could escape being determined one way or the other until 1774. But the fact is that after first publication the British

author usually disappeared, or if he did re-appear, it was in the pillory.

"Ear-less on high stood unabashed De Foe,
And Tutchin flagrant from the scourge below."

The London booksellers managed the whole business, and as a rule they respected each other's publications just as, until lately, the American publishers respected each other's user of a British author. In the assignments which they took from authors the words "for ever" were always employed, and in the commotion occasioned by the decision in *Donaldson* v. *Becket* the London booksellers asserted that they had paid authors, including Mr. Justice Blackstone, large sums for their books on the footing of perpetual copyright, but when one remembers how short is the life of any book for which a bookseller would be willing to pay a high price, it is certain that perpetuity cannot have entered much into the calculations of the trade. What the bookseller pays for is in respect of an anticipated sale in the next decade or two—not in the next century. Who knows what the world is going to read a hundred years

hence? This is in truth the consideration that knocks the bottom out of the author's case for perpetual copyright. Blackacre is Blackacre for all time. Where barley and oats once bowed before the wind a murky city may stand:

> "There where the long street roars, hath been
> The stillness of the central sea."

The change is but a change of user; but Hawkesworth's Voyages, and Hume's History, and Johnson's Dictionary—works once of celebrity, for which the whole trade contended—where and what are they now? They are superseded, and for commercial purposes they are as dead as the Babylonian Empire. After all, what has an author to do with perpetuity? How can he dispose of his rights in it? Had Milton, in the course of his negotiations with Mr. Symonds, complained of the fifteen pounds in exchange for which he parted with "Paradise Lost," and asserted that three hundred years hence the age in which he and his publisher were then living would frequently be called the "Age of Milton," do you suppose that would have extracted another

five pounds from the pocket of Symonds? The money market takes short views. Half a century writes *Finis* to most authors, while in the case of the few who prove to be for all time, the feeling of mankind would be one of resentment were there now living in Paternoster Row or Madrid or Florence a capitalist who could say, "Hamlet is mine," "Sancho Panza is mine," "The 'Inferno' belongs to me." Who would not feel that this disreputable *bourgeois* was the enemy, not the friend, of the world-wide genius of Shakespeare, of Cervantes, of Dante?

The claim to perpetual copyright was born too late to live. Natural rights—their empire is sped! Listen to Mr. Matthew Arnold: "Now for me the matter is simplified by my believing that men, if they go down into their own minds and deal quite freely with their own consciousness, will find that they have not any natural rights at all."[1] "Property," he proceeds, "is the creation of Law." True enough; yet if Mr. Arnold had ever had to consider what is the Common Law of England as distinguished from the

[1] "Irish Essays," p. 251.

Statute Law, he would have found it a little difficult to give natural rights the cut direct. But at all events, so far as books are concerned, it is now generally agreed that authors must and may well be content with terms of years. At the expiration of those terms, the Thomas Teggs may, to use the language of Carlyle's Petition to Parliament, begin to steal.

The fact is that we have outgrown the controversy. For more than fifty years now last past the minds of English book-producers have been engaged with a more fascinating subject than discounting their very risky claims upon futurity. The English language has travelled far. Education has made reading easy; bookbuyers exist or ought to exist in millions—not indeed, it may be, for those "useful" books written by those "learned men" who were to be "encouraged" by the blundering boobies who passed the Statute of Anne, but for novels, popular versification, and what is politely called *Belles Lettres*. Instead of a barren perpetuity of duration, the popular author began to lust after international recogni-

tion, and most marvellously has he accomplished his heart's desire.

Our original copyright conceptions were wholly municipal. We wished to protect the British author, who published in Britain on British paper a book printed by British printers. The learned men we sought to encourage were of our own manufacture. As for foreign books, we had no great opinion of them; but were they worth translating, Grub Street was full of needy scholars who for a few shillings would place their contents before the British reader, but the idea of paying for the privilege was quite alien to the mind of the trade; and it must be remembered that the publishing business has always in this country been in the hands of those whom Dr. Johnson called "the Booksellers," a most excellent and deserving body of tradesmen not in the least likely to give birth to lofty thoughts about the universal rights of authors all the world over, unless indeed they had acquired such rights by an absolute assignment they believed to be valid.

In this matter, as in so many others, France has led the way. She was the first

of the nations to make no difference in the nationality of an author, and to give to everyone who published a book within her realms, whether native or alien, whether resident or non-resident, precisely the same recognition. This France managed to do in the very throes of her Revolution, on the 19th of July, 1793.

In 1838 we passed our first International Copyright Act, empowering the Queen in Council to confer upon the authors of foreign books to be specified in the Order the sole liberty of printing and reprinting such books within the British Dominions for such term as the Order should direct, not exceeding the term to which British authors were then by law entitled.

In 1844 the last-mentioned Act was repealed, and a wider measure enacted which authorised the Queen in Council to direct by an Order that as respects all or any particular class or classes of the following works, namely, books, prints, 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, designers, engravers, and makers thereof respectively shall have copyright therein during the period defined in the Order, but not exceeding the term which such persons would enjoy had their works been first published in the United Kingdom. This Act (7 and 8 Vict., c. 12), by its tenth section, prohibited the importation into any part of the British Dominions of copies of books wherein there was subsisting British copyright, which had been printed or reprinted in any foreign country by virtue of any Order in Council. The 14th clause provided that no such Order in Council should have any effect unless it was stated therein that due protection had been secured by the foreign Power named in such Order for the benefit of British authors.

In 1851 a convention was 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. This convention was confirmed by an Act of Parliament passed in 1852 (15 and 16

Vict. c. 12), which also enabled Her Majesty to make similar stipulations in any treaty on the subject of copyright which might thereafter be concluded with any foreign Power.

Numerous conventions have at different times been entered into between Great Britain and foreign Powers, but happily they are now superseded by the CONVENTION OF BERNE, which created among the States who acceded to it a literary and artistic Union for the protection of authors and artists. The 9th of September, 1886, the date when the plenipotentiaries signed the Convention, is a red-letter day in the annals of literature, and marks a true epoch in the cloudy history of men of letters. Authors and artists may well be proud of having secured for themselves and their works the first place in the still scanty records of the Parliament of Man and the Federation of the World. The first two articles of the Convention of Berne are as follows:—

"Article 1er. Les pays contractants sont constitués à l'état d'Union pour la protection des droits des auteurs sur leurs œuvres littéraires et artistiques.

"Article 2. Les auteurs ressortissant à l'un des pays de l'Union ou leurs ayants cause jouissent dans les autres pays, pour leurs œuvres, soit publiées dans un

de ces pays soit non-publiées, des droits que les lois respectives accordent actuellement ou accorderont par la suite aux nationaux.

"La jouissance de ces droits est subordonnée à l'accomplissement des conditions et formalités prescrites par la législation du pays d'origine de l'œuvre ; elle ne peut excéder dans les autres pays, la durée de la protection accordée dans ledit pays d'origine.

"Est considéré comme pays d'origine de l'œuvre celui de la première publication, ou, si cette publication a lieu simultanément dans plusieurs pays de l'Union, celui d'entre eux dont la législation accorde la durée de protection la plus courte.

"Pour les œuvres non publiées, le pays auquel appartient l'auteur est considéré comme pays d'origine de l'œuvre."

The first signatories were Germany, Belgium, Spain, France, Great Britain, Haiti, Italy, Switzerland, and the Bey of Tunis, a dignitary who, though not conspicuously literate, was usually of the same way of thinking as France. Since the 5th of September, 1887, when the formal ratifications of the signatures of the plenipotentiaries were exchanged, Luxembourg, Monaco, Montenegro, and Norway have joined the Union.

In 1896 a diplomatic conference on International Copyright met in Paris to discuss

a revision of the Berne Convention, and drew up what is called the Additional Act of the 4th of May, 1896, and a declaration explanatory of certain stipulations of the Convention.

Reading the original Convention of Berne, together with the modifications of 1896, we find that an author, whether he belongs to a country inside or outside the Union, if he has complied with the formalities of publication required by the municipal law of the country belonging to the Union where his book is first published, enjoys the full protection which the Union guarantees; that is to say, he is protected against unauthorised editions, unauthorised translations, and, if he is a dramatist or an artist, against unauthorised representations or exhibitions of the work he has published in one of the countries of the Union.

This is, indeed, International Copyright. Practically the value of the Convention turns upon its provisions as to Translations. For popular purposes in Britain it is not much use to say to a Heine, or even to a Hugo, "You shall be protected within the British dominions as a German or a Frenchman

in your original garb," for it is only by means of translations that foreign authors can become widely known in so unilingual a country as that of Her Britannic Majesty.

On this question of translations, were the rights of the original author to be based on metaphysical conceptions of property, labour and occupancy, there would be much room for word-chopping. Happily, the rights of the original author now rest on the Convention of Berne as amended in 1896.

By Article 5 of the original Convention authors publishing in any of the countries of the Union, or their assigns, are to enjoy in the other countries the exclusive right of making or authorising the translation of their works until the expiration of ten years from the publication of the original work in one of the countries of the Union. By the amending Act such authors are to enjoy this exclusive right during the whole period of their copyright, provided that they do within ten years from the date aforesaid publish an authorised translation of their own.

Simple as these provisions sound they represent an enormous stride forward along

the path of civilisation, and perhaps in our moments of excitement we may hail them as harbingers of that good time coming when there shall be a common law for Europe founded upon an international recognition of mutual rights and obligations.

Russia and *Holland* are the most important of the European States which remain outside the Convention of Berne. Russia is known to be engaged in a revision of her own municipal law, which at present grants copyright to Russian authors for the period of their lives, plus fifty years. It is believed that she is willing to concede the same rights to all works published in Russia, whether the author is a Russian or a foreigner. It is not thought likely she will join the Berne Convention. In Holland the Netherlands Union for the Advancement of the Bookselling Trade has lately decided, by a majority of 81 to 40, to take no steps in favour of the adhesion of Holland to the Berne Union.

But splendid though the Convention of Berne and International Copyright may be, to the British author who longs for a huge public, for greater sales, for an income that rolls and

swells and accumulates, the accession of the Republic of Liberia, the original adhesion of the Bey of Tunis, and of the President of the Republic of Haiti to the Convention of Berne are matters of small moment; even France and Spain do not annually absorb much of our literature. No! a British author's thoughts wander in the direction of the setting sun—to America and Canada—where by vast leaps and bounds a population grows and grows; where all can read, and where the English language is universally spoken.

The attitude of the United States of America with regard to British authors was long a sore subject. "Ephraim," says the Prophet Hosea, "is a wild ass that trampleth down the corn alone." The publishers of America were like Ephraim. They defended themselves by saying that their customers were young and well educated and poor, and books were articles of necessity and unreasonably dear, and have them they must, else their peoples would, if not perish, at least pine. After all, the American publishers only did what the Dublin printers used to do before the Act of Union, and what most publishers would do

but for the law. There were always in the United States men who advocated a change in the law—the founders and supporters of the American Copyright League—who struggled valiantly in the good cause, and ultimately achieved a great success. By Acts of the Legislature, dated 3rd of March, 1891, the 3rd of March, 1893, and the 2nd of March, 1895, foreign authors, whose books have been first printed in the United States, and who observe certain conditions and formalities as to the deposit of copies, and so forth, have the same exclusive rights as American authors, the duration of which is for a period of twenty-eight years from the date of publication, and for a further period of fourteen years, if at the expiration of the twenty-eight years the author is still living, or if there is then still living a widow, or a child, or children of the author. There was a great deal of grumbling and dissatisfaction with the stipulation as to American printing, but in matters of this kind the United States are only a little behind us. There can be no doubt whatever that in 1842, when our first modern copyright statute was passed, we only

intended to protect books printed in Great Britain. Anyhow, America is now a Tom Tiddler's ground for British authors who choose to print there; but I am not sure that they have picked up quite so much American gold and silver as they hoped to do. As to this, however, I have no facts to communicate. For a great many British books there is no demand in either the States or Canada.

The great thing still to be done is to labour for uniformity of copyright law in all parts of the world. Some general *consensus* as to duration would be eminently desirable. At present we have every variety. In Mexico, Guatemala, and Venezuela, three not very literary states, it is perpetual. In most countries it is for the lifetime of the author plus a term of years.

Thus, in Spain the term is life and eighty years.

In France it is life and fifty years.
In Germany it is life and thirty years.
Whilst in Peru it is life and twenty years.
In Brazil it is life and ten years.
In Chili it is life and five years.

In Italy a more complicated rule prevails. Copyright always lasts for the author's life, and if the author does not live for forty years after publication the copyright continues until a term of forty years has expired. At the expiration either of the author's life or of this term of forty years, whichever proves to be the longer, another term of forty years begins, during which anybody can publish the books on terms of payment of a royalty to the owner of the copyright. Here at home the term is for life plus seven years, or a term of forty-two years from the date of first publication, whichever may prove the longer. In America, as I have already had occasion to mention, the term is for twenty-eight years, and then for a further term of fourteen years, if the author or any widow or child is living at the expiration of the twenty-eight years.

It will, I expect, be generally agreed that the simplest arrangement is for life and a term of years after death, and probably fifty years would not be thought too long. I shall have to return to this subject again.

II.

THE ORIGIN OF COPYRIGHT.

II.

THE ORIGIN OF COPYRIGHT.

"MANUSCRIPTS are quite out of the case. "They could produce no profit. Therefore I "shall begin from the introduction of printing "by Caxton, in 1491." Thus did the wily Wedderburn, in 1760, begin his argument for the plaintiff in the copyright case of *Tonson* v. *Collins* (of which we shall hear more), and he was right enough in thus coolly giving the go-by to all the centuries before the fifteenth of our present era. Carefully as the search after copyright has been conducted by laborious and erudite persons, no mere lawyers like Wedderburn, Thurlow, Blackstone, and Dunning, retained and refreshed by fees, but by authors bearing such Shandean names as Reinelius, Thomasius, Fabricius, Crenius, and Menckenius, not a trace of it has been discovered in the days of manuscripts, copyists, and plagiarists. The lively tale recorded by

Montalembert in his *Moines de l'Occident*, and retold by Mr. Putnam in his interesting volume, *Books and their Makers during the Middle Ages* (G. P. Putnam's Sons, 1896), how St. Columba, sitting up all night to do it, furtively made a copy of abbot Fennian's Psalter, and how the abbot protested as loudly as if he had been a member of the Stationers' Company, and brought an action in detinue, or its Irish equivalent, for Columba's copy, and how King Diarmed, sitting in Tara's halls, not then deserted, gave judgment for the abbot, saying *la gache boin a boinin*, that is, "to every cow her calf, and accordingly to every book its copy," has been voted unworthy of belief, and this in the teeth of the fact that the identical copy of the Psalter in St. Columba's well-known handwriting was so recently as 1867 in the possession of an Irish baronet, and exhibited in the Museum of the Royal Irish Academy at Dublin!

But though Wedderburn was right enough in a copyright case to begin with Caxton, he was wrong in his statement that manuscripts could produce no profit, nor

is it possible to agree with a more recent authority, M. Edouard Laboulaye, that *la raison tout simple* why the ancients knew nothing about literary property was that printing was necessary to make *une œuvre d'esprit* an article of commerce. We are all of us, even members of the Institute, too apt to exaggerate the effects of mechanical contrivances. There were books and booksellers, and libraries public and private, bookhunters and bookstalls, in Cappadocia and other places, before Fust and Gutenberg. Mr. Putnam brings this home to us well in the following passage:—

"Teachers like Origen in Cæsarea in the third century, and St. Jerome in Bethlehem and St. Augustine in Hippo in the fifth century, put forth long series of writings--religious, philosophical, and polemical—with apparently an assured confidence that they would reach wide circles of contemporary readers, and that they would be preserved also for generations to come. The sacking of Rome by Alaric (in 410) is used by St. Augustine as a text or occasion for the publication of his beautiful conception of 'The City of God,' in much the same manner as a preacher of later times might have based a homily on the burning of Moscow or the fall of Paris. The preacher of Hippo speaks as if he were addressing, not the small circle of his African

diocese, but mankind at large. And he was justified in his faith, for the *De Civitate Dei* was the book which, next to the Scriptures, was most surely to be found in every monastery of Europe."—*Putnam*, i. 32.

Our own Bede, too, who spent all his laborious days in the diocese of Durham, on the shores of the Tyne, what was there he did not know? He knew both Greek and Latin; he was a poet, a rhetorician, a historian, an astronomer, an arithmetician, a chronologist, a geographer, a philosopher, and a theologian. Were the Venerable Bede to come to life again and to resume (as he instantly would) the studies which were interrupted by his death in the eighth century, who can doubt that in five years he would have caught up Lord Acton, Mr. Jebb, Mr. Gardiner, the Bishop of London, and Dr. Fairbairn, and once more assume a place among the scholars and theologians of Europe? And yet the whole of his knowledge was gained from the ordinary monastic sources. Dr. Maitland, the true glory of Lambeth, in his fascinating series of articles to the *British Critic*, republished under the title, *The Dark Ages*, says:—

"We are, on the one hand, familiar with the Press; used to see its rapid multiplication; filled with the idea of its almost unlimited powers. We are, on the other, but little accustomed to read any large mass of manuscript, or to write continuously anything which could be called a book. . . . Thus, I think, we are apt to be led into error when we think we are comparing the respective powers of hand-writing and the Press. . . . I believe that the history of printing will bear me out in this, that although the power of multiplication at work in the Dark Ages was below that which now exists, and the whole actual produce of the two periods not to be compared, yet, as it regards those books which were considered as the standard works in sacred and secular literature, the difference was not so extreme as may have been supposed. I may illustrate my meaning by asking what proportion the copies of Gregory's 'Morals' or Augustine's 'City of God,' *printed* between the years 1700 and 1800, bear to those *written* between the years 1100 and 1200?"—*Dark Ages*, 415.

The labours of the *Scriptorium* were indeed incessant, and though Montalembert is an enthusiast and must be read with caution, his opinion is worth citing that during the eleventh and twelfth centuries the great classical writers were more generally known and appreciated than when he wrote his *Moines de l'Occident.* The stories that have come down to us, and are sometimes repeated in the columns of country news-

papers, about the enormous prices paid in the Dark Ages for particular manuscripts, must be read with the judicious reserve recommended by Maitland. Only the other day £416 was paid for a copy of Walton's "Compleat Angler," and it would perhaps be no rasher for a writer five hundred years hence to draw from this undoubted fact an inference as to the market price of "The Compleat Angler" in 1898 than it is for us to dogmatise about the price of manuscripts in the eleventh century from the often retailed anecdote in the *Annales Bénédictines* which tells how Agnes, the wife of Geoffrey, Count of Anjou, bought of a priest named Martin a collection of homilies, and gave for the same, "by way to wit of barter or exchange," two hundred sheep, three hogsheads of wheat, millet, and rye, some skins of sable, and four pounds in silver. It was a big price for a sermon, but have I not myself seen a printed copy of the *De Civitate Dei* knocked down at auction for £1,000 amidst the applause of a crowd to whom it would have been rash to impute much familiarity with the masterpiece of St. Augustine? Yet

in the same sale I was able to buy an excellent copy of the same book (though not of the same edition) for seven shillings and sixpence.

That books were dear in the eleventh century and are (some of them) cheap at the end of the nineteenth is certain enough, but that there were books bought, books read, and books collected before the movable types were invented is also certain, and ought not to be forgotten when the origin of copyright is the subject under consideration.

The trade in manuscripts increased in bulk, and under the protection of the Universities, those great mediæval institutions, of powerful ecclesiastics, and cultivated monarchs, developed into a vast industry. You may read in M. Renouard's authoritative book, *Des Droits d'Auteurs* (Paris, 1838), how at the date of the invention of printing there were in Paris and Orleans alone ten thousand copyists. No doubt, M. Renouard adds, "*si l'on en croit Villaret.*"

It is therefore a fact of great significance that at no time during the manuscript period was any claim for author's copyright

made or asserted. It is useless to say there was no need for such a claim. True it is that the books reproduced by the copyists were, for the most part, old books—either of devotion, psalters, homilies, and the like, or the classical authors; but the same is largely true at the present day; and there are no members of the *genus irritabile* more jealous of their rights and more envious of each other's reputations than rival editors, annotators, and compilers. With ten thousand copyists at work in Paris and [redacted] Orleans alone, "*si l'on en croit Villaret*," the exclusive rights of living writers, if such rights existed, must have been infringed by the busy pens of the transcribers. The invention of printing, had it stood alone, was nothing more than a clever labour-saving device for multiplying copies more quickly and cheaply than by hand, nor did it involve the birth of a new property-right. Were it lawful to make fifty copies of a book by hand, it were equally lawful to make five hundred by means of a printing press. The new printers pursued precisely the same plan as the old copyists. They had never heard of

an author's copyright. When Frobenius of Basle was minded to print an edition of the *Adagia* of Erasmus, he never thought of asking "by your leave," and Erasmus, so far from being angry with a piratical publisher, sought out Frobenius and lived for some years in his house and at his charges. Printing by itself was not the mother of author's copyright.

In considering the origin of copyright, two things must never be forgotten. First, the Church and her priesthood, frightened—and who dare say unreasonably frightened?—at the New Learning, and at the independence and lawlessness of mind and enthusiasm that accompanied the New Learning; and, second, the guilds or trade unions, jealous of their privileges, ever at war one with another, and making their appeal to the Crown for protection against outside interference with their strictly defined domains of business.

M. Renouard has put this so graphically that it would be a shame not to give his very words:—

"Il a été dans la destinée de l'imprimerie d'apparaître dans le monde à l'époque où la réforme ébran-

lait le genre humain par une des plus violentes agitations d'idees qui l'aient jamais travaillé. L'art nouveau venait donner des voix et des ailes à la pensée au moment où la pensée c'était la guerre, et lorsque les opinions, aux prises, étaient tout-à-la-fois le théâtre et l'objet des combats. On brûlait ceux qui pensaient mal, et les questions religieuses avaient assez de puissance pour ranger en bataille les nations les unes contre les autres. Laisser tranquillement exposer dans les livres les doctrines que l'on poursuivait jusque dans les plus intimes replis de la pensée, c'eût été plus qu'une inconvenance, c'était une impossibilité.

"La constitution intérieure des sociétés n'était pas plus compatible que les passions générales avec un régime libre. Le monopole était une nécessité. Des lignes de démarcation, très prononcées, separaient les professions. Chaque branche de commerce ou d'industrie avait ses attributions à part, desquelles il n'était pas permis de sortir, mais où d'autres, non plus, ne pouvaient pas pénétrer. Cette classification jalouse, assez profondément enracinée dans les habitudes nationales pour qu'il en reste encore aujourd'hui parmi nous de nombreux vestiges, servait au maintien de l'ordre ; elle secourait les marchands et artisans qu'elle aidait à se coaliser contre les exactions et les persécutions de toute espèce, et en même temps elle protégeait l'ignorance du public contre bien des fraudes, grâce au point d'honneur qui, par intérêt et par amour-propre, porte une compagnie à exercer une action de police sur la moralité de ses membres. La librairie et l'imprimerie, car un même corps réunissait les imprimeurs et les libraires, ne pouvaient pas échapper à la condition commune. Il était inévitable que cette profession eût, comme les autres,

son domaine marqué, dans lequel elle se tint enfermée, mais où elle seule eût des droits. Les querelles des libraires, soit avec les auteurs qui voulaient eux-mêmes exploiter leurs livres, soit avec les communautés religieuses qui élevaient la prétention d'avoir des presses à elles, soit contre les merciers et les fripiers pour les contraindre à ne vendre que des almanachs et des abécédaires, leur guerre active contre les étaleurs et bouquinistes, n'ont rien qui doive surprendre. Les tailleurs plaidaient de même contre les fripiers, les marchands de drap contre les tailleurs, les cordonniers contre les savetiers ; toutes les corporations, enfin, contre quiconque paraissait empiéter sur leurs monopoles. Dans tous les temps, et par la nature même des choses, les procès et les monopoles seront toujours inséparables."—*Renouard*, i. 29–30.

Note this.

This vivacious language brings us face to face with the censorship of the Press and the monopoly of the booksellers, and from these two independent and occasionally clashing interests sprang copyright.

As to the censorship of the Press, nobody either on the Continent of Europe or here at home thought of disputing it. In Paris, in London, in Geneva, it was applied with equal vigour, though to different subject matter. It is impossible to have any acquaintance with the publications of the 15th and 16th centuries without amazement

at the recklessness, the scurrility, the foul-mouthedness, as well as the mental disturbance and moral laxity displayed by too many of them. Even the wit of such a man as Ulrich von Hutten is disagreeably coarse, whilst the vulgar buffoonery of the majority who had no wit is depressing. A free Press in those days was an idea not to be tolerated. Even at a later date and a quieter time, our own John Milton, a solitary pamphleteer, a non-church-goer, and a most unrepresentative man, retained "the fire and the executioner" as the most effectual remedy for those books which he found "mischievous and libellous." Did Milton mean found by a jury? I think not.

It would be out of place to attempt here a sketch of the history of the censorship. What I want to emphasise is the distinctive but co-operative effect of the licensing of books and the licensing of booksellers—imprimaturs and privileges. Readers of old books must occasionally have found the imprimaturs more amusing than the contents. Milton makes very merry with them. "Sometimes five Imprimaturs are seen to-

gether dialogue-wise in the Piazza of one Title page, complimenting and ducking each to other with their shaven reverences, whether the Author, who stands by in perplexity at the foot of his Epistle, shall to the Presse or to the Spunge." The proud spirit of Milton, condemned as rebellious both by Dr. Johnson and Cardinal Newman, had to submit to the indignity of an imprimatur for "Paradise Lost" itself. But now the only trace we have left in our possessions (India excepted) of Press censorship (for the supervision exercised by Her Majesty over the *Court Circular* hardly counts) is that absurd official, the Censor of Plays.

The most noticeable difference between censorship in France and in England is that with us the authority has always been centralised and derived from the royal prerogative. In France there were originally as many censors as there were ecclesiastics, whilst the Universities and the Parliaments all had their say in the matter. Ultimately, and in obedience to the general course of French history, the king became the

universal custodian of every kind of authority, and garotted the Press as and when he chose.

In England the early printers, Caxton, Pynson, and Wynkin de Worde, worked for private patrons, and produced the volumes, now the pride of the library, not to supply any existing demand, but to satisfy themselves and their employers. Caxton's books have no *imprimatur* or *cum privilegio*,[1] but it would be rash to infer from this, as Yorke, Solicitor-General, did in arguing[2] *Basket* v. *The University of Cambridge* (1758), that the Crown never claimed a prerogative over the Press until the Stationers' Company became a corporation in the reign of Philip and Mary. The introducers of any new industry would naturally seek both the protection and the patronage of the Crown, whilst to peddle new ideas in print has at all periods of man's history exposed the pedler to pains and penalties of divers kinds. In the time of Henry VIII. authors had other things to think of than half profits or good royalties.

[1] Pynson's books frequently have. Manuscripts are in existence prefaced with *cum privilegio*.

[2] 1 W. Blackstone's Reports, 105.

But it was different with the printers or booksellers, who from the beginning of things were alert to make a little money out of their calling, and their best chance of doing this was to secure for themselves the exclusive right of printing particular books. This was done by means of letters patent issuing from the Crown. The first and chief among these monopolists was the king's printer, to whom belonged, by virtue of letters patent granted from time to time, the sole right of printing any book or work of the king's, save as might be excepted, in the English tongue. These king's books included:

(*a*) Acts of Parliament and their abridgments.

(*b*) Since the great Submission of the Clergy and the Act of Supremacy, all books of the rites and services of the resettled Church of England.

(*c*) Bibles and Testaments.

(*d*) Law Books and Year Books.

(*e*) Almanacks.

(*f*) Educational works, Latin grammars.

Henry VIII. appointed a printer, but the

first appointment by letters patent was made by Edward VI. in 1547.

These prerogative books are supposed by lawyers to be a class by themselves; in fact, to be the king's copyright by virtue of some quality residing in the books, or in the circumstances attendant upon their first production. This may be so, but it is guess-work, and our actual monarchs do not seem —so far, at all events, as appointing printers was concerned—to have struck any distinction between one kind of book and another. In 1534, Henry VIII., by letters patent, granted to the University of Cambridge licence to appoint three printers who might, within the University, print and put to sale *omnes et omnimodos libros* which might be approved by the Chancellor (or his Vice) and three Doctors. Here we see a claim by the Crown to authorise and appoint both licensers of books and publishers of books. Henry's letters were confirmed by a statute of Eliza-beth. No doubt, in 1758, when the grant of Henry came to be considered by Lord Mansfield, that eminent judge, who was, as we shall hereafter see, an author's man, cut it down

to the King's Books or "Copyright of the Crown"; "for," said he, "the construction of the law is that the Crown only intended to do that which by law it is entitled to do."[1] But between the opinions of 1758 and 1534 as to what the Crown could lawfully do there is [redacted] room for much difference.

Letters patent were not always so general in their terms; they were sometimes granted to a particular bookseller in respect of a particular book, and sometimes—though this is rare—to an author in respect of a particular work. When this was done the grant was always for a term of years—seven, fourteen, twenty-one, or the like. In fact, it was a monopoly, and nothing else, though when monopolies were practically destroyed by the famous statute of James I., books were in terms excluded from its provisions.

I mention these things because they show how closely interwoven is the censorship of the Press with the monopoly of the booksellers, and how both are controlled by the prerogative and practice of the Crown.

Both at home and abroad the questions

[1] *See Basket* v. *University of Cambridge*, 1 W. Blackstone, 121.

we are considering were much affected by the laws against heresy. Strictly speaking, heresy hunting is only a matter of police,[1] and many of the proceedings against books and printers and importers were founded upon the plain provisions of our statute law. Still, as the printing press did become the great instrument of circulating the new ideas, and as the most expeditious way of getting rid of an edition is to burn it, the much-vexed authorities, fully persuaded both of their power and their duty to suppress unlawful thinking, had to seek out summary remedies—short shrifts. In this they were greatly assisted here in England by the Court of Star Chamber. This court played a great and sometimes a very useful part in our domestic history. It exercised the jurisdiction of the Court of Chancery with, at all events, some of the celerity of the police magistrate, and it brought the authority of the Crown to bear directly upon many a tyrant of the country-side and truculent family bully. It administered

[1] In saying this I have in mind a period of history after the final breach with Rome.

interrogatories, and asserted the right to put to the torture those whom it adjudged guilty of contempt of its proceedings in refusing to answer when they were in a position to do so. It was a sinister place, and quite out of keeping with our common law, but it was marvellously well adapted to deal with unlicensed booksellers and heretical writers. Its proceedings, so far as reported, and so far as such reports exist, may be searched in vain for any trace of author's copyright. Heresy, libel, infringement of letters patent and of the rights of the king's printer, and of other licensees, examples of all these are to be found, but of the author in pursuit of his rights as an author, the oracle is dumb.

From time to time the Star Chamber issued its decrees relating to book-licensing and book-printing, until in 1637 it proceeded to codify its law upon the whole subject. This famous decree is one of the first examples we possess of an attempt to codify in one comprehensive measure the whole law on any particular subject; and though the Star Chamber was destined shortly to perish, yet

when the Parliament of Charles II. desired to enact its Licensing Act (13, 14, Car. II., c. 33), it did little more than adopt as its own the substance and the language of the codifying decree of 1637 concerning printing.

In considering the terms of this decree or code we must not be led aside from our main purpose, which is the origin of copyright. It contains thirty-three clauses, and regulates the whole Printing trade, descending to many details it is unnecessary to mention. The decree may be read in Mr. Edward Arber's edition of Milton's "Areopagitica"—one of that series of English reprints for which the student is eternally Mr. Arber's debtor. Among its main provisions are the following:—

First. It decreed that no person should print any book or pamphlet until the same had been first lawfully licensed and entered upon the register books of the Company of Stationers.

Second. Of law books, the licensees were certain of the judges; of history, the Secretaries of State; of heraldry and titles of honour, the Earl Marshal; of all other books, whether of divinity, physic, philosophy, or poetry,

the Archbishop of Canterbury or Bishop of London, except that within the Universities of Oxford and Cambridge the Chancellors or Vice-Chancellors were the licensees, not meddling with books of the common law and affairs of State.

Third. The duty of the licensees was to testify that the book contained nothing that was contrary to the Christian faith and the doctrine and discipline of the Church of England, nor against the State or Government, nor contrary to the good life or good manners or otherwise "as the nature and subject of the work may require."

Fourth. That no person shall within the kingdom or elsewhere print or import any copy, book, or books printed beyond the seas or elsewhere which the Company of Stationers *or any other person or persons have or shall by any letters patent, order, or entrance in their register books or otherwise* have the right, privilege, or authority solely to print, upon pain of loss and forfeiture of such book or books.

Fifth. Every printer of any books, ballads, charts, portraiture, or any other thing shall set his own name, as also the name of the

author, thereunto, upon pain of forfeiture of the books, the defacement of the press, and corporal punishment.

Sixth. To forge or counterfeit upon any book the name, title, mark, or vignette of the Stationers' Company, or of any particular person or persons which have or shall have lawful privilege, authority, or allowance to print the same, was made punishable by imprisonment.

Seventh. No haberdasher, ironmonger, chandler, shop-keeper, or any other person not having been seven years apprentice to a bookseller, printer, or bookbinder shall in London or elsewhere sell any Bibles, Testaments, Psalm books, primers, abcees, almanacks, "or other book or books whatsoever" upon pain of forfeiture of the books and other punishment.

Eighth. No press or printing-house to be set up or demised without notice first given to the master and warden of the Stationers' Company.

Ninth. Twenty master printers named, each of whom was allowed the use of one press or more.

Tenth. For the better discovery of printing in corners without licence, the master and wardens of the Stationers' Company were authorised to take such assistance as they should think needful and go in search of printing-houses, and "to view what is in printing, and to call for the licence," and if unlicensed "to seize upon so much as is printed," and so on.

Lastly. Every printer was ordered to deliver a copy of every book new printed or reprinted by him at the Common Hall of the Stationers' Company to be sent to the Bodley Library at Oxford, pursuant to an agreement betwixt Sir Thomas Bodley and the company.

There is nothing here to help us, unless we can make something out of the fourth of the above quoted provisions. The wording is a little vague, but its upshot is that no book was to be printed in England of which the exclusive right of printing already belonged to the Stationers' Company or to any other person. How could such an exclusive right be obtained? The clause proceeds to say (1) by Letters Patent, (2) by Order, (3)

by Entrance in the Register Books of the Company, (4) Otherwise. Nos. 1 and 2 are Crown grants. No. 3 is by entry on the company's books. But what is No. 4? Are the words "or otherwise" words of abundant caution put in by the draftsman as a net in which to catch any accidental omission, or can they be taken to refer to the exclusive right of the author of a published book to multiply or withhold copies on his own terms? They may cover such a right if it existed, but to suppose that they referred to it, *i.e.* that the draftsman had it in his mind, is (I think) out of the question.

One thing is plain enough, and that is that by 1637, and indeed long before, the Worshipful Company of Stationers had got a firm grip of the book trade and of the producers of books. But the Stationers deserve a lecture to themselves.

The Star Chamber was abolished in 1640, and with it perished its decrees, its pains, and its penalties.

In January, 1642, the House of Commons made the following order, which is interesting as recognising in unusual and

indeed unique terms the rights of authors. "It is ordered that the Master and Wardens of the Company of Stationers shall be required to take especial Order that the printers do neither print nor reprint anything without the name and consent of the Author. And that if any Printer shall notwithstanding print or reprint anything without the consent and name of the Author that he then shall be proceeded against as both Printer and Author thereof, and their names to be certified to this House."

I suspect the real object of this order was to punish printers and in no way to protect authors. I cannot find any record of action being taken under its terms.

In March, 1643, the House of Commons authorised a committee to search for printing presses where scandalous and lying pamphlets were printed, and to destroy them, and to commit to prison the printers and vendors of such pamphlets; and in June of the same year the Lords and Commons assembled at Parliament published the order which excited the indignation of Milton and occasioned the *Areopagitica*.

This remarkable order, after reciting that very many as well stationers and printers as others of sundry professions, not free of the Stationers' Company, had taken upon them to set up private printing presses in corners and to print and sell books, etc., and that by reason that divers of the Stationers' Company and others being delinquents (contrary to former order and the constant custom used among the said Company) had taken liberty to print, vend, and publish the most profitable copies of books belonging to the Company and other stationers, ordered that no book, etc., should be printed or sold unless the same had been first licensed under the hands to be appointed by both or either Houses and entered in the register book of the Company of Stationers according to ancient custom, and the printer thereof was to put his name thereto; and, further, it was ordered that no person should print or re-print any book heretofore allowed of and granted to the said Company for their relief and maintenance of their poor without the consent of the master wardens and assistants of the Company, "nor any book or books

lawfully licensed and entered in the register of the said Company for any particular member thereof without the license and consent of the owner or owners thereof."

On this order Milton makes two comments which have been made to play a part in this copyright controversy. Near the beginning of the *Areopagitica* he says: "For that part which preserves justly every man's copy to himself or provides for the poor I touch not." And at the very end of his immortal tractate he says: "And how it [*i.e.* the policy of licensing books] got the upper hand of your precedent order, if we may believe those men whose profession gives them cause to enquire most, it may be doubted there was in it the fraud of some old *patentees* and *monopolizers* in the trade of bookselling, who, under the pretence of the poor in their company, not to be defrauded, and the just retaining of each man his several copy, which God forbid should be gainsaid, brought divers glosing colours to the House, which were indeed but colours, and serving no end except it be to exercise a superiority over their neighbours, men who

do not therefore labour in an honest profession to which learning is indebted that they should be made other men's vassals."

The sublime Milton is not always a model of lucidity, and I propose to postpone a consideration of these oracular utterances of his until we have made a short study of that Stationers' Company with its "copies" and "registers," which obviously is a leading, if not the dominant, factor in the whole case for and against copyright at common law.

To conclude this lecture, it is only necessary to remind you that the Licensing Act of Charles II. expired in 1679, and the next statute relating to books and printing was the unfortunately conceived and unhappily expressed statute of Queen Anne, which, however, has the honour of being the first copyright statute at law to be found in the *Corpus Juris* of any State, either of ancient or modern times.

III.

THE STATIONERS' COMPANY AND THE FIRST COPYRIGHT STATUTE.

III.

THE STATIONERS' COMPANY AND THE FIRST COPYRIGHT STATUTE.

THE Stationers' Company was established by charter in 1556. Its history has been compiled, and its register books transcribed and printed, in five handsome volumes by the loving and almost exuberant zeal of Mr. Edward Arber (1875—1894). There you may read at large and at your leisure of the manners and customs of the old printers of London, their courts and apprentices, their wine and wassail. It would be affectation to pretend that the masters and keepers or wardens and commonalty of the mystery or art of stationers were men of profound learning or passion for letters, or that they pursued their trade otherwise than as tradesmen. The leading London booksellers controlled the Company, and what manner of men they were during the 17th and 18th

centuries we know very well. The Dodsleys and the Tonsons, the Lintotts and the Coopers, Roberts, Beckett, Miller, Osborne, we still read their names in our early editions of Prior, and Swift, and Gay, and Collins, and Sterne, or see them all clubbed together on the title-pages of those trade editions of great authors with which we are pleasantly familiar. The bulk of them were worthy men, and if we may believe the garrulous John Dunton, who spent his life among them "exchanging copies," they were honest topers and faithful sons of the Church of England. Cormorants and scamps there were among them, men like Jack Lee[1] and Edward Curll, but taking them one with another, they were decent fellows

[1] "*Mr. Lee in Lombard Street.* Such a Pirate, such a Cormorant was never before. Copies, Books, Men, Shops, all was one. He held no propriety, right or wrong, good or bad, till at last he began to be known, and the Booksellers not enduring so ill a man among them to disgrace them, shewed him out, and off he marched to Ireland, where he acted as felonious-Lee as he did in London. And as he had lived a Thief so he died a Hypocrite, for being asked on his death-bed if he would forgive Mr. C. (that had formerly wronged him), 'Yes,' said Lee, 'if I die I forgive him, but if I happen to live I am resolved to be avenged on him.'"—Dunton's "Life and Errors," vol. i., p. 214.

and tradesmen in every bone of their bodies. These were the men who looked after the Stationers' Company, which grew rich and prosperous enough.

From the very first two things are plain about the Stationers' Company.

First, they kept register books wherein by decree of the Star Chamber, by orders of Parliament, and finally by Act of Parliament all new publications and reprints had to be entered at the date of publication; and

Secondly, such entries were, by usage of the Company, exclusively made in the name or names of members of the Company.

Thirdly, by virtue of such entry, the bookseller, in whose name the entry was made became (in the opinion of the Stationers' Company) the owner, or proprietor, of such book or copy (as they called it), and ought to have the sole printing thereof, presumably for ever.

Here we get the foundation of booksellers' copyright. What was the position of the author? His "copy" was not the printed book entered (as by law ordained) in the

register books of the Stationers' Company—for unless he were a bookseller and a member of the Company, as well as an author, the entry could not be made in his name, but must be made in his publisher's name, who thereupon became the proprietor of the printed book. No, the author's copy is the manuscript, and the only way open to him for dealing with that was to sell it out and out as John Milton did "Paradise Lost" to Symonds in 1667, or to persuade the Crown to give him a grant of letters patent for a term of years as the poet Wither succeeded in obtaining for his "Divine Psalms," of which more anon.

As printing presses were licensed and in the hands of a Guild, it was impossible for an author to print his own books as Horace Walpole and Sir Egerton Brydges were able to do at a later date, and as letters patent were not easily obtained, the ordinary book producer could only go cap in hand to some member of the Stationers' Company and make the best terms he could. The author's copyright had therefore in practice no independent existence, all he

could do was to put a member of the Company in the way of obtaining that bookseller's copyright which was founded on the "ancient usages" of the Stationers' Company.

The Company's property may be classified under three heads.

First. Its property as a trading corporation. Under this head must be included those State publications, which from time to time were assigned to it by the Crown, sometimes in derogation of former grants and sometimes on the cesser of the grants to the king's printer. . . .

The Company usually stood well with authority, and occasionally alleged an exclusive right to print which it did not always possess. For example, over the psalmody of the Church of England they exercised control by their repeated assertions that no version of the Psalms of David could be used in church except that of Sternhold and Hopkins, which belonged to them, whereas it is doubtful whether Sternhold and Hopkins were ever lawfully authorised. At all events, Luke Milbourne, who had the assurance in

1698 to publish a version of the Psalms (a very bad one) of his own, observes: "Nor could I ever find any authentic allowance for singing them" (*i.e.* Sternhold and Hopkins) "in public, whatsoever the Company of Stationers pretend to, whose plausible title had a regard to their own profit more than the Church's edification."

Second. The property held by the Company for the benefit of poor members, their widows and children. This charitable property appears to go back so far as 1583, when several printers and members of the Company surrendered certain copies to the use of the poor of the Company.

Third. The property of individual members of the Company acquired by entry of their "copies" in the register. . . .

Let me give two extracts from this register:—

3rd September 1604

MASTER WATERSON Entered for his copies certain copies which were Master Ponsonbie's.

(i.) The Arcadia of Sir Philip Sidney.

(ii.) The ffayrie queene, both parts by Spencer.

The next extract relates to the famous First Folio Shakspere.

8th November 1623

MASTER BLOUNT
ISAAK JAGGARD } Entered for their copie under the hands of Master Doctor Worrall and Master Cole Warden Master William Shakspeer's Comedyes, Histories & Tragedyes soe many of the said copies as are not formerly entered to other men V12. (Then follows a list of the plays printed in the Folio.)

If you now turn back to the quotations (p. 67) I made in the last lecture from the *Areopagitica*, you will be ready to hazard an answer to the following question: When Milton exclaimed, "God forbid the just retaining of each man his several copy should be gainsaid," and avowed his abhorrence of defrauding the poor of the Company, was he referring to the author's copy or to the bookseller's copy? I think clearly to the bookseller's.

Let us now see how the London booksellers, under cover of the Company of Stationers, sought to bolster up and make good their case for perpetual copyright. So

long as the Press was a licensed Press, and the master and wardens of the Company authorised to search for and destroy unlicensed presses, and so long as the number of master printers was severely limited, the leading booksellers had the trade in their own hands, but when anybody was free to set up a printing press and make his own terms with authors, the existing monopoly was threatened, and the only way of saving it was *first* to secure that no member of the Stationers' Company should transgress its ancient usage and make free with another member's copy, and *secondly*, to maintain the practice of requiring that all new books and reprints should be registered as before, and in the name or names of members of the Company.

The first of these ends the booksellers sought to accomplish by two bye-laws of the Company, made respectively in 1681 and 1694 at assemblies of the Company held at the Common Hall.

"At an Assembly of the masters and keepers, or wardens and commonalty of the mystery or art of stationers of the City of London, held at their Common

Hall in the parish of St. Martin, Ludgate, in the Ward of Farringdon Within, London, on Wednesday the 17th day of August, anno domini 1681, for the well-governing the members of this company. The several laws and ordinancies hereafter mentioned were then made, enacted and ordained by the master and keepers or wardens and commonalty of the mystery or art of stationers of the City of London, in manner and form following, viz.

> "And whereas several members of this company have great part of their estates in copies, and by ancient usage of this company when any book or copy is duly entered in the register-book of this company to any member or members of this company, such person to whom such entry is made is and always hath been reputed and taken to be Proprietor of such book or copy, and ought to have the sole printing thereof, which privilege and interest is now of late often violated and abused.
>
> "It is therefore ordained that where any entry or entries is or are or hereafter shall be duly made of any book or copy in the said register-book of this company, by or for any member or members of this company that in such case if any member or members of this company shall then after without the licence or consent of such member or members of this company for whom such entry is duly made in the register-book of this company or his or their assignee or assigns print or cause to be printed, import or cause to be imported from beyond the seas or elsewhere any such copy or copies book or books or any part of any such copy or copies book or books, or shall sell, bind, stitch, or expose the same

> or any part or parts thereof to sale, that then such member or members so offending shall forfeit to the master and keepers or wardens and commonalty of the mystery or art of stationers of the City of London, the sum of twelve pence for every such copy or copies book or books, or any part of such copy or copies book or books, imprinted, imported, sold, bound, sticht and exposed to sale contrary hereto."

And again in 1694.

"At an assembly of the masters and keepers or wardens and commonalty of the mystery or art of stationers of the City of London, held at their Common Hall in the parish of St. Martin, Ludgate, in the ward of Farringdon Within, London, on Monday the 14th day of May, Anno Domini 1694, the several laws, ordinances and oath hereafter following were then by them made, enacted and ordained for the well-governing of the members of the corporation of them the said master and keepers or wardens and commonalty of the mystery or art of stationers of the City of London, viz.

> "Whereas divers members of this company have great part of their estates in copies, duly entered in the register-book of this company, which by the ancient usage of this company is are or always hath and have been used, reputed and taken to be the right and property of such person and persons (members of this company) for whom or whose benefit such copy and copies are so duly entered in the register-book of this company, and 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, and that he and they to whom such copy and copies are so duly entered, purchased or devised ought to have the sole printing thereof.

"Wherefore for the better preservation of the said ancient usage from being invaded by evil-minded men, and to prevent the abuse of trade by violating the same, it is ordained that after any entry or entries is or are or shall be duly made of any copy or copies, book or books in the register-book of this company by or from any member or members of this company, if any other member or members of this company shall, without the licence or consent of such member or members of this company for or by whom such entry is duly made, or of his assignee or assigns, print or cause to be printed, import or cause to be imported from beyond the seas or elsewhere, any such copy or copies book or books or part of any such copy or copies book or books whereof such due entry hath been made in the register-book of this company to or for such other member of this company, or shall sell bind, stitch or expose the same or any part or parts thereof to sale without such licence, that then such member and members so offending shall forfeit and pay to the master and keepers or wardens and commonalty of the mystery or art of Stationers of the City of London the sum of twelvepence for every such several copy or copies book or books imprinted, imported, sold, bound, stitcht or exposed to sale without such licence or consent as aforesaid."

I have set out these bye-laws at length, familiar though they are to all who are well read in the legal history of copyright in England, because they speak for themselves and need no comment. To rely upon them as declaratory of legal rights would indeed be absurd. It would be harsh to describe them as "honour among thieves," for in many cases the author's copy (that is, the manuscript) had been acquired for a fair consideration, and as the author, poor fellow, could do nothing on his own account in order to acquire protection for his manuscript, obviously the best way of befriending him was to protect his article as soon as he had sold it to a respectable member of a great City company.

Before leaving the Worshipful Company of Stationers, I feel bound, in order that you may the better appreciate the place it occupied in the seventeenth century, to revive for a few moments an old quarrel, and ask you

"To weep afresh a long since cancelled woe."

On the 29th of October, 1603, King James I. granted to the Stationers' Company the old patent, once John Day's, for "Psalters and Psalmes in Metre or Prose, with Musycall Notes or without Notes." In 1623, the same monarch, being minded, one may charitably suppose, to make some recompense to the unfortunate poet, George Wither, whom he had cast into prison and despitefully used for writing a poem, not only granted Wither, for the long period of fifty-one years, the monopoly or copyright of that bard's "Hymns and Songs of the Church," but ordained and decreed that these same "Hymns and Songs" should henceforth, during the period of fifty-one years, be bound up and sold with all English Psalm Books, and that Wither, his executors and assigns, should be entitled for as much per sheet of the "Hymns and Songs" as the Stationers' Company received for their Psalms. The Company were furious, and one cannot wonder, at having an extraneous volume thrust bodily into their editions of the "Psalms in Metre," and being obliged to open an account with a despised and impecunious poet. The Company fell to

abusing Wither, since they dared not abuse the king, nor did Wither fail to maintain his reputation for quarrelsomeness. In the "Scholler's Purgatory" of Wither, a tract written in excellent prose, are to be found two character-sketches, one of "The Honest Stationer," the other of the "Dishonest or Mere Stationer" which smack so of the times, and present so lively a picture of the situation I have been attempting feebly to describe, that I offer no apology for reading to you lengthy extracts from them.

"An Honest Stationer.

"An honest stationer is he that exercizeth his mystery (whether it be in printing bynding or selling of Bookes) with more respect to the glory of God and the publike advantage then to his owne commodity; and is both an ornament and a profitable member of a civill Commonwealth. He is the caterer that gathers together provision to satisfy the curious appetite of the soule, and is carefull to his powre that whatsoever he provides shalbe such as may not poyson or distemper the vnderstanding. And, seeing the State intrusteth him with disposing of those Bookes which may both profit and hurt as they are applyed (like a discreet Apothecary in selling poysnous druggs), he observes by whom and to vvhat purpose such bookes are likely to be bought vp before he will deliver them out of his hands.

If he be a printer he makes conscience to exemplefy his Coppie (*i.e.* to compose his book) fayrely and truly. If he be a Booke-bynder he is carefull his worke may bee strong and serviceable. If he be a seller of Bookes, he is no meere Bookeseller (that is) one who selleth meerely ynck and paper bundled up together for his owne advantage only; but he is the Chapman of Arts, of wisdom and of much experience for a little money. He would not publish a book tending to schisme or prophannesse for the greatest gain; and if you see in his shopp any bookes vaine or impertinent, it is not so much to be imputed his fault as to the vanity of the Tymes. For when bookes come forth allowed by authority, he holds it his duty rather to sell them then to censure them. Yet he meddles as little as he can with such as he is truly persuaded are pernicious or altogether vnprofitable.

"The reputation of Schollers is as deare vnto him as his owne. For he acknowledgeth that from them his mystery had both beginning and meanes of continuance. He heartely loves & seekes the prosperity of his owne Corporation. Yet he would not iniure the Vniuersityes to aduantage it, nor be soe sawcie as to make comparisons betweene them. He loves a good Author as his Brother and willbe ready to yeeld him the due portion of his labours without wrangling. When he comes to be Maister or Warden of his Company he labors truly to rectify what is amisse, but fyndes so many peruerssones & so few of his good mind that his yeare is out before he can bring any remedy to passe. He greeues for those Abuses which have bene offred to me and other Authors but fynding that by speaking on our behalfes he is likely to bring himselfe

into an inconuenience vvithout profitt to vs he prayes in silence for amendment and that God would not lay to the charge of the whole Corporation that vvhich but some among them are guilty of. He feares none of those reproofes vvhich are to be found in this booke. For he knows himselfe cleare and is resolued to make sale of it as it comes forth with allowance from Authority. In a vvord he is such a man that the State ought to cherish him, Schollers to loue him; good customers to frequent his shopp, and the whole Company of Stationers to pray for him: For it is for the sake of such as he that they haue subsisted & prospered thus long. And thus you haue the true description of such a Stationer as I exempt from my reprofes: now followes the character of him at whose reformation I haue aymed.

"A MERE STATIONER.

"A Mere Stationer is he that imagines he vvas borne altogether for himselfe and exercizeth his Mystery without any respect to the glory of God or the publike aduantage. For which cause he is one of the most pernitious superfluities in a Christian gouernment & may be well termed the Deuills seed[s]man; seeing he is the aptest Instrument to sowe schismes heresies scandalls & seditions through the world. What booke soever he may haue hope to gaine by he vvill divulge though it contayne matter against his Prince, against the State, or blasphemy against God. And all his excuse will be that he knew not it comprehended any such matter. For (giue him his right) he scarcely reads ouer one page of a booke in seauen yeare, except it be some such history as the *Wise men of Gotham* and that he doth to furnish

himselfe with some foolish conceits to be thought facetious. He prayseth no booke but vvhat sells well & that must be his owne Coppy too or els he will haue some flirt at it: No matter though there be no cause. For he knowes he shall not be questioned for vvhat hee sayes, or if he be his impudence is enough to outface it. What he beleeues is prepared for him in the next world I know not, but for his enriching in this life he is of so large a faith that he seems to beleeue all Creatures & Actions of the vvorld vvere ordayned for no other purpose but to make bookes vpon to encrease his trade. And if another man of his small vnderstanding should heare him pleade his owne supposed right where none might contradict He would halfe thinke that all our Vniuersityes & Schooles of Learning were erected to no other end but to breed Schollers to study for the enriching of the Company of Stationers.

"If an Author out of meere necessity do but procure meanes to make sale of (*i.e.* to publish) his owne booke or to preuent the combinations of such as he by some Royall or laufull priveledge, he presently cryes it downe for a Monopoly: affyrming that men of his profession may go [and] hang themselves if that be suffred. Marry; Authors haue a long time preserued a very thankfull generation of them from hanging if they cannot afford them one booke of ten Millions to releeue them withall in a case of need—and vvhen that booke was the Authors owne alsoe and no parte of the Stationers former liuelihood. This is just as reasonable a complaint as if a Company of Hagglers should prefer a bill against the Cuntry Farmers, for bringing their own Corne and other prouisions to the next markett. He will fawne upon Authors at his first acqu[a]intance & ring them

to his hiue by the promising sounds of some good entertainment but assoone as they haue prepared the hon[e]y to his hand he driues the Bees to seek another stall.

"If he be a seller of Bookes he makes no conscience vvhat trash he putts off nor how much he takes for vvhat which is worth nothing. He vvill not stick to belye his Authors intentions or to publish secretly that there is somewhat in his new ymprinted books against the State or some Honorable personages; that so they being questioned his vvare may haue the quicker sale. He makes no scruple to put out the right Authors name and insert another in the second edition of a Booke; And when the impression of some pamphlet lyes upon his hands to imprint new Titles for yt (and so take mens moneyes twice or thrice for the same matter vnder diverse names) is no injury in his opinion. If he get any written Coppy into his powre likely to be vendible, whether the Author be vvilling or no, he vvill publish it, & it shallbe contriued and named alsoe according to his owne pleasure, which is the reason so many good Bookes come forth imperfect and vvith foolish titles. Nay, he oftentymes gives bookes such names as in his opinion will make them saleable when there is little or nothing in the whole volume su[i]table to such a Tytle.

"If he be none of the Assistance [*i.e.* the Assistants] of his Company he ordinarily rayles on their partialyty in maniging of the Kings Priveledges or the general stock but this he doth more in envy then in loue to vpright dealing, For when he comes to those places (into which his uery troublesomnesse sometyme helpes him the sooner) he makes all vvorse than before & playes the

knave *Cum Privilegio.* He is then bound to pray for the poore much more then than they are for him. For they are indeed his Benefactors. He will be ready vpon all occasions to boast of the 200 li. a yeare which is giuen among their pensioners but he hath not thankfulnesse enough to tell any man that it ariseth out of his Majesties Priviledges bestowed for that purpose nor how many thousand pounds are yearely made thereof beside.

"If he once gett to be an officer in the Society he forgetts to speak in the first person for euer after but (like a Prince) says 'we will' and 'we do this,' etc. He thinks vpon nothing more then to keepe vnder the inferiors of the Corporation & to draw the profitt of the Kings Priveledges to his private vse. He stands in feare of nobody but the Archbishop of Canterbury the Bishop of London & the high Commission & loues nobody but himself.

"I cannot deuise what his Religion is nor he neither (I think). For what sect or profession soeuer his customer is of he will furnish him with Bookes tending to his opinions. To a Papist hee rayles vpon Protestants to Protestants he speakes ill of Papists & to a Brownist he reuiles them both. Yet I dare say this for him that he is an enemy to the alteration of Religion in this Commonwealth because he feares it would spoyle their Priveledge for *Davids Psalmes in English meeter* or hinder the reprinting of many vendible coppyes. Marry a Tolleration he would hold well withall soe that he might haue but the sole printing of the *Masse-booke* or *Our Ladyes Psalter.*

"He will take vpon him to censure a booke as arro-

gantly as if he had read it or were a man of some understanding. He speakes of reuerend Doctors as disdayufully as of schoole boyes. And mentiones the Vniuersityes with no more respect then if all their famous Colleges were but so many Almeshouses maintained out of the Stationers Hall.

"He will allow of no Prueledges which the Kings Majestie shall vouchsafe concerning bookes vnles he may be interested in the best part of the profitt. Yea rather then those which are bestowed upon his own Corporation shalbe disposed of for the benefite of the generallity according to his Majesties intention he will go neare to his best to forfeit them altogether For he will at any tyme suffer some mischiefe himselfe to do another a great spight.

"To conclude he is a dangerous excrement worthy to be cutt off by the State to be detested of all Schollers to be shun'd of all the people & deserues to be curst & expeld out of the Company of Stationers. For by the couetousnesse cruelty & vnconscionablenesse of such as he a flourishing & well esteemed Corporation is in danger to come to ruine and disgrace."[1]

I return now to the course of events subsequent upon the final expiration of the Licensing Act in 1694.

The bye-laws before quoted did all that bye-laws could do to punish those members

[1] I am indebted for my knowledge of this pamphlet to Mr. Arber, who makes use of it in his Notes to his Transcript of the Registers of the Stationers' Company.

[after the final expiration of the Licensing Act in 1694]

of the Stationers' Company who were inclined to steal each other's copies; but something more than this was wanted, if booksellers' copyright by entry in the register of the Company was to be maintained.

The *desideratum* was an Act of the Legislature, which should make such an entry compulsory, and recognise the "ancient usage" of the Company, which only permitted such entries to be made in the name or names of members of the Company.

The booksellers accordingly proceeded to petition Parliament for a new Licensing Act. I cannot do better than narrate their proceedings in the words of Mr. Justice Willes used by him in 1769 in the course of his judgment in the great case of *Millar* v. *Taylor*.

"For five years successively attempts were made for a new Licensing Act. Such a bill once passed the House of Lords, but the attempts miscarried upon constitutional objections to a licenser."

"The proprietors of copies applied to Parliament in 1703, 1706, and 1709 for a bill to protect their copyrights which had been invaded, and to secure their properties. They had so long been secured by penalties that they thought an action at law an inadequate

remedy, and had no idea a bill in equity could be entertained but upon letters patent adjudged to be legal. A bill in equity in any other case had never been attempted or thought of: an action upon the case was thought of in 31 Charles II., but was not proceeded in."

"In one of the cases given to the members[1] in 1709 in support of their[2] application for a bill the last reason or paragraph is as follows—'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 truth, 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 be 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.'

"On the 11th of January, 1709, pursuant to an Order made upon the booksellers' petition, a bill was brought in, for securing the property of copies of books to the rightful owners, &c. On the 16th of February, 1709, the bill was committed to a committee of the whole

[1] Of Parliament. [2] The Booksellers'.

house and reported with amendments on the 21st of February, 1709."—4 Burrow's, 2317.

These proceedings on the part of the booksellers resulted in the famous statute of Queen Anne; a measure which, though singularly ill-framed to secure the privilege of the booksellers, did (*and for the first time*) confer directly upon authors a qualified and time-limited property in their compilations and productions.

It is, however, noteworthy that by this time the author in his own right appears on the scene. It was the age of Pope and Swift and Bolingbroke, of Addison and Steele, great wits who, though they would have been very angry if it had been suggested that they were booksellers' hacks, makers of "*copy*" for the *plump printers of a City* company, yet were not ashamed to be called authors, or to be concerned in the encouragement of learning. It is the tradition that Swift drafted the original Bill, and that his draft was much cut up in committee of the whole House. Unfortunately no records of this stage are extant, and

we are therefore confined to the statute itself.

Its effect may be stated shortly. It recites that printers, booksellers, and other persons had of late frequently taken the liberty of printing, reprinting, and publishing books and other writings without the consent of the *authors or proprietors*, to their very great detriment, and too often to the ruin of them and their families.

This recital is remarkable for its introduction of the word "authors." The proprietors are, of course, our old friends the booksellers, and the rhetoric about their "ruin" and their "families" smacks of Stationers' Hall, and has no foundation in the facts of literary life in England.

The Act then proceeds to make a distinction between old books and new books. In the case of old books it provided that the authors of books already printed, who had not transferred their rights, and the booksellers or others who had purchased or acquired the copy of any books in order to print or reprint the same, should have the

sole right and liberty of printing them for a term of twenty-one years from the 10th of April, 1710, and no longer.

In the case of *new books* the Act provided that the authors should have the sole right of printing them for fourteen years and no more from the date of publication, but if the authors were still alive at the end of the said term of fourteen years, they should have another term of fourteen years.

Penalties were imposed upon pirates—namely, forfeiture and the payment by way of fine of a penny per sheet. One half of the penalty went to the Crown, the other half to the informer.

The only other provision I need mention is that no book was to be entitled to protection unless the title to the copy had been entered, before publication, in the register-book of the Stationers' Company, which book was to be kept open for inspection at any time without fee.

This last provision is of the utmost importance, since it negatived any idea of the register-book being confined to members of the Company. As a matter of fact, however,

authors continued to sell their books out and out to the booksellers, in whose names the entries at Stationers' Hall continued to be made.

In my next lecture I will give some account of the fierce strife in the courts as to the effect of this statute of Anne upon the rights of authors and booksellers.

IV.

THE BATTLE OF THE BOOKSELLERS FOR PERPETUAL COPYRIGHT.

IV.

THE BATTLE OF THE BOOKSELLERS FOR PERPETUAL COPYRIGHT.

If it be true that Swift had a hand in the drafting of the statute of Queen Anne, he became responsible for a veritable Battle of the Books fiercer and more prolonged than the one his fancy has painted and his pen described. To narrate this warfare, costly, prodigious, and protracted, within reasonable limits is a task that may well prove beyond my powers, but at all events I will attempt it.

To understand it properly, to enter into its humours, you must visualise and keep clearly before you:

First. Authors and book-producers of every kind and hue, lucky and luckless, honourable and base, lean Goldsmiths and fat Hawksworths, ingenious but impecunious Defoes, dull but prosperous Campbells, unfortunate Boyces, a thousand nameless writers

who hung upon the outskirts of society and lived or starved by their pens.

Second. The London booksellers — the stationers, as Pope still calls them,[1] a shrewd and greedy race, controlling their Company, buying and exchanging "copies," holding their sales of their "copyrights," as they are pleased to call the books they have entered in their own names in the register book of their own Company — sales from which the public are in fact jealously excluded.

Third. The country booksellers, and notably, as the eighteenth century advances, the Scots booksellers, who eye their metropolitan brethren with envy and growing dislike; and

Fourth. The courts of law and equity, where great judges sat, and where, during term, and on terms, the rights of property, if once made out, were certain to be scrupulously regarded and courageously upheld.

[1] "With authors, Stationers obey'd the call
(The field of glory is a field for all);
Glory and gain th' industrious tribe provoke,
And gentle Dulness ever loves a joke."
THE DUNCIAD, Book ii.

It often happens in matters of legislation that traders clamour for something, and when they get it make small use of it. One of the grievances the statute of Anne was intended to alleviate was the absence from our common law of pains and penalties, and these the statute inflicted. But the booksellers did not in practice make much use of penalties. They suddenly fell in love with the High Court of Chancery, and sought injunctions to restrain the publication of the books of which they alleged themselves to be the proprietors. Injunctions, it is hardly necessary to say, may be granted *until trial* on a *primâ facie* case being made out, and these interim injunctions may either be made *perpetual* at the trial or *dissolved*. Before the Judicature Acts of 1873 and 1875, in order to apply for an injunction in Chancery, it was necessary to file a bill, and then to move for an interim injunction pending the hearing of the cause. Such a motion had to be supported by affidavits. It was a formidable species of artillery to set a-roaring, and as just about the same time as the passing of the Act of Queen Anne

the Chancery judges appear to have relaxed the rule referred to by Mr. Justice Willes' [1], and to have granted interim injunctions to persons who alleged themselves to be the proprietors of copyright, proceedings in Chancery became the rule. We hear of a member of the Stationers' Company alleging himself to be the owner of the "Pilgrim's Progress," because, forsooth, it was one of the books he bought at the sale of the stock of a retiring stationer, and of his threatening a country printer with a bill in Chancery and an injunction if he did not forthwith withdraw his edition of John Bunyan's immortal dream and pay costs. Those of us who were acquainted with the details of the old Chancery procedure will hear without surprise that the country bookseller cried *Peccavi.*

In order fully to appreciate the effect of the relief given in Chancery by way of injunction, it is necessary to remember that in theory a Chancery injunction was only given by way of assistance to a common law right, and if the Chancery judge doubted the common law right, he

[1] *See* p. 92

ought not to have granted even an interim injunction until the right was established, which it could be by the Chancery judge directing an issue raising the question to be tried at common law. Now as Chancery judges did on certain occasions grant injunctions to booksellers who alleged themselves to be proprietors of copyright, independently of the terms of years created by the statute of Anne, it was plausibly argued by the advocates of copyright at common law that these judges must have been satisfied that such a copyright existed, else would they never have granted an injunction, but at the most directed an issue.

For example, in 1735, Sir Joseph Jekyll, M.R., granted an injunction restraining the publication of an edition of "The Whole Duty of Man," on the ground that this once famous though sadly Arminian treatise was the exclusive property of Mr. Eyre, the bookseller.[1] As "The Whole Duty of Man" was first published in 1657, it was an old book within the meaning of the

[1] *Eyre* v. *Walker*, cited 4 Burrow's, 2325, and elsewhere.

statute, and consequently its statutory protection had come to an end in 1731 (twenty-one years after 10th of April, 1710). The Master of the Rolls did not require any production of title, any proof of assignment from the author. Had he done so, and had such proof been forthcoming, all the ink that has been shed over the question of the authorship of the treatise in question might have been spared. But no such proof would have been forthcoming. In 1736 the same judge granted an injunction in the case of Nelson's "Festivals,"[1] another "old book," the statutory protection of which had likewise expired in 1731. In 1739 Lord Hardwicke, "a monument of learning and industry," gave Jacob Tonson an injunction to restrain the publication of "Paradise Lost."[2] Old Jacob claimed his title from Symonds, Milton's assignee, and he produced the original assignment. Whether he proved the mesne assignments from Symonds to himself, is not stated. In 1752 the same Lord Chancellor had to reconsider Tonson's

[1] *Walthoe* v. *Walker*, cited 4 Burrow's, 2326, and elsewhere.
[2] *Tonson* v. *Walker*, as above.

right to the same poem in the case of Bishop Newton's well-known edition. "Upon solemn argument for dissolving the injunction the Lord Chancellor continued it till the hearing, and the defendant gave it up. The injunction was penned in the disjunctive: to restrain the defendant from printing Milton's poem, *or* the Life of Milton, *or* Dr. Newton's Notes. The two former were quite clear of the statute. "The order was carefully penned and perused by Lord Hardwicke after it was drawn up."[1]

Lord Hardwicke, though continuing the injunction till the hearing, gave no opinion to bind himself, saying that if at the hearing he should consider the point doubtful, he would send it to law to be argued. The inclination of his opinion was that there might be a common law property not taken away by the statute.

These Chancery injunctions were very much to the mind of the London booksellers, and so long as the pirate booksellers were few in number, and ill-provided with the

[1] *Tonson* v. *Walker*, No. 2, cited W. Blackstone's Reports, Vol. I, p. 332.

sinews of war, booksellers' "copies" were pretty well respected *inter se*. But as time went on the country booksellers grew in importance, and there were not wanting lawyers to advise them that the claims of the London trade to the ownership of old books was, since 1731, at all events, mere bluff and brag.[1]

The trade consulted together. What they wanted was a finding at law, for the equity proceedings, though useful as a means of bullying, had not resulted in any final establishment of right. They decided upon a collusive action, a friendly suit in which all the facts should be found in their favour, and judgment be delivered accordingly. The action of *Tonson* v. *Collins* was started in 1760, on the case, for selling certain books called *The Spectators* without any license

[1] The Scots law may be found stated crudely but accurately in "Morison's Decisions of the Court of Session," 8,295, and "Brown's Supplement," Vol. 5, p. 508. As early as 1748 the London booksellers sought to restrain, in the Scots courts, the Edinburgh booksellers from reprinting old English books, but the Lords of Session, then men of a patriotic strain, sent these pursuers empty away. The booksellers tried again over Stackhouse's Bible, in 1773, but were again repulsed with expenses. The Scots judges were all against copyright at common law.

or consent from the sole and true proprietors of the copy thereof — viz. the plaintiffs, to their injury and damage. On not guilty pleaded, the jury found a special verdict which is really worth printing. It is as pretty a romance as if it had been written by Mrs. Charlotte Lennox or Mrs. Frances Sheridan.[1]

"That the 'Spectator' is an original composition by natural born subjects resident in England, viz. Mr. Addison, Sir R. Steele, &c., first published A.D. 1711. That Jacob Tonson deceased in 1712 purchased of the authors for a valuable consideration the said work to him and his assigns for ever. That the plaintiffs, Jacob and Richard, are his personal representatives and assigns. That old Jacob in his lifetime and the plaintiff since his death have constantly printed and sold the said work as their property, and now have and always have had a sufficient number of books of the said work exposed to sale at a reasonable price. That before the reign of Queen Anne it was usual to purchase from authors the perpetual copyright of their books and to assign the same for valuable consideration, and to settle them in family settlements for the provision of wives and children. That to secure the enjoyment of said copyright the Stationers'. Company have made several bye-laws, particularly one dated 17th August, 1681, and another dated 14th May, 1694 (therein set forth), reciting and recognising in the strongest terms

[1] *Tonson* v. *Collins*, W. Blackstone's Reports, I., p. 300; *see also* p. 321.

the copyright of authors and their assigns, and prohibiting any infraction of such right by members of their Company under certain pecuniary penalties. That the said Jacob Tonson, deceased, complied with the conditions required by the said Company to ascertain his right by registering the said work as soon as he had purchased the copy. That the defendant without licence of the plaintiffs and knowing the said copy to have been purchased by said Jacob Tonson, deceased, printed, published and sold several copies of the same in April and May, 1759, whereby the plaintiffs were damnified, but whether the defendant is liable in law to answer the damages they are ignorant. But if the court shall adjudge him liable they find him guilty, damages £5, if otherwise, not guilty."

Tonson v. *Collins* came on to be heard by Lord Mansfield, before whom the argument was genuine enough, for Thurlow, who appeared for the defendant, was a fierce anti-booksellers' man, and put the whole case against perpetual copyright at common law with all his native vigour. He referred contemptuously to Warburton's attempt to distinguish between books and machines.[1] "Sir Isaac Newton," said Thurlow, "had no greater property in his *Principia* than Lord

[1] *See* Warburton's Works, Vol. 12, p. 405, "A letter from an Author to a Member of Parliament concerning Literary Property, 1747."

Orrery had in his machine. If the labour of the head give the right the property is just the same. Both have arisen from the extraordinary acts of the State." He asserted and accurately that *Tonson* v. *Collins* was the first action ever known to be brought upon this head of property. Wedderburn conducted the plaintiff's case with the utmost skill, and Lord Mansfield showed himself by his interlocutory observations to be most friendly to the plaintiff's case. He directed the case to stand over for further argument. When it came on the second time the following year Blackstone held Wedderburn's brief, and Yates, afterwards Mr. Justice Yates, held Thurlow's. It was all gone into again at immense length, but at the close of the argument Lord Mansfield again directed it to stand over for further argument before all the twelve judges. This he appears to have done in the hope that the parties might acquiesce under the decision and avoid the House of Lords. But by the time the case came before all the judges information had reached them that the whole was a collusion,

that the defendant was nominal only, and that the expenses were paid by the plaintiff; they therefore refused to proceed in the cause, though it had been argued *bonâ fide*, and very ably, by the counsel who appeared for the defendant. They thought this contrivance to get a collusive judgment was an attempt of a dangerous example, and therefore to be discouraged (per Willes, J., 4 Burrow's, 2327).

The judges were understood to be of Lord Mansfield's way of thinking, as indeed they were apt to be. The booksellers' luck was beginning to desert them. Who, I wonder, told the judges *Tonson* v. *Collins* was collusive? Thus foiled in their purpose and robbed of the victory that was almost theirs, and of the fees that had enriched Wedderburn and Thurlow, Blackstone and Yates (Chancellors and judges that were to be), the booksellers fell grumbling back, and we may be sure drank confusion in their common-hall to the eaves-dropping knave who told the judges (at the eleventh hour) the truth about *Tonson* v. *Collins*.

In 1766 another opportunity occurred. Andrew Millar, the bookseller in the Strand, who, according to Dr. Johnson, had raised the price of literature, and who thanked God he had done with Dr. Johnson when the last sheet of the great dictionary was returned to him ("I am glad," replied the Doctor with a smile, "that he thanks God for anything"), had given James Thomson, in 1729, £242,10s. for "The Seasons," which had appeared in parts at different dates between 1727 and 1729. Millar took an assignment from Thomson to himself, his heirs and assigns for ever, and being a member of the Stationers' Company, duly entered "The Seasons" in the register-books in his own name, and thereupon became in his opinion the sole and exclusive proprietor for ever and a day. Thomson died in August, 1748. In 1763 one Robert Taylor, an outside bookseller, regardless of the cash transaction of 1729 and the entry in the Company's book, published and exposed for sale in England several copies of Thomson's or Millar's "Seasons." The booksellers saw their chance, Mansfield was still Lord Chief

Justice, and the famous action-at-law of *Millar* v. *Taylor* was begun. A special verdict was recorded in which the jury were made to repeat upon oath the cock-and-bull story of how long before Queen Anne perpetual copyrights had been made the subject of family settlements for the provision of Mrs. Bookseller and her babes. Lord Mansfield entered into the spirit of the game like the fine sportsman he was. He had not that impatience of argument which marks the present century. He had listened to Wedderburn and Thurlow in the first full argument of *Tonson* v. *Collins*, he had listened to Blackstone and Yates in the second argument of the same case, a third time found him perfectly ready and willing to hear Dunning and Thurlow repeat in *Millar* v. *Taylor* all that had been said in *Tonson* v. *Collins*, and more than this, to have *Millar* v. *Taylor* argued twice even as was *Tonson* v. *Collins*, and to hear Blackstone and Murphy repeat the arguments of Dunning and Thurlow. At the end of the second argument the case was ordered to stand over for the opinion of the court

until the next term. In the meantime Millar vexatiously died. However, in 1769, the judges of the King's Bench, Lord Mansfield and Yates, Aston and Willes, J.J., delivered their minds on this great subject. Their judgments occupy ninety-eight pages of the fourth volume of Burrow's, 2303—2408.

The statute of Anne had clearly no application to the case, its periods of protection having expired. "Therefore," said Mr. Justice Willes, "the author's title to the copy depends upon two questions — 1st, Whether the copy of a book belongs to an author by the common law. 2nd, Whether the common law right of authors (if any) to the copies of their own works is taken away by 8 Anne, c. 19."

Lord Mansfield and Willes and Aston, J.J., answered Question No. 1 in the affirmative, and Question No. 2 in the negative. Mr. Justice Yates, who had been counsel against the booksellers in *Tonson* v. *Collins*, answered Question No. 1 in the negative and Question No. 2 in the affirmative. It

was the first time the court had differed in Mansfield's time.

The following quotations from Lord Mansfield's judgment will show the working of his mind on the subject:—

"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 [1] 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 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,

[1] *Webb* v. *Rose* (1732); (2) *Pope* v. *Curl* (1741); (3) *Forrester* v. *Waller* (1741); (4) *Duke of Queensbury* v. *Shebbeare* (1758), all cited 4 Burrow's, 2330. These are cases to restrain the publication of manuscripts of unpublished writings.

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 labour. It is *just* that another should not use his name without his consent. It is *fit* that he should judge when to publish, or whether he ever will 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, in 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. Anyone 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."

"The single opinion of such a man as Milton,[1] speaking after much consideration upon the very point, is stronger than any inferences from gathering acorns and seizing a vacant piece of ground; when the writers, so far from thinking of the very point, speak of an imaginary state of nature before the invention of letters."

"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,

[1] In the "Areopagitica."

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."

"I always thought the objection from the Act of Parliament the most plausible. It has generally struck at first view. But upon consideration it is, I think, 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.'"

"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 a right of 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 contained shall extend or be construed to extend to prejudice or confirm any right, etc.' '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 generality 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."[1]

* * * *

The majority of the judges being for the plaintiff, judgment was entered accordingly.

[1] It is now the better opinion that Lord Mansfield was quite wrong, but it will be admitted that he goes wrong "in the grand style."

A writ of error was afterwards brought, but eventually Taylor suffered himself to be nonpros'd, and some time in 1770 the Court of Chancery, in obedience to the declaration of the common law right, granted an injunction, but whether to Millar's executors or to whom else I have not been able to ascertain.

So far the booksellers had won, and by winning had established for the time the author's right of perpetual property for himself and his assigns in the books he composes or compiles. Whether the decision in *Millar* v. *Taylor* raised the price of literature by one penny it would be hard to say. I doubt it.

Why the matter did not rest there longer seems at first a little strange. But the truth is this was no lawyer's question. The question of literary property was discussed everywhere and by everybody. Great as was Lord Mansfield, he was not the Court of Final Appeal. Besides, Parliament might have something to say about it. The great Cham of literature, Dr. Johnson, though a booksellers' man, was against perpetual copyright. Boswell reports him to have delivered the following judgment in 1773:—

"There seems (said he) to be in authors a stronger right of property than that by occupancy; a metaphysical right, a right, as it were, of creation which should from its nature be perpetual, but the consent of nations is against it; for were it to be perpetual, no book, however useful, could be universally diffused amongst mankind should the proprietor take it into his head to restrain its circulation. No book could have the advantage of being edited with notes, however necessary to its elucidation, should the proprietor perversely oppose it. For the general good of the world, therefore, whatever valuable work has once been created by an author, and issued out by him should be understood as no longer in his power, but as belonging to the public; at the same time the author is entitled to an adequate reward. This he should have by an exclusive right to his work for a considerable number of years."

As to the precise duration of copyright Dr. Johnson sometimes was for a hundred years and sometimes was content with sixty.

Thus encouraged by the *Zeitgeist*, the country booksellers, growing in importance every day, continued to make free with old books, regardless that they were the "copies" of the members of the Stationers' Company. The next great offender was Donaldson, the Edinburgh bookseller, who opened a shop in London, where he sold cheap editions printed in Scotland of popular

English authors all deceased. Donaldson was a prosperous man, as is proved by the hospital bearing his name at the west end of Edinburgh. Oddly enough, Thomson's "Seasons" was once more the carcase over which these birds of prey contended. At Millar's sale in 1769, Becket (Sterne's publisher) gave £505 for the Thomson copyrights. Thereupon, according to Lord Mansfield, Thomson's "Seasons," lately Millar's, became Becket's. Donaldson boldly challenged this property of Becket's by printing and selling copies of the "Seasons." Becket went straight to Chancery, filing his bill for an injunction and an account. He did not rest his case on the romance of the juries of Westminster Hall, nor did he plead his compliance with the provisions as to sale and fair price contained in the statute of Anne, but went boldly on his property. "Thomson's 'Seasons,'" said he, "is now mine. Donaldson, under colour of right, is committing a trespass on my property, and is selling on his own behalf my goods. Restrain him and make him account." The Lord Chancellor Bathurst,

on the authority of *Millar* v. *Taylor*, granted the injunction and ordered the account. Donaldson appealed to the House of Lords, before which tribunal accordingly, and for the first time, the question came in February, 1774. (*See Donaldson* v. *Becket*, 4 Burrow's, 2408; 2 Brown's Parliamentary Cases, 129.)

The House was not a very strong one. Lord Mansfield did not think fit to attend, considering himself too deeply committed. Lord Camden was a fierce anti-booksellers' man, and the Lord Chancellor was a weakling. The House of Lords, after listening to the now well-worn arguments, invited all the judges to attend and to answer the following questions, which are worth setting out. I append to each question the way in which it was answered by each of the judges.

The First Question.

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?

Ayes 10.

NARES, J.
ASHURST, J.
BLACKSTONE, J.
WILLES, J.
ASTON, J.
GOULD, J.
SMYTHE, C.B.
DE GREY, C.J.
PERRATT, B. (subject to the qualification that an author could not bring an action against any person who printed, published, and sold the same unless such person obtained a copy by fraud or violence).
ADAMS, B. (of the same opinion as PERRATT, B.).

Noes 1.

EYRE, B.

THE SECOND QUESTION.

If the author had such right originally, did the law take it away on his printing and publishing such book or literary composition; and might any person afterwards reprint and sell for his own benefit such book or literary composition against the will of the author?

Ayes 4.	*Noes* 7.
EYRE, B.	NARES, J.
PERRATT, B.	ASHURST, J.
ADAMS, B.	BLACKSTONE, J.
DE GREY, C.J.	WILLES, J.
	ASTON, J.
	GOULD, J.
	SMYTHE, C.B.

THE THIRD QUESTION.

If such action would have lain at common law is it taken away by the statute of 8 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?

Ayes 6.	*Noes* 5.
EYRE, B.	ASHURST, J.
NARES, J.	BLACKSTONE, J.
PERRATT, B.	WILLES, J.
GOULD, J.	ASTON, J.
ADAMS, B.	SMYTHE, C.B.
DE GREY C.J.	

THE FOURTH QUESTION.

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?

Ayes 7.	*Noes* 4.
NARES, J.	EYRE, B.
ASHURST, J.	PERRATT, B.
BLACKSTONE, J.	ADAMS, B.
WILLES, J.	DE GREY, C.J.
ASTON, J.	
GOULD, J.	
SMYTHE, C.B.	

THE FIFTH QUESTION.

Whether this right is in any way impeached, restrained, or taken away by the statute 8 Anne.

Ayes 6.	*Noes* 5.
EYRE, B.	ASHURST, J.
NARES, J.	BLACKSTONE, J.
PERRATT, B.	WILLES, J.
GOULD, J.	ASTON, J.
ADAMS, B.	SMYTHE, C.B.
DE GREY, C.J.	

This, it must be admitted, was a close thing. A considerable majority of the judges believed in the doctrine of perpetual copyright at common law, whilst it was but by

a majority of one that they imputed to the statute of Anne the murderous effect of destroying the very property it sought to protect. Had Lord Mansfield attended as a judge this majority of one would have disappeared.

The temper of the House of Lords on this question proved to be very different from that of the King's Bench. We have only meagre reports of their lordships' speeches. Some portions of the Lord Chancellor Apsley's and Lord Camden's are worth quoting. (*See* Cobbett's Parliamentary History, Vol. 17, 1001.)

LORD CHANCELLOR APSLEY.

"He then very fully stated the several cases of injunctions in the Court of Chancery, produced several original letters from Swift to Faulkner, and others relative to the statute of Queen Anne, and gave an historical detail of all the proceedings in both Houses upon the several stages of that Act, and the alterations it had undergone in the preamble and enacting clauses, all tending to shew the sense of the legislature at the time of passing it to be against the right, and that they rejected the other Bills afterwards drawn up chiefly by the advice of dean Swift and the countenance of Mr. Addison which were presented in the same spirit and upon the same grounds, and concluded with declaring that he was clearly of opinion with the appellants."

Had the Lord Chancellor's speech been properly reported we should have been wiser men to-day. Lord Camden, a man of unusual ability and strength, is reported as follows (*see* Cobbett, 17, 994):—

"In short the more your lordships examine the matter the more you will find that these rights are founded upon the charter of the Stationers' Company and the royal prerogative; but what has this to do with the Common Law right? for never my lords forget the import of that term. Remember always that the Common Law right now claimed at your bar is the right of a private man to print his works for ever independent of the Crown, the Company and all mankind. In the year 1681 we find a bye-law for the protection of their own Company and their copy-rights which then consisted of all the literature of the kingdom, for they had contrived to get all the copies into their own hands. In a few years afterwards the Revolution was established, then vanished prerogative, then all the bye-laws of the Stationers' Company were at an end, every restraint fell from off the press and the whole Common Law of England walked at large. During the succeeding fourteen to sixteen years no action was brought, no injunction obtained, although no illegal force prevented it; a strong proof that at that time there was no idea of a Common Law claim. So little did they (*i.e.*, the Booksellers) then dream of establishing a perpetuity in their copies that the holders of them finding no prerogative security, no privilege, no licensing Act, no Star Chamber decree to protect their claim in the year 1708, came up to Parlia-

ment in the form of petitioners with tears in their eyes hopeless and forlorn; they brought with them their wives and children to excite compassion and induce Parliament to grant them a statutory security. They obtained the Act and again and again sought for a further legislative security."

In those days lay peers were in the habit of attending and taking part in the appellate business of the House of Lords, and on this occasion several non-legal personages ventilated their opinions, which proved to be as divided as those of the judges. On a division twenty-two lords voted for Donaldson and eleven for Becket—so the ayes had it—the motion being that the decree of the court below be reversed.

Thus for ever perished perpetual copyright within this realm.

If it be a wise rule of conduct to assume that those who are hurt most will cry out the loudest, the London booksellers and not the authors were here the parties most injuriously affected. They cried out very loud indeed—declared they had been cheated and betrayed, deluded by lawyers, and outwitted by authors, who had sold them books on the terms of perpetuity. Blackstone, it

turned out, had sold his immortal Commentaries to a bookseller for a round sum,[1] and had assigned them to him and his heirs for ever, and now it appeared that all he had to sell were the beggarly terms of years meted out by the Act of Anne, which at the best and added together only amounted to twenty-eight years from first publication. Blackstone, the booksellers had to admit, had done nothing in his judicial capacity to derogate from his own grant, but still it was a hard case.

The course taken by the booksellers was to petition the House of Commons that leave be given to bring in a bill for their relief. This leave was granted, and a committee appointed to take evidence.[2]

Before that committee there appeared a

[1] Sir W. Blackstone published his famous Commentaries in four volumes in so many different years, and he entered each volume on its publication on the Register of the Stationers' Company. The copyright of the whole book he afterwards sold to Cadell and two other booksellers for (I think) £4,000. On the expiration of fourteen years from the date of publication, being still alive, he assigned to the same booksellers his interest in the second statutory term of fourteen years, and also he assigned all his corrections and alterations of and in the text and notes.

[2] *See* Cobbett's "Parliamentary History," Vol. 17, p. 1077 (year 1774).

Mr. William Johnston, who had been in business as a London bookseller from 1748 to 1774. He stated that on going into the trade he had bought the business of a Mr. Clarke for £2,000, and that one half of the purchase-money was in respect of copyrights. He also stated that during his business life he had laid out £10,000 more of his money in the purchase of copyrights, and that three-fourths of the books in the trade had his name as part proprietor, especially the old copies. He stated that copyrights were purchased by the booksellers at public sales, and admitted that none but booksellers attended such sales.

He further admitted that he was the registered owner of some of the classical writers in the Delphin edition, and that he had purchased the right of printing some of these ancient authors; he did not, however, allege or suppose that in their case he was protected by law. He claimed to be the owner of Steele's "Tatler," and produced an assignment from Steele. He likewise claimed to be the owner of Camden's "Britannia," but admitted that he had never heard of

or seen any assignment from Camden; in fact, it was not the original Camden but Bishop Gibson's translation that he claimed as his.

He stated that he had bought many shares of books without examining their titles, and added it was not the habit of booksellers to investigate titles. He claimed to be the owner, or part owner, of Dryden's works. These he had bought at Tonson's sale. He had never seen any assignment from Dryden. In the same way he claimed to be the owner of Locke's works, but he had never seen an assignment, but for all that he believed there was one. He likewise claimed to be the owner of Bunyan's "Pilgrim's Progress," since it was one of the books in Clarke's stock, and it was assigned to him by Clarke's executors. He had never looked into the title, but, nevertheless, he had stopped one Luckman, of Coventry, from printing an edition of the book. He did not take legal proceedings against Luckman, but by a private arrangement all copies of the pirated edition were handed over to him, and Luckman paid the costs. He

stated that he had never consulted counsel on making purchases as to the Common Law right. He had never considered Queen Anne's penalties worth having, but regarded an injunction in Chancery as the best remedy.

Thurlow, then Attorney-General, spoke against the booksellers, whom he described "as a set of impudent and monopolising men who had combined together and raised a fund of upwards of £3,000 in order to file bills in Chancery against any person who should endeavour to get a livelihood as well as themselves, and although they had purchased 'copies' from Homer down to Hawkesworth's 'Voyages' (which was a mere compilation of trash), they were highly censurable for not having taken counsel's opinion."

Mr. Dunning espoused the cause of the booksellers, as also did Mr. Burke, who referred to the fact that Blackstone had sold his Commentaries to booksellers for a large sum, and had assigned the same to them, their heirs and assigns for ever. Mr. Burke seized the opportunity to speak at

large in favour of Blackstone's Commentaries.

This agitation of the booksellers excited the furious opposition of Charles James Fox, who from first to last, whilst the matter was before the Commons, opposed and obstructed the bill in every possible way, on one occasion keeping the committee wrangling for some hours as to his right to put to a witness the following question: "Whether it was his opinion that if the evasion of copyright was deemed a felony without benefit of clergy, it would be for the benefit of the public?"

Leave, however, to bring in a bill was obtained, and eventually, after much difficulty, it was read for the third time by a considerable majority, Fox throughout acting as teller for the minority.[1] The bill was thrown out by the House of Lords on the 2nd of June, 1774, Lord Camden's motion that it be read this day two months being

[1] This Bill was never printed, only ordered to be engrossed. I have searched the Journals of both Houses, but cannot find any copy of it or statement of its contents. It probably extended the Statutory periods of protection.

carried by twenty-one contents against eleven non-contents. Lord Mansfield did not attend the proceedings. In fact, Lord Mansfield seems to have shirked the question as soon as it reached the floor of the House of Lords either as a legislative or a judicial assembly.

The Lord Chancellor (Apsley) observed that the booksellers never could imagine that they had a Common Law right, for that all the injunctions were on the statute except that of Lord Hardwicke's in 1752, which Lord Hardwicke granted on condition that the cause should be tried at common law, but that the booksellers would not venture on it, nor did they ever bring any action thereon till lately in the cause of *Millar* v. *Taylor*. His lordship observed that his late decision[1] on the ground of the Common Law right had no reference to his own private opinion, for in that judgment he was necessarily governed by the prior one in the Court of Queen's Bench, and was obliged to decree according thereto, but that he was

[1] When he granted an injunction in *Becket* v. *Donaldson* on the authority of *Millar* v. *Taylor*.

satisfied there never did exist a Common Law right, and that the monopoly of the booksellers was supported among them by oppression and combination, and that none of their allegations nor any part of the bill required further inquiry.

Lord Camden said that during his practice in the law he always found the gentlemen of the profession universally against the Common Law right; that it was inserted in the bill that it was a prevailing opinion that a Common Law right did exist; that if this meant that such an opinion prevailed among others than booksellers, he would venture to say there were fifty to one against it; and with respect to booksellers, he had ground to say that many London booksellers were not of that opinion; that all the country booksellers, and those of Ireland, Scotland, and America, were against it; that he could not but think this attempt an affront on the House, for that they having determined between the contending parties that one of them had usurped for forty years the rights that did not belong to them, and that the other party had been injured and deprived

of their rights; this present proceeding contradicted the whole of that principle and reversed the state of the parties; and treated the latter as thieves and pirates and the first as oppressed and injured. Lord Camden added that the monopolising booksellers had maintained their monopoly by most iniquitous oppressions, and exercised it to the disgrace of printing; and if the line of justice and equity were drawn it would be that those who had deprived others of their right for a series of years should make compensation to all those they had injured by such conduct. His lordship said further that if the bill had stated what particular set of men had been injured, and what loss they had sustained, they might have had some favour shown them, but in the present state they could have none. He concluded by hoping that their lordships would reject the bill.

This was done, and thus an end was made of the controversy.

[1] *See* Cobbett's "Parliamentary History," 17, 1400-1.

V.

LEGISLATIVE ENACTMENTS SINCE QUEEN ANNE.

V.

LEGISLATIVE ENACTMENTS SINCE QUEEN ANNE.

PERPETUAL copyright was the law of England for five years only, viz. from 1769 until 1774. From 1709 (the date of the statute of Anne), every author of a published book had, if he chose to register it, a patent of protection for himself and his assigns for a term of fourteen, and it might be twenty-eight years. In no other European country had the author or his assigns fared so well.

In France, down to the Revolution, the only rights of an author were bound up with the privileges granted by the authorities.

"Ces privilèges étaient accordés à des libraires, à des auteurs, ou même à des personnes n'ayant aucune de ces deux qualités. En l'absence de règles générales, la durée du privilège et les peines applicables aux contrevenants étaient déterminées dans chaque cas particulier. . . . . On voit qu'à la veille de la Révolution de 1789, il n'y avait pas à proprement parler de droit pour les auteurs d'œuvres littéraires. Ils avaient seulement la faculté de réclamer un privilège, qui pouvait toujours leur être refusé. Mais à plusieurs reprises,

l'idée que l'auteur a un véritable droit avait été développée."—"*Lois Françaises et Etrangères sur la Propriété Littéraire et Artistique, par MM. Lyon-Caen et Delalain.*" Paris, 1889, tom. i., pp. 5 and 8.

In July, 1793, M. Lakanal made a report to the Convention on the subject. He said that of all kinds of property the one hardest to dispute, least calculated to injure Republican equality or to affront liberty, was that allowed to works of genius.

"Le génie a-t-il ordonné, dans le silence, un ouvrage qui recule les bornes des connaissances humaines, des pirates littéraires s'en emparent aussitôt, et l'auteur ne marche à l'immortalité qu'à travers les horreurs de la misère. Et ses enfants!

"Citoyens, la postérité du grand Corneille s'est éteinte dans l'indigence."

A magnificent exordium!

The law itself, secured to authors of all nationalities, whether "grand Corneilles" or writers of a more ordinary type, the exclusive right to sell and distribute their works *dans le territoire de la République* during their lives, and gave their heirs and assigns the same right for ten years after their death—a very rational bit of work for 1793.

Germany cannot be said to have had

any copyright law until 1870. Spain was earlier, since in 1834 she gave her authors the same terms as those of 1793. Italy did nothing in the direction of a general law until 1865, and without multiplying instances it may be taken as certain that in no other country have the rights of native authors been so well contested as in England, although as a matter of history it was the booksellers or publishers rather than the authors who were most interested and active in the assertion of these rights.

Oddly enough the only corporations or persons to obtain relief from the effect of the decision of the House of Lords in *Donaldson* v. *Becket* were the Universities of Oxford and Cambridge. These seminaries, always easily alarmed, obtained an Act of Parliament (15 Geo. III. c. 53), securing to their learned if somewhat supine selves perpetual copyright in all books given or bequeathed to them. Their agitation was hardly called for. In 1878 it appeared that the University of Oxford possessed six copyrights, and Cambridge none. Englishmen are singularly averse from enriching their Universities —

but how few copyrights are worth having after thirty years? Nevertheless, if you wish to prevent your literary productions from becoming the prey of the cheap bookseller—if you do not want to be "a penny poet" or to be floated down to posterity as a "Camelot Classic," bequeath your copyrights to Oxford or Cambridge, and the chances are neither you nor your books will ever be heard of again. But the sepulture will be dignified.

In 1801 and in 1814, the Act of Queen Anne was altered, and authors were secured in their copyrights for the term of their natural lives, or twenty-eight years from the date of first publication, whichever was the longer.

This was the state of the law when 5 and 6 Victoria, c. 45 (1842), was passed, and this is the statute by which copyright is now regulated.

With its history I need not trouble you. Lord Macaulay's two speeches are well known. The honest if flowery rhetoric of Sergeant Talfourd, and the sober labours of Lord Mahon, eventually bore fruit in an

extended term of protection. Its provisions, however, cannot wholly escape consideration.

The Act of 1842 adheres in its preamble to the old lofty conception of copyright as being something intended to promote the production of literary works of a lasting benefit to mankind, and its authors certainly never contemplated that its provisions should afford protection to the contents of a telegram to a newspaper stating the result of a cricket match at the Antipodes. Preambles are apt to be lofty. When it comes to definition the Act is businesslike enough, for it defines a "book" to mean and include every volume, part or division of a volume, pamphlet, sheet, or letterpress, sheet of music, map, chart or plan, separately published; and "copyright" to mean the sole and exclusive liberty of printing or otherwise multiplying copies of anything to which the word book is applied.

On the important subject as to the duration of copyright, it gave the author and his assigns the longer of the two following terms, the author's life *plus* seven years, or forty-two years from the date of

first publication. If the publication was posthumous, forty-two years is the period of protection.

This is highly irrational. In no possible event should copyright be made to depend on the date of first publication, since to do so is to make an author's intellectual output become common property in driblets, and to throw open to the printers the early and uncorrected editions at a time when the later and corrected ones are still protected. Thus, the first edition of Hallam's "Middle Ages" appeared in two quartos in 1818, and continued to be amended and improved by its accomplished and conscientious author, who in 1848 published in a separate volume, for the benefit of former buyers, a supplemental volume. Hallam died in 1859. In 1860 the forty-two years since the publication of the first edition of "The Middle Ages" expired, but as the alternative term proved the longer, the copyright in the first edition did not terminate until 1866, seven years after Hallam's death in 1859. In the case of the volume appearing in 1848, the other term was the longer, since forty-two

years after 1848 carries us on to 1890. What did the cheap booksellers do? One of them, whose surname happened to be the same as Hallam's authorised publisher, reprinted in the interval between 1866 and 1890 the first edition of 1818, and held it out to the world as Hallam's "Middle Ages." Among the buyers of this antiquated reprint was no less erudite a person than Mr. Herbert Spencer.[1] This is a grievous injustice to the reputation of a serious and painstaking author. It is an insult to the memory of a man like Hallam that the law of his country should permit so shameful a treatment of his well-considered writings after his death.

In the case of poets, too, how unsatis-

[1] "It happens that I can give personal illustrations of the great inconveniences and, I may say, mischief which arise from the termination of an author's copyright at different dates. I was not aware until two days ago, when talking to Dr. Smith on this question, that the existing cheap edition of Hallam's 'Middle Ages' is an imperfect work. I have been making quotations from that work. I shall now have to go back on my quotations and see if I have been betrayed into errors, and observe further, that but for mere accident I should have been in the predicament of perhaps having quoted obsolete passages."—*See* "Various Fragments," p. 58.

factory it is that the first rough draft should be exposed to cheap republication at a time when their whole work is still private property. Anybody can now print Browning's "Pauline," but the "Ring and the Book" will not be free property until 1911, and "Asolando" will be protected till 1931.

This, I repeat, is fantastic. Whatever the term of protection is, it should cease at one and the same time for the whole of an author's life-work. During an author's life he and his assigns are, of course, to be protected; the question is, for how long afterwards? Fix upon your term of years, and have done with it.

Life, of course, is an uncertain term. Mr. Keble published his "Christian Year" in 1827, and did not leave the world he made better by his presence until 1866, having lived to see ninety-five editions. Keats published his "Lamia, Isabella, and other Poems," in June, 1820, and died in February, 1821. Between two such terms of years there is a great difference. How can these odds be made even? A term of one hundred years might be fixed, but then -

it would have to be from the date of first publication, which, as we have seen, is open to grave objection. On the whole, I think it will be best to adhere to the life-term, for, lottery though it be, it is a lottery in which all have shares.

The authors of the Act of 1842 were not imbued with the grand conception hereafter to take shape and substance of international copyright. They contemplated that the books they wished to protect should all be published in the United Kingdom, and it never entered their home-keeping heads that such books should be printed elsewhere than in Britain and Ireland, or otherwise than on British paper and by British typographers. On this point the reasoning of Lord Cairns in *Routledge* v. *Low*, L. R. 3, H. L. 100, is conclusive. He pointed out that by the 8th section of the Act 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 defaulting publisher 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 register is provided for the colonies. By the 14th section, a motion to expunge or vary any entry in this register is to be made in the Court of Queen's Bench, Common Pleas, or Exchequer. And finally, by the 17th section, there is a provision against 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 without the British dominion. Which provision, in Lord Cairns' opinion, showed clearly that publication in the United Kingdom is indispensable to copyright.

What, however, was not so clear upon the face of the statute is whether it gave its protection to every author who first

published in the United Kingdom, wheresoever he might then be resident.

This question arose incidentally in the interesting case of *Routledge* v. *Low*, to which I have just referred. *Routledge* v. *Low* turned upon a work called "Haunted Hearts," composed by an American lady living in New York, who, being minded to publish it in Great Britain, posted the manuscript to Messrs. Sampson Low & Co., and (being well advised) arranged to go to Montreal, in Canada, and live—or, as Lord Cairns, who had a Scriptural style, preferred to call it, "sojourn"—there for a few days before, at, and after the actual date of publication in London. Maria Cummins—for that was the name of this well-advised lady—went to Montreal, and there abode during this critical period. She assigned the copyright of "Haunted Hearts" to Messrs. Sampson Low & Co., who did not omit to register both the novel and the assignment at Stationers' Hall. "Haunted Hearts" was then published in two volumes, at the monstrous price of sixteen shillings. Shortly afterwards Messrs. Routledge, always thinking

of the poor and needy, issued an impression in one volume for two shillings. Thereupon Messrs. Sampson Low & Co. filed their bill in Chancery seeking an injunction. The cause found its way—as between two such combatants it could hardly fail to do—to the House of Lords, where it was heard by Lord Cairns, Lord Cranworth, Lord Chelmsford, Lord Westbury, and Lord Colonsay, who were all of opinion that an alien friend (like Miss Maria Cummins) who published in the United Kingdom whilst residing in a British colony is entitled to the benefit of English copyright. But they clearly affirmed the view that the first publication of a book must be made in the United Kingdom if British copyright is to be secured to its author. Lord Cairns and Lord Westbury went on to express the opinion (though it was not necessary for their decision) that protection is given by the statute to every author who first publishes in the United Kingdom, wheresoever he may then be resident. This, however, was doubted by Lords Cranworth and Chelmsford.

The Act of 1842 provided for the

registration of books at Stationers' Hall, and in terms enacted that no proprietor of copyright in any book could take any proceedings in respect of any infringements unless he had before commencing such proceedings caused the book to be registered in the manner provided by the Act.

The omission to make an entry does not affect the copyright of a book, but only the right to sue.

The 18th and 19th sections deal with works published in parts and with reviews and magazines which are made up of contributions by different hands. The Act provides that if these contributions were made "on the terms that the copyright therein shall belong" to the proprietor, projector, conductor, or publisher, and shall have been "paid for by such proprietor," etc., then the copyright shall be the property of such proprietor, etc., subject to this, that the proprietor shall not for twenty-eight years publish such contribution *separately* without the consent of the author or his assigns.

Provision is made by the 19th section for the registration at Stationers' Hall of the

title of any work published in parts and of the *time* of the first publication of the first volume, number, or part thereof, and the name and place of abode of the proprietor and publisher. This will secure the copyright of the completed work.

At this time of day it is, however, more useful to consider the omissions from the Act than anything else.

First, nothing is said in the Act about *translations*, nor is it clear even at the present time, apart from the provisions of the International Copyright Acts, whether an unauthorised translation of a protected work is in law piratical or not. Clearly, if the original work is not entitled to copyright, anybody who chooses is at liberty to translate it. But if the original book is entitled to protection, it would seem unreasonable to permit it to be translated without the consent of the owner of the copyright. On the other hand, arguments might arise as to how far the translation was a literal one, and it might be argued that the translator had expended more care in the production of his translation than ever

did the author on his so-called original work. Coleridge introduces into his translation of Schiller's "Wallenstein" lines of exquisite poetry, for which you may search in vain in the original play.

Literary courtesy has usually induced translators from very early times to obtain the permission of the author they sought to honour. Plays, perhaps, are an exception. The German drama once enjoyed great popularity in this country, and it did so in consequence of a series of unauthorised and very bad translations.

The law remains to be settled by statute.

A *second* omission from the Act of 1842 is a very natural one. It relates to what is barbarously called the *dramatization of novels.* Novels nowadays are mostly written by people who would write plays if they could, and as a successful play makes (so I am told) fifty times as much money as a successful novel, it is naturally very irritating for an ill-paid novelist to find his tale turned into a lucrative play by some person vastly inferior to himself in everything but dramatic instinct. The law, however, stupidly

enough, does not regard the representation on the stage of a dramatic piece as an infringement of the printed book out of which it has been constructed. This law prevented Mrs. Henry Wood from becoming one of the richest women in England. Her "East Lynne" has been acted in every theatre in every town throughout the British Empire, but she had to be content with her profits as a novelist, which were beggarly as compared with those that would have poured into her coffers had she been entitled to cry "halves" with the theatres. In considering the purely commercial side of copyright, we must be content with humble examples, and to speak of Woods rather than of Wordsworths.

The playwright must, however, proceed cautiously in this matter, for though he is entitled to turn a novel into a play, he is not entitled to print copies of his play if it contains considerable passages extracted almost *verbatim* from the novel. This was decided in the case of the play founded upon Mrs. Burnett's *Little Lord Fauntleroy*,[1] where the infringement of copy-

[1] *Warne* v. *Seebohm*, 39 Chy. D. 73 (1888).

right complained of was that for the purpose of producing the play the defendant (a dramatic author) had made four written copies of it, one for the Lord Chamberlain, and three for the use of the performers. Very considerable passages in the play were extracted almost *verbatim* from the novel. The dramatic author claimed the right to make more copies if it should be necessary to enable him to give further representations of the play in London or elsewhere. But it was held that what he had done amounted to an infringement of the plaintiff's copyright, and that all passages of Mrs. Burnett's book in the four copies must be cancelled.

It is now generally admitted that the unauthorised dramatization of novels should be prohibited, but I expect it will be found difficult to do more than prevent the bodily appropriation by the dramatist of the *ipsissima verba* of the novelists. Plots, situations and scenes have been the common property, both of novelists and dramatists, for so long a time that to attempt to set them out now by metes and bounds between the hosts of rival claimants would tax even

the lettered intellect of a judge of the Chancery Division.

The fact that the Act of 1842 did not deal with *abridgments* can hardly be called an omission, for it was then not only the law, but also the general opinion that a good, honest abridgment was a new book and in no sense a piracy of the original work, and was consequently entitled to copyright on its own account.

Abridgments have gone out of fashion. "Rasselas" was once abridged, and an injunction to restrain the abridgment was refused, it appearing that not one-tenth part of the first volume (for the original "Rasselas" was in two volumes) had been abstracted, and that the injury alleged to be likely to be sustained by the bookseller to whom our great moralist had sold "Rasselas" to pay for his mother's funeral was based on the fact that it was the story that was curtailed and not the reflections.[1]

Although the question has lost interest there can be little doubt that the next time the law is taken in hand the too seldom

[1] *See Dodsley* v. *Kinnersley*, Ambler, 403.

exercised right of cutting themselves short will be reserved to authors during their periods of protection. But should an assign be allowed to lop off the redundancies of his assignor?

A question which has become of great commercial importance since 1842 is the position of newspapers under the Act of that year.

In 1881 Sir George Jessel, in the case of *Walter* v. *Howe*, 17 Ch. Div. 708, rudely brushing aside an elaborate decision of the Vice-Chancellor Malins, decided that a newspaper was within the Act of 1842 and must be registered in the manner provided by the 19th section of that Act, and further that in order to enable the proprietor of a newspaper to sue in respect of a piracy of any article therein, he must show that the article in question had been composed on the terms that the copyright therein should belong to the proprietor in the manner directed by the 18th section of the Act. In *Walter* v. *Howe* the defendants had sold a pamphlet which was, in fact, a reprint of a memoir of the late Lord Beaconsfield which appeared in the *Times* newspaper on the 20th of April, 1881. Thereupon the

plaintiff, Walter, without joining the author of the article as co-plaintiff, moved for an injunction, but was unprovided with any evidence to show that he or the other proprietors of the *Times* had purchased or were entitled to copyright in the memoir beyond the fact that they had paid the author for his literary services in concocting it. Sir George Jessel decided in the first place that the plaintiff was not entitled to sue without the author, there being no evidence to show that he had, within the 18th section of the Copyright Act, paid the author of the memoir on the terms that the copyright therein should belong to him, and also that even if the plaintiff had a copyright in the memoir, he was not entitled to sue because his newspaper had not been registered under the Act.

It follows from this that, if a newspaper is registered under section 19 of the Act of 1842, that is, if at the time of the first publication of the newspaper, the name and place of abode of the proprietor thereof and of the publisher have been entered in the book of registry at Stationers' Hall,

the newspaper proprietor becomes entitled to sue under the Act, and if he has entered into an agreement with anybody to have work done for his paper on the terms that he is to be entitled to copyright, or if he has got the copyright assigned to him, he is in a position to sue in respect of any infringement of that copyright. See *The Trade Auxiliary Company* v. *Middlesborough and District Tradesmen's Protection Association*, 40 Ch. Div. 425. Probably, at the present time, on proof of payment for the article most judges would infer that the newspaper proprietor was entitled to copyright.

The question next arises, how much of a newspaper is a proper subject of copyright?

It is commonly said that there is no copyright in news. The price of Consols, the result of a horse-race, or the figures of a contested election are news which anybody can publish if so disposed.

Exactly the same may be said of ideas. There is no copyright in ideas, but only in the mode in which they are expressed. But if the proprietor of a newspaper enters into an arrangement at expense to himself,

whereby news interesting to the public, or some portion of it, is conveyed to it earlier than it would be by the ordinary channels, ought he not to be entitled to protection, even though he employs no literary embellishments in conveying to the public the fact that a particular horse has won a race? Suppose he gave a poet sixpence to hitch the horse's name into a rhyme, the distich would be capable of copyright, and a rival who reprinted it might be cast in damages. But, on the other hand, if the rival only stole the horse's name and gave the rhyme the go-by, what then?

The copyright statutes have been made to cover a good many things which were not within the contemplation of their authors; for example, telegraphic codes and tradesmen's illustrated catalogues; and it is difficult to see why newspaper enterprise, which is a commercial thing, should not be entitled to some protection.

In the case of *Walter* v. *Steinkopff*, 1892, 3 Ch. D., 489, the *Times* obtained an injunction against the *St. James's Gazette* from publishing extracts from a long article or letter on America by Rudyard Kipling.

The *Times* previously to the action had been duly registered as a periodical publication under the Act of 1842, and the copyright of the Rudyard Kipling article had before publication been purchased and paid for, and the assignment of the copyright in that article registered.

Nobody can read the newspapers without becoming aware of the fact that an enormous amount of steady, daily pilfering goes on. Journalists, like the early Christians, have, if not all, at least many things in common. They would, doubtless, love to acknowledge their mutual indebtednesses were it not for their childish aversion to advertise each other in their own columns. Sometimes, at the very end of a long and seemingly original paragraph, you may discover in a parenthesis a reference to the rival print from which the whole has been conveyed. This is no new feature. In 1839 M. Renouard, in the work I have made such frequent use of, moralises as follows:—

"Une habitude d'emprunts réciproques entre les feuilles périodiques s'est établie par la force des choses et s'exercice avec une latitude qui dégénère souvent en

abus. . . . La tolérance sur les emprunts réciproques des journaux étant devenue inévitable, l'usage a dégénéré en abus, car en toute occasion, il se rencontre des gens qui se chargent de domontrer par les faites jusqu'à quelles limites extrêmes la plus légère concession sur les principes peut logiquement être portée. Il s'est donc établi une industrie d'une rapacité presque cynique. Elle a consisté a créer des journaux dont tout la redaction est empruntée à d'autres; concurrence commode, puisque son unique artifice pour economiser les frais de redaction, consiste a d'approprier celle que d'autres ont payée. Un de ces journaux, de peur que l'on ne s'y méprit, a poussé la logique jusqu'à s'intituler avec une audacieuse franchise, *le Voleur*, un autre, *le Pirate*."—*Traité des Droits d'Auteurs*, tom. ii., 115.

We may note an improvement in journalistic morals since 1839, and now perhaps it is chiefly in the region of foreign intelligence that most of the stealing is done; and it might be argued that as in the case of speeches and sermons so with newspapers; their *mode* of publication implies a free gift to that huge, floating, impersonal "public" for whose multifarious wants journalists cater, whose tastes, lofty or low, they supply, and whose "rights" they defend. I am, however, encroaching upon the subject of my next lecture.

VI.

LITERARY LARCENY.

VI.

LITERARY LARCENY.

What use is one author entitled to make of another? All manufacturers have their secrets. Potters are not welcome visitors at Sèvres. A book-maker at work has his methods, his modes of treating his authorities. It never does to inquire too curiously, and the law, to do that *corpus* justice, would be the last to do so.

Ideas, it has always been admitted, even by the Stationers' Company, are free as air. If you happen to have any, you fling them into the common stock, and ought to be well content to see your poorer brethren thriving upon them. He and he alone is the really great and fortunate author whose books mark epochs in the history of thought, so that you may confidently assert of any work that it was written before or after the appearance of these memorable productions. This is indeed to live up to the parliamentary preamble, and to write books "of

lasting benefit to the world." And how does the world benefit if not by appropriation and by assimilation? What was once untrue and then contrary to religion, becomes (according to the famous formula) what everybody knew before.

Another and less exalted indication of literary influence is *imitation*. We all can furnish examples of this, for we see the process going on under our own eyes. Dickens used to be imitated on all sides. If he is so no longer, it is because other methods of composition than his have been introduced to the notice and taken the fancy of the reader, and consequently attracted the attention of the "sedulous ape."

A third noticeable trait of literary influence may be considered in connection with the work, very different in its character, of such men as the late Mr. Freeman and Mr. Matthew Arnold. Mr. Freeman's erudition has been served up in a thousand dishes. Mr. Arnold's lively phrases, poetical quotations, bits of Greek translation, have reverberated through every newspaper from Aberdeen to Plymouth, from Norwich to Limerick, and form a considerable part of

the stock-in-trade of a number of ready writers.

But all this goes on outside 5 and 6 Victoria, c. 45.

What is it that is protected by copyright? Reproduction, of course. But what else? What is plagiary, and is it a breach of the law? The sublimity and vast reading of Milton have not protected him from the charge of stealing from a Dutchman; the exquisite scholarship and taste of Gray have not deterred persons who have read more than they have enjoyed from laying blind hands on his images and affiliating them elsewhere. To trace the origin of phrases has a fascination for some minds. Who first said "End it or mend it"? But nobody has suggested that Gray's "Elegy" or "Paradise Lost" was not entitled to the benefit of whatever copyright law existed in this country in 1751 and 1665 respectively.

The literary larcenist must do more than filch ideas, imitate mannerisms, repeat information, borrow phrases, utilise quotations; you must be able to attribute to him the felonious intention of appropriating without independent

labour a material part of a protected work. To do this is, in the eye of the law, to infringe copyright—to misuse your brother author.

Our Law Reports are full of cases of the kind—interesting cases they are too, and one thing they show very conclusively—that legal proof of literary larceny is difficult. That a particular leg of mutton is mine is capable of easy proof or disproof, but *how much of my book is mine* is a nice question. Byron, who had a masculine intelligence, in other words, a robust conscience, writing to Moore, says: "Galt says there is a coincidence between the first part of the 'Bride of Abydos' and some story of his, whether published or not, I know not, never having seen it. He is almost the last person on whom anyone would commit a literary larceny, and I am not conscious of any *witting* theft on any of the genus. As to originality, all pretensions to it are ludicrous—there is nothing new under the sun."[1]

In reading the cases in the Reports for the last hundred years, you cannot overlook the literary insignificance of the contending

[1] Moore's Life of Byron, vol. ii., p. 300.

volumes. The big authors and big books stand majestically on one side—the combatants are all small fry. The question of literary larceny is chiefly illustrated by disputes between book-makers and rival proprietors of works of reference, sea charts, Patteson's "Roads," the antiquities of *Magna Græcia*, rival encyclopædias, gazetteers, guide books, cookery books, law reports, post office and trade directories, illustrated catalogues of furniture, statistical returns, French and German dictionaries, Poole's farce, "Who's Who?" Brewer's "Guide to Science." This is not by any means an exhaustive list, but it accurately shows the nature of the proceedings.

The general rule of law cannot be better introduced than by quoting well-known words of Lord Eldon, used in 1811:[1] "The question upon the whole is whether this is a legitimate use of the plaintiff's publication in the fair exercise of a mental operation deserving the character of an original work." Of course, by employing the word "original" Lord Eldon gets into very deep water. Lord Ellenborough goes into a little more

[1] *Wilkins* v. *Aikin*, 17 Vesey, 422.

detail: "That part of the work of one author is found in another is not of itself piracy, or sufficient to support an action. A man may fairly adopt part of the work of another; he may so make use of another's labours 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 the *animus furandi?*" (*Carey* v. *Kearsley*, 4 Espinasse, 168.)

The intent to steal, the unscrupulous determination to benefit by another's labours (that other being a "protected" author) without independent work of one's own, this is to be a pirate at law. If the extraneous matter is not protected property, the offence is the moral offence of plagiary. Legal detection of the theft will usually depend upon the degree of cunning possessed by the thief. He must indeed be a tyro in his trade, a barren rascal, who cannot carry on the ancient craft of plagiary without running any real risk of being restrained by an injunction of the court. There are artifices known to the book-maker, twists and turns, whereby he may steal with impunity. If

he will only acknowledge his indebtedness to previous "labourers in the same honourable fields," and be careful to verify all the quotations, and re-correct the letterpress of these previous labourers, who in their own turn were probably not wholly destitute of the predatory instinct, it will go hard with him if he does not escape the final penalties of the law.

Indeed, it is a task of great difficulty to say what amounts to proof of an *animus furandi*. I will mention a case to show how the most careful and accomplished judges may differ. In 1866 a gentleman of Welsh descent published a volume called "The English and their Origin," which he had written in the hope of obtaining an Eisteddfod prize. In 1868 another gentleman, beguiled by the same hope, composed and also subsequently published a treatise entitled "The Pedigree of the English People." Author No. 1 read the work of author No. 2, and having done so filed his bill in Chancery alleging that author No. 2 had incorporated into his book a very considerable part of the book of author No. 1. The cause came on to be heard by the late Lord Justice

James, then a Vice-Chancellor. It is hard to imagine a more competent person to try such a case than was Sir William James. The very soul of honour, a monument of good sense and sound law, he was likewise a man of literary instincts and habits. He read both books, and came to the conclusion, which he expressed in an elaborate judgment,[1] that book No. 2 was (as to a considerable part of it) "cribbed" from book No. 1, and he granted an injunction accordingly. Author No. 2 appealed, and the appeal was heard by Lord Hatherley and Sir George Giffard. Here again one falls in love with the tribunal. Two abler men, two more conscientious judges, have rarely sat together even in the old Hall of Lincoln's Inn—now fallen from its high estate so low as to be the scene of these lectures. Lord Hatherley and Sir George Giffard read both the books, and having done so, were clearly of opinion that book No. 2 was in no sense a crib of book No. 1. Says Lord Hatherley: "The result of the whole case was this—The defendant [author No. 2] was led to look into

[1] *See* L. R. Ch. App., vol. v., p. 252 in the notes.

the particular portions of Pritchard (an earlier and 'common' author) by some of the quotations of the plaintiff [author No. 1]. Being directed to that part of Pritchard, he did go to Pritchard's books, 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 perhaps he might never have done if the plaintiff had not led the way by pointing to that author and to the works 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" (5 L. R. Ch. App. 251. 1869).

Here we see gravely described by a Lord Chancellor the innocent process how a man, having made up his mind to write a book, picks up his information on the subject of it as he goes along. After all, even Gibbon must once have heard of *Gildus* for the first time. Who, as Wordsworth exclaims, "can point as with a wand and say this portion

of the river of my mind came from that fountain?" In the case of streamlets it ought to be a little easier than in the case of rivers, but even with streamlets it is a difficult task for the proprietor, and for third parties it must always be guess-work.

The task of disentangling pirated matter from that which is either original or common property is also a ticklish job, but if the necessity arises the courts will undertake it on the principles enunciated by Lord Eldon in *Mawman* v. *Tegg*, 2 Russell 385. This Tegg, Carlyle's "Thomas Tegg and other extraneous persons," had inserted in his "London Encyclopædia" articles copied from the "Encyclopædia Metropolitana." Lord Eldon referred it to the Master to ascertain the extent of the alleged piracy, and at the same time directed the plaintiff to bring an action at law, and the defendant to keep an account, "and after all these matters are gone through I think the court will then be able to say what upon the whole ought to be done or might further be done." The "extraneous Tegg," who worked his business on the principle of "small profits and quick returns,"

concluded that the best thing he could do "upon the whole" was to compromise the suit, but before it quite died Lord Eldon found time to make the following observations:—

"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."—2 Russell, 390.

An interesting branch of the law of piracy is the right of open and avowed *quotation*. How much of a man's book, pamphlet, sheet of letterpress, tragedy, comedy, play, opera, or farce may you quote

in print? A poet-laureate publishes a birth-day Ode or "Song hymeneal," a novelist puts out a short story, which excite in the critical breast admiration or contempt—how much of the ode, how much of the short story may the critic safely include in a published judgment? Or it may be that the critic essays to give an adequate representation of a Ruskin or a Pater, a Stevenson or a Meredith. How far may his quotations extend? Then there are anthologies and collections and elegant extracts. Shakespeare and Milton, Addison and Burke, may be rifled at will. Wordsworth and Coleridge have joined the majority of unprotected authors, but Macaulay and Carlyle and Ruskin are wholly or in parts still "somebody's" property.

The reviewer of a book is entitled to illustrate his criticism by quotation. "Quotation," said Lord Eldon in *Mawman* v. *Tegg*,[1] "is necessary for the purpose of reviewing," and nobody has yet been found bold enough to assert that reviewing is not necessary. If therefore it is asked how much quotation is permissible to a reviewer, the answer must

[1] 2 Russell, p. 393.

be, as much as is necessary for a review. But what is a review? A great deal of modern reviewing is but "scissors and paste," long extracts, and short, sometimes merely exclamatory, comments. This is not reviewing but advertising. Its legality is doubtful, its utility from the author's point of view unquestionable. Publicity is the great thing nowadays. Whether it be a new novel or a new sauce, if it is to be sold, it must be shouted. It is the professional opinion that the publication of the whole of a short story, or, indeed, the whole of a book of light literature, in the columns of a widely circulated newspaper, so far from injuriously affecting, positively stimulates the sale of the volume thus advertised.

With poetry it is perhaps different. The case of *Campbell* v. *Scott*, 11 Simon 33 (1840), illustrates the perils of the anthologist, now a recognised industry. The plaintiff, and in this respect the case is unusual, was the well-known poet, and his moaning was to the effect that the defendant, who was not the well-known poet but the publisher of a work called "The Book of the Poets," had included

within the covers of the last volume of the series, without leave or licence, six complete poems belonging to the plaintiff—"Ye Mariners of England," "Lord Ullin's Daughter," "Glenara," "The Last Man," "The Song of the Greeks," "The Turkish Lady"; and copious extracts from "The Pleasures of Hope" and other poems belonging to the same mint. The defendant boldly alleged a custom of the trade to which he belonged to publish (of course in good faith) selections from the writings of living and protected authors, and asserted that this right had been constantly practised by publishers of the greatest respectability. He further said that in his opinion he would have been doing injustice to the great poetical reputation of Campbell had he omitted to give him his proper place in the "Book of the Poets." Campbell was obdurate, and demanded an injunction, which the Vice-Chancellor of England granted him.

It is now understood that to publish in an anthology a complete poem without the proprietor's leave is to commit a breach of the law of copyright, but in a review this

can hardly be so. Suppose the volume reviewed be one of sonnets or short lyrics or epigrams, how can a reviewer get on without the privilege of complete quotation? Were a new Hazlitt to review the poetry of the last three decades, who would seek to restrain, or if seeking would succeed in restraining, his marvellous faculty of apt illustration? The test must always be: Are the quotations introduced to illustrate the criticism, or is the criticism a vulgar peg on which to hang the quotations? But it is more than doubtful whether in the present day any real injury is done to the commercial interests of an author, whether poet or prose man, by extensive quotation from his writings—always assuming such quotation to be accurate.

The same general rules of law apply to quotations from newspapers just as much as to quotations from bound volumes, always supposing the difficulties created by the 18th and 19th sections of the Act of 1842, referred to in the last lecture, to be successfully surmounted. If a newspaper is registered, and if the circumstances in which any particular contribution to its columns was made were

such as to create the inference that copyright in it was to belong to the proprietor of the newspaper, that person is as much entitled to bring his action for an injunction against infringement as any other owner. He must of course make out that the article in question is proper subject matter for copyright, but so must everybody else who seeks an injunction or other relief in such cases.

English judge-made law comes in for a good deal of abuse, and is often disadvantageously compared with codes. And yet codes are but Acts of Parliament, and in England it is not the fashion to speak respectfully of Parliamentary drafting. The great objection to judge-made law is that it is scattered and not always consistent with itself, but saving these just exceptions the language of our judges is usually at least as explicit as that of codes.

Let us see what foreign codes have to say about the right of quotation.

The seventh article of the German code relating to copyright (1870) lays down that it is no breach of the law:

"(1) To reprint passages or small portions of published books or to insert even in their entirety in the body of

a considerable work the shorter pieces of an author, provided that the work referred to has a scientific character and is a collection made from different authors for use in schools, or has a special literary object. The author quoted must be named and the quotation verified by reference to the place whence it comes.

"(2) To reprint articles extracted from newspapers or periodicals; always excepting stories and scientific works and writings of a reasonable length the reproduction of which is expressly forbidden in the newspaper or periodical.

"(3) To reprint laws, codes, official documents, etc.

"(4) To print speeches, sermons, discourses, etc."

The Austrian law I will quote in the French translation of M. Lyon-Caen. It is the 5th article of the code or law of 1846.

"Au contraire, n'est pas à considérer comme une contrefaçon et est par suite permis.

"(*a*) La citation textuelle de passages isolés d'une œuvre déjà publiée.

"(*b*) L'insertion d'articles, de poésies isolés, etc., empruntés à une œuvre de plus d'étendue à une revue ou à une feuille périodique quelconque, dans une œuvre nouvelle et indépendante d'après son contenu, spécialement dans une œuvre critique et historique, ou dans un recueil d'extraits d'œuvres de plusieurs écrivains, composé dans un but littéraire spécial, ou destiné à l'usage des églises ou des écoles. Seulement la source originale doit être expressément indiquée et l'article emprunté ne doit ni dépasser une feuille de l'œuvre dont il est tiré ni être publié comme brochure separée. Quand il s'agit de journaux de feuilles périodiques quelconques, l'article

emprunté ne dois pas faire plus de deux feuilles pour une année. Les journaux politiques proprement dits sont seulement tenus de mentionner la source."

In Spain the Code of January, 1879, contains the following articles relating to newspapers :—

"Art. 29.—Les propriétaires de journaux, qui veulent s'en assurer la propriété et les assimiler aux productions littéraires pour la jouissance des bénéfices de cette loi, présenteront à la fin de chaque année, au bureau d'enrégistrement de la propriété intellectuelle trois collections des numéros publiés pendant la même année.

"Art. 30.—L'auteur ou le traducteur des écrits qui ont été insérés ou qui seront à l'avenir insérés dans les publications périodiques, ainsi que leurs ayants droit, pourront publier ces écrits sous forme de collection choisie ou complète, s'il n'en pas été autrement convenu avec le propriétaire du journal.

"Art. 31.—Les écrits et télégrammes insérés dans les publications périodiques pourront être reproduits par toutes autres publications de même genre, si la publication originale ne porte pas, en tête ou à la fin de l'article, que la reproduction est interdite ; dans tous les cas, on doit toujours indiquer la source où l'on a puisé."

In Belgium newspapers are allowed to help themselves from their neighbours, but they must acknowledge the appropriation, nor may they take an article if its production

is expressly forbidden (Article 14 of the law of 22nd March, 1886).

Denmark, by a law dated 29th December, 1857, permits as follows (Article 13):—

"(1) La citation litterale de passages détachés d'un écrit imprimé.

"(2) La réimpression dans les journaux d'articles ou de nouvelles détachés empruntés à d'autres journaux à la condition d'indiquer expressément la source.

"(3) La réimpression de poésies comme text de compositions musicales.

"(4) L'insertion de morceaux détachés poésies ou autres empruntés à des écrits imprimés dans des ouvrages de critique ou d'histoire littéraire.

"(5) L'insertion de ces morceaux ou poésies dans de recueils de lecture, livres scolaires, recueils de chants, ou autres analogues, lorsqu'il s'est écoulé au moins un an depuis la première édition de l'écrit.

"(6) L'emploi de la même manière, de compositions musicales.

"(7) Toutefois, les ouvrages littéraires ou musicaux ainsi utilisés devront toujours porter, dans les cas de réimpression ou d'insertion prévus aux numéros 3 et 5, le nom de l'auteur, et dans le cas du numéro 6, le nom du compositeur si ces noms ont été déjà publiés."

Passing from quotations we come to titles. The title of a book, "*Est-il un objet de privilège compris dans la protection que la loi assure à tout genre d'écrit?*" This question is asked by M. Renouard in his delightful

Traité des Droits d'Auteurs, tom. ii., p. 118. Speaking generally, and remembering that *la réponse depend des circonstances*, M. Renouard, as a French lawyer, answers Yes!

Yet, when we examine his reasoning we find it proceeding not upon copyright notions, but upon the general rule both of law and morals that one tradesman must not get up his goods so like another tradesman's similar goods as to deceive buyers as to the identity of the articles. But a tradesman is not to be permitted to use in his advertisements common words in connection with his article, and then by reason of his expenditure to claim those words as his, for the base purpose of vending his commodity. He cannot claim the *words* unless they are special, but he can rely upon what is called the "get-up" of his goods for the purpose of proving that a rival has, with or even without a fraudulent intent, imitated that "get-up."

For example, in France, in 1833, M. Michaud, the editor of the famous *Biographie Universelle*, in fifty-two volumes, failed in his attempt to restrain the publication by

Gosselin et Furne of a *Biographie Universelle* in six volumes, "par Une Société de Gens de Lettres, de Professeurs et de Biographes":—

"Considérant que la titre donné par les editeurs Gosselin et Furne à l'ouvrage par eux publié est une expression génériqué consacrée par l'usage pour ce genre d'écrits, et que les ressemblances existantes entre ce titre et la biographie de Michaud, notamment les différences de prix, et d'étendue des deux ouvrages, ne permettaient aucune confusion, la Cour Royale de Paris, informe les deux jugements (du tribunal de commerce), et rejette les réclamations de Michaud."—Renouard, ii. 125.

This language points to confusion of goods, not to the wrongful appropriation of protected matter.

If the appropriated title is the name of a newspaper or periodical, like *Le Constitutionnel* or *Punch*, it then clearly becomes not a question of copyright but of trade-name. Why should a rival newspaper proprietor call his sheet by the name of my newspaper, if his object be not to steal my customers?

This reasoning has small application to the ordinary case of books. Authors, to do them bare justice, seldom wish to create the impression that their books were written by anybody else, and though once in a century a

roguish publisher might appear who was ready and willing to palm off upon the reading public Mr. A.'s trashy novel for Mr. B.'s good one of the same name, he would, I think, find it hard to do so with any chance of success, without exposing himself to the general rule of law already referred to.

In English law a title merely as such is not copyright.[1] I may not pass off my books as yours, that is, I must not by calling my books by the same names as yours, printing them on the same paper, binding them in the same colours, and generally adopting the same outward style and devices, cheat people who want *you* into buying *me*; but if I am silly enough to write a novel and call it "The Egoist," or even "The Ordeal of Richard Feverel," taking care to couple my name with it, Mr. George Meredith neither could nor would complain. And why should he? The style is the man.

Obviously, only fancy names could be protected. Grave works, histories, and the

[1] *Weldon* v. *Dicks* (10 Chy. D., 247) is on this point overruled by *Dicks* v. *Yates* (18 Chy. D., 76). *See per* Lindley, L.J. (38 Chy. D., 142.)

like, are usually, though not always, content to repeat their titles, one after another—a sober record. Whilst, as for fancy titles, who dare say they are ever new? "Vanity Fair"—is it Thackeray's or Bunyan's? Is "In Memoriam" the property of Lord Tennyson? Does "Far from the Madding Crowd" belong to Mr. Hardy, and "Red as a Rose is She" to Miss Broughton? Playwrights and novelists had better leave the matter alone, for the more it is stirred the less we shall come to think of their originality.

I remember a case coming into the Court of Chancery about a novel written by that veteran and admirable story-teller, Miss Braddon, which she had dubbed "Splendid Misery."[1] Somebody else called a tale by the same name, and Miss Braddon's publisher objected. A little research of the kind "that turns no student pale" revealed to the defendant's counsel that whilst the century was still young a Mr. Surr had published a novel called "Splendid Misery." The counsel flourished this antiquated fact, for to him it seemed

[1] *Dicks* v. *Yates* (18 Chy. D., 76).

as old as Nineveh, in the face of the judge, who happened to be Sir James Bacon. "Oh, dear me—yes!" languidly remarked that accomplished and aged man; "I remember Mr. Surr's book coming out very well. It had a considerable vogue at the time, though, no doubt, the subsequent publication of the Waverley novels interfered a good deal with the popularity of books of the kind to which it belonged."

It is now well-settled law in England that the titles of books are not copyright.

A word may here be said, though the subject has no special connection with literary larceny, about speeches, sermons, and lectures. Copyright protects "copy." The invader of copyright must be confronted with the original and protected article from which he has purloined. Hence the easy flow of the extempore speaker untroubled with notes, be he cleric or layman, is not within the Acts.[1]

But if the discourse be written, or at least capable of reconstruction from careful

[1] *See* Lord Eldon in *Abernethy* v. *Hutchinson*, 1 Hall and Twisden, 39.

notes, what then? An author's right to his manuscript is a Common Law right; the paper is his, and the writing on the paper, but has he, by reading or repeating it out aloud in a public place for a fee or for love, made a present of it in its literary form to the public? Was there anything in law to prevent the local print from reproducing *verbatim* Mr. Barnes Newcome's lecture to his constituents on "Mrs. Hemans and the Poetry of the Affections"?[1] As a rule lecturers are not and need not be agitated on this subject. Unless they happen to be politicians of the first rank, lecturing on some subject of which their ignorance is extensive, they will *not* be reported *verbatim*. That this is so is proved by the fact that in the present state of the law (see 5 and 6 William IV., c. 65) (1835) no lecture is protected unless notice in writing of its delivery shall have been given to two justices living within five miles of the place where such lecture shall be delivered two days at least before delivering the same.

[1] Consult *Nichols* v. *Pitman*, 26 Chy. D., 374, as to relief against the shorthand writer.

As this statutory notice is rarely if ever given, the vast majority of lectures are unprotected, at all events from *verbatim* reports in the newspapers, and if lecturers ever grumble it is rather with the scantiness than with the profusion of the space allotted to them in the Press.

Sermons, like speeches, properly so called, are not supposed to claim copyright. It is absurd to imagine a Wesley or a Bright winding up one of their moving discourses with "All rights reserved." Their *intention* was to sow their words broadcast. To make a selection in book form from newspaper reports of sermons and speeches, as is sometimes done (more often with popular sermons than with speeches), is, if unaccompanied by the orator's permission, an act of bad taste, but not illegal.

The subject of Literary Larceny is not, from the lawyer's point of view, one of much importance, whilst from the author's it may safely be said that frankly to acknowledge indebtedness has always been a tradition honoured in the observance.

VII.

THE PRESENT SITUATION.

VII.

THE PRESENT SITUATION.

THE question of copyright has, in these latter days, with so many other things, descended into the market-place, and joined the wrangle of contending interests and rival greedinesses. Dr. Johnson is supposed, in his famous letter to Lord Chesterfield, to have sounded the death-knell of the patron, and to have exalted the booksellers, or publishers as they are now called, into his place, and now Sir Walter Besant, a brave knight, tilts manfully against the publisher, and bids authors realise the commercial value of their wares.

Up to a recent date there is abundant evidence to show that authors' profits have, with few exceptions, been small, and this general smallness had an influence upon their position and governed their ideas. But now there exists, and every day its swollen ranks are recruited, a great, greedy, ill-informed,

tasteless public, chiefly composed of people under middle-age, who are anxious to be amused, and, so far as is consistent with amusement, to be instructed by means of books, magazines, newspapers, plays, and pictures. To gain and retain the ear of this public even for a decade, to tickle their fancy, to win their confidence, is (to a prolific writer) to make a fortune, and at no time in the world's history was the spending of a fortune so easy and so agreeable as in the England of to-day. Half-a-dozen really popular novels (and every novel is not popular that seemeth so), a couple of successful long-running plays, will put their authors in possession of a sum of money more than equalling in amount the slow accumulations of thirty years of a laborious and successful professional life. All profits are grossly exaggerated. The income-tax commissioners have this fact brought home to them. The heroes of the Bar, the pet doctors, the army crammers, the playwrights, and the novelists do not on an average of years make the sums attributed to them by the attorneys' clerks, druggists' apprentices,

printers' devils, scene-shifters, and other persons who play the part of chorus to these great men; but for all that, the pecuniary rewards of a really popular author and playwright are to-day very large and seem likely to go on increasing.

Indifference to the money honestly produced by the sale of books has never been a general characteristic of the British author, who for the most part has always taken whatever he could get. Shakespeare and Milton were paid the market-price of their labour. Pope made a good thing out of Homer, and Cowper and Lord Derby tried to do the same. Robertson and Hume drove very good bargains with the booksellers, and though neither Gibbon nor Johnson were great hands at a bargain, still bargains they drove. Goldsmith was very inadequately rewarded for his "Vicar," but had there been a "firmer" offer he would have accepted it. Sir Walter Scott carried on a lively trade at Abbotsford, and Lord Byron chaffered with John Murray with his accustomed amusing effrontery. Everybody has heard of Macaulay's famous cheque.

Carlyle, Dickens, Thackeray, Miss Brontë, George Eliot, Tennyson, and Browning were honest men and women who, though they did not exactly write for money, took as much money as they thought they could get for what they had written.

As payers of the poor-rate we all feel that an author, particularly if he has a wife and family, would be clearly guilty of a grave dereliction of duty if having composed a history, written a novel, or invented a play, he did not forthwith carry it into the book-market and make the best contract he could for its publication.

Once you use the word *contract* certain consequences, legal and moral, follow as the night the day. The contractual relationship involves *like-mindedness*, and in order for persons to be like-minded they must mean the same thing. All the cards must be on the table, and when the accounts come to be settled between the parties according to the terms of their contract, they must be truthful and complete. This is rudimentary law and elementary morals.

If the subject-matter of a contract be-

tween an author and his publisher was an illustrated trade catalogue I can hardly suppose it would give rise to sentiment, but if the book be one of a literary complexion the negotiation does become a little delicate. After all, sneer as you may at the vanity of human wishes, all authors, even the humblest, write for fame as well as for money, and for fame more than for money. The author falls in love with his own phrases, however clumsy, with his own generalizations, however hasty, with the puppets of his own fancy, however ungainly—even his epigrams sparkle—and when he goes to a publisher with his "copy" under his arm, he is in no mood for petty huxtering, and is indeed prone to forget that he is inviting that excellent man to embark his capital and enterprise into what, apart from hoped-for profit, is no concern of his.

An author easily gets to look upon publishers as if they stood in a fiduciary relation towards him—as if they owed him a duty—as if it were their sacred office to introduce new writers to the world. He forgets that if he likes to take the trouble and

has the money or the credit he can publish the book himself. The paper merchant will sell him paper, the printer will print his sheets, the binder will bind, the newspaper will advertise, the booksellers will accept copies on the terms of their trade. He has no actual need of a publisher. If the author replies, "I have no cash wherewith to make the preliminary payments," or "I have neither the time nor the energy to make the necessary arrangements," he must then be content to buy the publisher's cash, the publisher's time and energy, the publisher's clerks and business connection, on the best terms he can, and provided those terms are explained to him, and the accounts when delivered to him are honest and complete, there is an end of the matter.

Most authors of real distinction, whether popular or grave, have got on with their publishers well enough, though, no doubt, exceptions occur to the mind.

But just as authors are tempted by their natural vanity to take a fanciful view of a publisher's business, so, too, publishers grow disposed to regard authors as a class

of persons who are so greatly obliged to their publishers for publishing and spreading abroad the books which may make their authors famous, that they ought not to insist upon a too rigorous system of explanation and account. Authors are not expected to be men of business.

Nor will this be denied—that never was a set of men so ignorant of the conditions of the trade on which they largely depended as authors. They knew next to nothing about the commerce of literature. Dr. Johnson knew about it, but then it was one of the characteristics of that great man to concern himself with the details of all trades and manufactures, and he was himself the son of a bookseller and had lived in a shop. But with hardly an exception authors were so ignorant of the book trade that it is wonderful no one of them has ever thought of writing a book about it. Nor could authors easily obtain advice, for solicitors and barristers were well-nigh as ignorant as the authors themselves. You may search the old books of precedents almost in vain for a publisher's agreement with an author,

and if one does occur it is a crude and perfunctory performance, of no value whatever. The trade has carried on its business for centuries in its own parlours, and very much in private.

In 1884, or thereabouts, the Society of Authors was incorporated, and ever since that date it has busied itself with the business affairs of authors—considering agreements, demanding accounts, discussing terms, denouncing the unjust retention of manuscripts, and so on. It likewise gives much valuable advice to literary aspirants as to the reputation of publishers and the wisdom or folly of signing any particular agreement. It also has greatly concerned itself with the question of copyright reform both at home, in the Colonies, and abroad.

Work of this kind is apt to encourage unduly an atmosphere of suspicion, and also to promote in uneducated minds the terrible delusion that paper stained with ink is an article of commercial value, as of course it may be. But so far as the Authors' Society has taught authors to examine carefully their agreements and to consider their rights,

and generally in a brotherly way to look after one another's interests, it has done and is doing useful and honourable work, and deserves to receive a much larger measure of support than it has yet done.

If it is objected to the Society that it too much emphasises the commercial side of literature, the answer must be, it is with the commercial side of literature the Society is concerned.

After all, why should not a really bad author like Mr. Thomas Rot or Miss Blatheria Gabblegoose make £100,000 out of their trashy books, if as a matter of fair commerce that sum represents their true share of the profits? Why should Rot's children and Gabblegoose's nephews and nieces be deprived of the cash value of their relatives' ridiculous popularity? Educate the masses if you can, so as to make that popularity impossible, but so long as it exists it is as much (within the limits of the period assigned by the law which, indeed, it will never exceed) the property of its creator as if it were somebody's soap or so-and-so's pills.

Commercial law does not distinguish

between the good and the bad. An exporter of hideously coloured pocket-handkerchiefs is as much entitled to his trade-profits on their re-sale as if they were made of the most exquisite cambric and lace.

The utmost I am willing to admit against the Society of Authors is that the editor of its monthly paper, "The Author," occasionally admits into its correspondence-columns the most truly amazing letters from persons engaged in the ancient craft of scribbling, which argue an inflated belief in the value and importance of literary compositions which can only entail disappointment, misery, and even madness upon its most unhappy victims. To encourage these poor nympholepts in their vain pursuit of editors and publishers is sheer barbarity.

The publishers (who have shown a little temper with the Society) lately instructed an eminent commercial lawyer to settle, in consultation with an astute equity draftsman, a model agreement between a publisher and an intending author. Here was to be the outcome of four centuries! The trade and the author were at last to be of one mind.

The publishers would have done well to have invited Sir Frederick Pollock (let me say) to attend the consultation between the eminent commercial lawyer and the astute equity draftsman, who, between them, produced a model agreement, which so far from soothing the suspicions of authors, has strengthened them—a thing to be regretted. Eventually a concordat will be arrived at. Each party is to a great extent independent of the other. Authors can, if they choose, produce their own masterpieces, and publishers can make very pretty fortunes out of non-copyright authors, who are not in a position to peruse draft agreements or demand yearly accounts; but the next time a model agreement is drafted between a publisher and an author, let the author's side be represented. I owe you an apology for this digression.

For some time past a new Copyright Law has loomed in the near distance:—1842, Sergeant Talfourd and Lord Mahon seem almost as far away as Queen Anne, Dr. Swift and the Stationers' Company. The Berne Convention, the American Acts of

Congress, the growth of our Colonies, the growing importance of the Commerce of Literature, the report of the Copyright Commission of 1878, the activity of the Copyright Association, of the Publishers' Association, of the Society of Authors, and generally that most fascinating of all movements, which merely to watch is exhilaration, the course of events, have carried us an immense distance from our old moorings.

As to the duration of copyright.—Perpetual copyright is dead. Nobody cares about it any longer. The average life of a book! What is it? Did Glover's "Leonidas" belong to me, would I republish it in the age of Rudyard Kipling? On the other hand, would we tolerate the ownership of "Paradise Lost" by Mr. Symonds' assignee? And yet Mr. Symonds bought it and took an assignment of it to himself, his heirs, and assigns for ever. We would not tolerate it, and there is an end of it. The world is governed by ideas, and one of its ideas is that authors and artists are entitled to reasonable protection for their books and pictures, and nothing more.

A scheme begotten in the office of the Board of Trade some time in the early 'seventies attracted a good deal of attention, advocated as it was with persistent energy, and in language of great lucidity, by Lord (then Sir Thomas) Farrer. The scheme was to allow anybody to republish any book he chose (after a short period, say three years) on the terms of paying the author or his assigns a royalty on sales, such royalty to be fixed—in the event, the not improbable event, of the parties differing—by a Board of Trade conciliator. This preposterous scheme, which reeks of our adorable "Civil Service," was based on the supposed misery of our poor population, sorely standing in need of the literature of the hour. It was knocked on the head by Mr. Herbert Spencer, and other eminent men who gave evidence before the Copyright Commission.

There is now a general agreement that the rational treatment of the subject is to secure to authors and their assigns protection for the period of the author's life, *plus* a term of years. How long is that term to be? Some say thirty years, some

fifty; Parliament will soon be called upon to decide this question. To assign, on grounds of reason, expediency, and fair play, the due limits of an author's right of exclusive enjoyment will be fine matter for a Wednesday afternoon.

Lord Herschell, who was one of the Copyright Commissioners who reported in 1878 on the whole law, recently obtained leave to introduce into the House of Lords a Bill to consolidate and amend the Copyright Law. This Bill was referred to a Select Committee of Peers, which has taken evidence. Doubtless the Bill will be reintroduced next session, and it is understood the present Government wish it well. A few of its clauses are worth reading as they show what may be regarded as the views of the intelligent law-reformer on some of the points I have had to consider in these lectures:—

1. The author of an original literary or artistic work first published in any part of Her Majesty's dominions, or first published simultaneously therein and elsewhere, shall have copyright in his work throughout Her Majesty's dominions, whether he is or is not a British subject.

2. Copyright in a literary or artistic work first published

after the commencement of this Act shall endure for the following terms:—

(i.) If the work is published during the life and in the true name of the author, then for the life of the author, and until thirty years after the end of the year in which he died.

(ii.) If the work is first published either after the death of the author, or not in his true name, then until the end of thirty years after the year in which the work was published.

5. Copyright in a book shall mean the exclusive liberty of printing or otherwise multiplying copies thereof: the owner of the copyright shall also have the exclusive right of doing or granting licenses to do any of the following acts, viz.:—

(i.) To make, print, or otherwise multiply any adaptation or abridgment of the book or any part thereof.

(ii.) To make, print, or otherwise multiply any translation of the book or of any part thereof.

(iii.) To make, print, or otherwise multiply or to perform any dramatised version of the book or of any part thereof.

6. The copyright in any article or other contribution first published in an encyclopædia, dictionary, yearbook, annual register, or similar work, shall in every case belong to the owner of such encyclopædia, dictionary, yearbook, annual register, or similar work.

7. Subject to the enactment in clause six, where any article or other contribution is first published in a review, newspaper, magazine, or other similar periodical, the copyright in such article or other contribution shall be the property of the author thereof. Provided that where

such author is either paid or to be paid for such article or other contribution by, or is otherwise in the paid employ of such review, newspaper, magazine, or other similar periodical, then subject to any agreement in writing to the contrary,

(i.) Such owner shall, during the subsistence of copyright in such article or other contribution, have the sole right of publishing the same as part of such review, newspaper, magazine, or other similar periodical, but not in any other form.

(ii.) The author shall not, without the consent of such owner, print or publish such article or other contribution in any form until after the expiration of three years from the end of the year of its first publication.

(iii.) The author may at any time register the said article or other contribution at Stationers' Hall as a separate work, and shall thereupon, without prejudice to the rights of such owner as aforesaid, be entitled to the remedies provided by this Act for infringement of copyright.

9. This Act shall apply to a lawfully produced translation of a book in like manner as if it were an original book.

11. Copyright in respect of a newspaper shall apply only to such parts of the newspaper as are compositions of an original literary character, to original illustrations therein, and to such news and information as have been specially and independently obtained.

LECTURES.

12. The author of any lecture shall be entitled to copyright therein as if the same were a book, subject to the following modifications and additions:—

(i.) The first public delivery of a lecture shall be deemed to be publication thereof.

(ii.) So long as a lecture has not been published as a book by or with the consent of the author, the copyright therein shall include the exclusive right of delivering the same in public, but when so published the copyright in the book shall date from the first delivery of the lecture.

(iii.) A report of a lecture delivered in public in the ordinary current edition of a newspaper after the delivery of such lecture shall not be deemed an infringement of the copyright unless the author before delivering the same gives public notice that he prohibits the same being reported, but no such report shall be deemed to be a publication of the lecture within the meaning of sub-section (i.)—

(iv.) The notice referred to in the last preceding clause may be given either by affixing the same to the door of the place where the lecture is delivered, or by advertisement in one or more newspapers published and circulating in the district, or by declaration made publicly by the lecturer immediately before the delivery of his lecture at the place where he delivers the same.

(v.) Delivery of lectures in any university, or public school or college, or on any public foundation, or by any person in virtue of or according to any gift, endowment, or foundation, shall not be deemed publication thereof.

The subject of *Colonial Copyright* would probably not have excited the interest it has but for the proximity of Canada to the

United States of America. Our Colonies have hitherto not troubled themselves much about new books. Nobody need sneer at them for that. If you are going to live up country you will hardly care to take with you all Balzac's novels or even all Miss Braddon's. A few well-thumbed volumes must be your companions. The Bible, Shakespeare, and Macaulay's Essays were said to be the books most frequently taken with them by our early colonists, and could one be convinced that these books were not only taken but read, we should be supplied with a reason succinct and conclusive why we have so greatly succeeded as a colonizing nation. What a colonist in the old days really pined after was the occasional sight of a newspaper from the old home. Who can wonder?

But in the United States of America there has long been a leisured class and a reading school-taught people, and in the absence of any law to the contrary it became the habit of the American publishers to reprint at comparatively cheap rates the works of British copyright authors. These

cheap reprints naturally found their way into the Dominion of Canada. Hence a turmoil. So far as the United States were concerned, our authors had no remedy but abuse—but Canada, was it not, as it were, our own kail-yard? Did not the Queen's writs run there, and so on? Certainly they did—yet with a difference, and to perceive the difference is statesmanship.

In 1842 nobody was thinking about the Colonies in connection with copyright. It was in one of his copyright speeches in the House of Commons that Macaulay made his famous remark about the value of land in Australia.[1] The Act of 1842 conferred upon authors publishing their books in Great Britain or Ireland copyright for the named term throughout the British Dominions,

[1] "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 2000 or 2100 somebody who claims through him will employ more shepherds than Prince Esterhazy and will have the finest house and gallery of pictures in Victoria or Sydney."—*See Speeches*, 235.

meaning, thereby "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." By the 15th section of the Act any person who *in any part of the British Dominions* printed or imported or sold or published any book in which there was subsisting copyright without the written consent of the proprietor, was made 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 had been committed.

Thus we have here an Imperial law of copyright binding on everyone everywhere throughout the British Dominions. Whatever Parliament could do in the way of custom-office assistance and trade regulation laws was done. All that Canada could do was to smuggle, and when we complained, she complained back: "What can I do? Just the other side of my immense frontier

there grows and flourishes a green bay-tree of knowledge, bearing rich crops of cheap reprints of Tennyson and Ruskin and Carlyle, and of all the novels and essays of the old country, and I am forbidden to stretch forth my hand and taste! How am I to grow cultured? Would it not be better for me in the higher aspects of my nature to become an American and to float the Stars and Stripes and cheap books rather than the Union Jack and dear ones?" This was the tenor of the complaint Canada made in the ear of the Board of Trade, and that Board espoused their cause. "What right have authors," exclaimed the indignant Board, always eager to snub somebody, "to stand between us and our colonists, panting to be cultured? If books are not cheap, let us make them so." Thereupon was passed the *Foreign Reprints Act* of 1847 (10 and 11 Vict. c. 95), which enabled the Queen in Council to suspend the Act of 1842 so far as any British possession was concerned whenever she was satisfied that such possession had by local law made due provision for securing or protecting the rights of British authors in such possession.

Canada promptly passed a law allowing American reprints to cross her border on payment of a custom duty of 12½ per cent., to be collected by the Canadian Government and paid to the British Government, who was to hold the same for the use and behoof of the reprinted author. The Act was a ludicrous failure. Mr. Copinger, in his valuable treatise on the Law of Copyright, mentions the case of the late Archbishop Trench, who was both a useful and a popular author. In 1875 Dr. Trench was the fortunate recipient of a letter from Her Majesty's Treasury informing him of the fact that they were his debtors to the tune of eleven pennies, which they were prepared to pay over to him on presentation of a signed receipt. This capital sum represented the whole amount levied in Canada on the Archbishop's behalf during ten years. From the point of view of the British author, elevenpence for ten years' sale was like the gold-headed cane bequeathed by old Peter Featherstone to Mr. Borthrop Trumbull, "farcical, considered as an acknowledgment." But the Canadians did not like the *Foreign*

Reprints Act any better than Dr. Trench. They grumbled at being obliged to *import* their cheap reprints from America instead of being allowed to *manufacture* the article for themselves. This was the thing on which they now set their hearts. Why should they not be allowed to republish what copyright books they thought fit, paying an excise duty of 12½ per cent. for the benefit of the authors? If you ask why the difficulty arose you must be reminded it was all a difference of price—the British price was high, the American price was low, and the Canadian claim was to have the article at the American price, and the great fact that supported the claim was that by smuggling they could and did get the American article at the American price. It was then suggested that Canada should have a copyright law of her own, and should confer upon books published in Canada a period of protection within the Dominion. This proposal suggested the query: Would it be lawful to import the Canadian copyright edition into England? Sir Thomas Farrer and the Board of Trade cried "Yes." "Certainly." "Why not?" "Down with

prices." The publishers at home and the few authors who took the trouble to know what was going on answered "No, certainly not." In the end Canada passed in 1875 a Copyright Act of her own, constituting the Board of Agriculture a kind of Stationers' Hall, and conferring copyright for a period of twenty-eight years upon any book or artistic work printed or reprinted, produced or reproduced, in Canada.

Here we have an example of what is called Concurrent Copyright. The Imperial Act of 1842 had already conferred Copyright for a longer term than twenty-eight years within Canada upon all books published in Great Britain or Ireland, and yet here we have a shorter term created by a local Act within the limits of the Dominion. The state of the author is indeed twice blessed.

This Act of 1875 fluttered the Parliamentary dove-cotes here at home. Did it not interfere with the already established rights of British authors? In order to get over the difficulty a British Act of Parliament was passed to give effect to the Canadian Act (38 & 39 Vict. c. 53), in which

Act, to the disgust of Sir Thomas Farrer and the Board of Trade, a clause was inserted prohibiting the importation of the Canadian reprints.

In 1889 Canada amended the Act of 1875, but the amendments are not material to be here stated.

How many British books are annually published and printed in Canada under the provisions of the Canadian law I have not discovered. But a good many are, and in the case of novels the Canadian price is fifty per cent. cheaper than the London price.

Australia is regarded by quick-nosed British authors as the best-stocked "cover" of the future.

Lord Herschell's Bill contains (among others) the following clauses relating to Colonial Copyright:—

(35.) Where an Act or Ordinance shall be passed in any British possession respecting Copyright in any literary or artistic works first published in any other part of the British Dominions, Her Majesty the Queen in Council may make an Order modifying this Act so far as it applies to that British possession, and to any literary or artistic

works so published in such manner as to Her Majesty in Council seems expedient—

Provided as follows:—

Before making any such Order in respect of any British possession Her Majesty in Council shall be satisfied that the British possession has made such provisions as it appears to Her Majesty expedient to require for the protection of authors of works first published in other parts of the British Dominions.

37. Where it appears to Her Majesty in Council that, having regard to the position, size, or other circumstances of any British possession, foreign reprints of books first published in the United Kingdom and entitled to copyright therein, ought to be permitted to be imported into that possession, and that effectual and reasonable provision has been made by the law of that possession for all the following objects; namely—

(i.) For preventing the importation into that possession of foreign reprints, except according to this Act;

(ii.) For imposing, collecting, and remitting to the copyright owner a reasonable percentage on all foreign reprints imported into that possession under this Act; and

(iii.) For stamping on the title-page of each imported copy the words, "Foreign reprint," for seizing unstamped copies, and for any other object for which, in the opinion of Her Majesty in Council, provision ought, for the purposes of this Act, to be made;

Her Majesty may, by Order in Council, direct that from and after the date of the Order, or such later date as may be specified in the Order, and for so long as the

said Order in Council is effectively carried out and in force, any person may, notwithstanding anything in any Act or law, import into that possession foreign reprints of any book, whether published before or after the commencement of this Act, subject nevertheless to the provisions of this Act and to the law of the British possession.

In New South Wales, South Australia, Victoria, Western Australia, Cape of Good Hope, and Natal and other colonies, there exist local laws establishing registers for copyright works, and conferring upon the proprietors of such registered works divers periods of protection. These colonies do not, like Canada, require a book to be printed within their respective territories in order to obtain the protection secured by the Acts.

It only remains now to call your attention to the mode in which the new Bill proposes to deal with the great question of International Copyright, which is perhaps the most exalted aspect in which it is possible to regard the subject of these lectures. Part III. of the Bill is entitled "International Copyright" and contains (among other) the following clauses—

International Copyright.

38. Her Majesty the Queen may, by Order in Council, direct that this Act shall apply to literary and artistic works, or any class of literary or artistic works, first published in the foreign country or countries named in the Order in like manner as if the works had been first published in the United Kingdom, and thereupon, subject to the provisions of this Act and of the Order, this Act shall apply accordingly.

Provided as follows:—

(i.) Before making any such Order in respect of any foreign country, Her Majesty in Council shall be satisfied that the foreign country has made such provisions as it appears to Her Majesty expedient to require for the protection of authors of works first published in the British Dominions:

(ii.) This Act, and an Order made under this part of this Act, shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which the work was first published:

(iii.) No registration and delivery of copies of works first published in a foreign country shall be necessary in the United Kingdom, but the application of this Act to foreign works shall be subject to the accomplishment of the conditions and formalities prescribed by law in the foreign country in which the work was first published.

40.—(1.) An Order in Council under this Part of this Act may provide for determining the country in which a literary or artistic work published simultaneously in two or more countries is to be deemed, for the purposes of copyright, to have been first published.

(2.) Where a work produced simultaneously in the United Kingdom, and in some foreign country or countries, is, by virtue of an Order in Council under this Part of this Act, deemed for the purposes of copyright to be first published in one of the said foreign countries, and not in the United Kingdom, the copyright in the United Kingdom shall be such only as exists by virtue of publication in the said foreign country; and shall not be such as would have been acquired if the work had been first published in the United Kingdom.

41. Notwithstanding anything in this Act,

(1) Any article of political discussion which has been published in any newspaper in a foreign country may, if the source is acknowledged, be republished or translated in any newspaper in this country; and

(2) Any article relating to any other subject which has been so published as aforesaid may if its source is 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 in which the article was first published.

I may conclude these lectures in the gracious language so often employed by the Crown in addressing Parliament, by commending these weighty matters to your experienced judgment.

INDEX.

Abridgments, 158
Acts of Parliament (*see* Statutes), 55
Almanacks (belonged to the king), 55
America, United States of—
duration of Copyright in, 36
Copyright League, 36
grants Copyright to foreigners, 36
Apsley, Lord Chancellor, 128, 136
Arber, Mr. Edward, 60, 71
Arnold, Mr. Matthew, 25, 168
Art of Printing, 15
"Arcopagitica," The, 65, 67, 77
Articles in Reviews, etc., Copyright in, 159, 209
Augustine, St., 43, 46
Author's "copy"? what is, 73
Authors drive best bargains they can, 197
Authors' Society, 202

Bassompierre, M., Publisher of Liége, 13
Bede, 44
Belgium—
joins the Convention of Berne, 31
law as to quotations in, 184
Berne, Convention of, 30
Bibles and Testaments (belonged to the king), 55
Blackstone, Sir William, 23, 131
Booksellers, The, 27
Booksellers' "copy"? what is, 77
Brazil, duration of Copyright in, 37
Browning, Robert, duration of Copyright in poems of, 148
Bunyan, John, 20, 102
Byron, Lord, 170

Camden, Lord Chancellor, 124
Canada, 35, 211
Copyright Acts of 1875 and 1889, 218, 219
Canterbury, Archbishop of, 21, 60
Carlyle, Mr., 26, 176
Cases cited—
Abernethy *v.* Hutchinson (1 Hall and Twisden, 28), 190
Baskett *v.* University of Cambridge (1 W. Blackstone, 105), 54
Campbell *v.* Scott (11 Sim., 31), 179
Cary *v.* Kearsley (4 Esp., 170), 172
Dicks *v.* Yates (18 Ch. Div., 76), 188, 189
Dodsley *v.* Kinnersley (Amb., 403), 158
Donaldson *v.* Becket (4 Burrow's, 2408; 2 Brown's Parly. Cases, 129), 23, 122, 143
Eyre *v.* Walker (cited, 4 Burrow's, 2325), 103
Forrester *v.* Walker (cited, 2 Brown's Parly. Cases, 138), 114
Licensed Victuallers' Newspaper *v.* Bingham (38 Ch. Div., 139), 188

Mawman *v.* Tegg (2 Russ., 385), 176, 177, 178
Millar *v.* Taylor (4 Burrow's, 2303), 91, 113
Nichols *v.* Pitman (26 Ch. Div., 374), 191
Pope *v.* Curl (2 Atkyns, 342), 114
Pike *v.* Nicholas (L.R., 5 Ch. 251), 173
Queensbury, Duke of, *v.* Shebbeare (2 Eden, 329), 114
Routledge *v.* Low (L.R., 3 H.L., 100), 149, 151
Tonson *v.* Collins (1 W. Blackstone, 300, 321), 41, 106
Tonson *v.* Walker (3 Swan, 672), 104
Trade Auxiliary Co. *v.* Middlesborough and District Tradesmen's Protection Association (40 Ch. Div., 425), 161
Walter *v.* Howe (17 Ch. Div., 708), 159
Walter *v.* Steinkopff (1892, 3 Ch., 489), 162
Walthoe *v.* Walker (cited, 4 Burrow's, 2326), 104
Warne *v.* Seebohm (39 Ch. Div., 73), 156
Webb *v.* Rose (cited, 4 Burrow's, 2330), 114
Weldon *v.* Dicks (10 Ch. Div., 247), 188
Wilkins *v.* Aikin (17 Vesey, 422), 171
Caxton, 41, 54
Chancery, Court of—
  its Injunctions, 101
Chili, duration of Copyright in, 37
Columba, St., 42
Commons, House of—
  Orders of 1642 and 1643, 64, 65
  proceedings before Committee in 1774, 131, 135
Copyists—
  Activity of, before invention of printing, 47
Copyright—
  charm of the subject, 9
  claim to perpetual, born too late to live, 25
  Colonial, 211
  definition of, 145, 209
  duration of, in different countries, 37
  duration, suggested periods, 38, 122, 146, 209
  effect of the art of printing on, 15
  effect of the Statute of Anne, 19, 126
  international, 28 *et seq.*
  manuscripts, why not Copyright in? 47
  origin of, 41 *et seq.*
  perpetual Copyright, the law of England for five years, 141
  printing not the mother of, 49
  property or privilege, 10

Denmark, law as to quotations in, 185
Donaldson, Mr., the Edinburgh bookseller, 122
Dunton, John, 72
Dunning, Mr. (afterwards Lord Ashburton), 41, 134

Educational Works (belonged to the king), 55
Edward VI. appoints printer by patent, 56

Erasmus, 49

Fox, Charles James, 135
France—
  arguments for perpetual Copyright in, 14
  Convention with, in 1852, 29
  duration of Copyright in, 37
  joins the Convention of Berne, 31
  position of Authors in, 141
Frobenius of Basle prints the *Adagia* without leave, 49

Galt, John, 170
Germany—
  duration of Copyright in, 37
  joins the Convention of Berne, 31
  right of quotation in, 182
Guatemala, duration of Copyright in, 37
Guilds, The, 49

Haiti joins the Convention of Berne, 31
Hallam, Mr., Copyright in works of, 146
Henry VIII. grants Letters Patent to the University of Cambridge, 56
Heraldry, Books of, 60
Herschell, Lord, his new Copyright Bill, 208 *et seq.*
History, Books of, 60
Holland refuses to join Convention of Berne, 34

Infringer or smuggler, 13
Injunctions in Chancery, 102
Italy—
  duration of Copyright in, 38
  joins Convention of Berne, 31

James I. and the poet Wither, 83
Johnson, Dr., 24, 27, 53, 122, 195
Johnston, Wm., bookseller, his evidence before Parliament in 1774, 132
Justinian, no reference to Copyright in, 9

Keble, Rev. John, duration of Copyright in the "Christian Year," 148
Keats, John, duration of Copyright in "Lamia, Isabella, and other Poems," 148
King, books belonging to the, 55

Lakanal, M., his report to the French Convention, July, 1793, on Copyright, 142
Lamartino, M. de, 18
Latin grammars belonged to the king, 55
Law books belonged to the king, 55
Lectures, 191, 210
Luxembourg joins Convention of Berne, 31

Macaulay, Lord, 144, 213
Maitland, Dr. S. R., 44, 46
Mansfield, Lord, 108, 112, 114, 120, 124
Manuscripts, importance of trade in, 43 *et seq.*
Marmontel, 13
Mexico, duration of Copyright in, 37
Millar, Andrew, the bookseller, 111
Milton, John, 24, 52, 53, 67, 68, 77, 104
Monaco joins Convention of Berne, 31
Montalembert, Count, 42, 45
Montenegro joins Convention of Berne, 31

Newspapers, Copyright of contents, 159, 164, 210
Norway joins Convention of Berne, 31
Novels, Dramatization of, 155

Orders in Council, 28

Peru, duration of Copyright in, 37
Plagiary, 169
Press, The Censorship of, 51, 53, 60
Printing, Art of, 15
Publishers, a little tetchy with "Society of Authors," 204
  their model draft, 205

Quotation, right of, 177 *et seq.*, 223

Russia—
  duration of Copyright in, 34
  remains outside the Convention of Berne, 34

Sermons, 192
Spain—
  joins Convention of Berne, 31
  law as to right of quotation, 184
Speeches, 190, 192
Spencer, Mr. Herbert, 147
Star Chamber, 58
  consolidating decree of, as to printing, 60
Stationers' Company, 71 to 90
  Bye-laws of, 78 to 81
Statutes quoted—
  13, 14 Car. II., c. 33; 59, 68
  8 Anne, c. 19; 19, 93
  15 Geo. III., c. 53 (1775), 143
  41 Geo. III., c. 107 (1801), 144
  54 Geo. III., c. 156 (1814), 144
  5 & 6 Wm. IV., c. 65 (1835), 191
  1 & 2 Vic., c. 59 (1838), 28
  5 & 6 Vic., c. 45 (1842), 145, 149, 153
  7 Vic., c. 12 (1844), 28
  10 & 11 Vic., c. 95 (1847), 215
  15 & 16 Vic., c. 12 (1852), 29
  38 & 39 Vic., c. 53 (1875), 218
Swift, Dr., 20, 93
Switzerland joins Convention of Berne, 31

Talfourd, Mr. Serjeant, afterwards Justice, 144
Thomson's "Seasons," 111, 123
Thurlow, Mr., afterwards Lord, 41, 134
Titles, no Copyright in, 185
Translations, Law as to, 164
Tunis, The Bey of, joins the Convention of Berne, 31

Universities, The, possess perpetual Copyright in literary property bequeathed to them, 143

Venezuela, Duration of Copyright in, 37

Warburton, Bishop, 108
Wedderburn, Mr., afterwards Lord Loughborough, 41
Wither, George, 83
  his characters of an Honest Stationer and of a Mere Stationer, 84–90

PRINTED BY CASSELL & COMPANY, LIMITED, LA BELLE SAUVAGE, LONDON, E.C.